



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 078 571 494



HARVARD LAW LIBRARY

THE

²⁰
July 7 42

DISTRICT REPORTS

OF

CASES DECIDED IN ALL THE

JUDICIAL DISTRICTS

OF THE

STATE OF PENNSYLVANIA

DURING THE YEAR 1901.

VOLUME X.

FROM VOLUME 58 OF THE LEGAL INTELLIGENCER.

PHILADELPHIA:
HOWARD W. PAGE, 808 WEST END TRUST BUILDING.
1901.

Entered according to Act of Congress, in the year 1901, by
HOWARD W. PAGE, Esq.
In the Office of the Librarian of Congress, at Washington, D. C.

Rec. April 4, 1902

TABLE OF CASES.

Abington Twp. v. P. & R. Ry., 719.
 Act of May 11, 1901, Construction of, 361.
 Adams v. Paper Mills Co., 266.
 Adams's Estate, 237, 296.
 Allegheny Co. Com.,—Crawford v., 649.
 Allinson,—Hale v., 13.
 Allport,—Com. v., 659.
 American Steel Co. v. Coke Co., 285.
 Anchor B. & L. Ass'n,—Com. v., 167.
 Anderson v. Lehigh Coal & Nav. Co., 14.
 Apartment House Co. v Kirk, 292.
 Appeal, Ebe's, 367, 370.
 Appeal, Scanlan's, 448.
 Appleton's Estate, 441.
 Application, Howell's, 504.
 Appointment of Town Clerk, 631.
 Armour & Co.,—Kiefaber v., 383.
 Armstrong's Estate, 670.
 Ashbridge,—Ryan v., 153.
 Ashley Boro. Road, 288.
 Assessor's List of Voters, 624.
 Association, Hall, of Camp No. 485, 621.
 Assurance Co., Life,—House v., 41.
 Atcheson's Estate, 297.
 Athow,—Phila. v., 187, 352.
 Atlantic & Pac. Tel. Co.,—Phila. v., 376.
 Aushutz-Bradberry Co.,—Weir Furnace Co. v., 81.
 Avondale Marble Co.,—Vollmer v., 434.
 Baizley's Estate, 398.
 Baker,—Muir v., 700.
 Baker,—Stambaugh v., 79.
 Bala Golf Club,—Christ Church v., 666.
 Bank, Harrisburg Nat., v. Moffitt, 22.
 Bank, Saginaw, v. Title & Trust Co., 74.
 Bank, Second Nat.,—Pringle v., 674.
 Barnes's and Heydrick's Nomin's, 681.
 Barrett v. Smith, 531.
 Barron,—Longenecker v., 429.
 Base-Ball Club, Phila., v. Lajoie, 309.
 Baxter's Estate, 97.
 Bear,—Gable v., 630.
 Belting Co., Main, v. Fowkes, 6.
 Bennett's Estate, 145.
 Beresford v. Coal Co., 243.
 Bergdoll v. Bergdoll Brewing Co., 173.
 Bergdoll Brewing Co.,—Bergdoll v., 173.
 Bethlehem Borough Extension, 690.
 Bilderback's Estate, 759.
 Black,—Miller v., 255.
 Blair,—Carter v., 749.
 Blair,—McPherson v., 492.
 Blair,—United States v., 106.
 Bliss v. Milholland, 201.
 Blumenthal,—Levison v., 412.

Board of Education,—Lyndall v., 6.
 Boettcher,—Com. v., 101.
 Boileau's Estate, 213.
 Bolivar Boro. v. Coulter, 171.
 Bollinger's Estate, 223.
 Bonschur,—Bornot v., 415.
 Bonus, Corporation, 646.
 Bonwill's Estate, 98.
 Borda's Estate, 117.
 Bornot v. Bonschur, 415.
 Boro., Bethlehem, Extension, 690.
 Boro., Bolivar, v. Coulter, 171.
 Boro., Centerville, Bridge, 636.
 Boro., Collegeville,—College v., 642.
 Boro., Lansdowne,—Hoffman v., 66.
 Boro., Lewistown, v. Telep. Co., 562.
 Boro., Linesville,—McCurdy v., 546.
 Boro., Miner's Mill,—Brennan v., 6.
 Boro., Norristown, v. Railway, 539.
 Boro., Schuylkill Haven,—Schuyl.
 County v., 494.
 Boro., Summerville,—Jeff. Co. v., 6.
 Bott's Estate, 122.
 Bouland's Estate, 235.
 Boyd's Estate, 87.
 Boyle's Estate, 206.
 Brady v. McEnroe, 115.
 Brangan,—Com. v., 739, 760.
 Brennan & Ward v. Borough, 64.
 Brenner v. Carter, 457.
 Brewing Co., Bergdoll,—Bergdoll v.,
 Brewing Co., Harrisburg Consumers
 Rieker v., 406.
 Brice,—Williams v., 721.
 Bridge in Centerville Boro., 636.
 Broat v. Knight, 140.
 Brock's Estate, 55.
 Brooke's Estate, 447.
 Brookwood Coal Co.,—Com. v., 254.
 Brown v. McCroskey, 583.
 Brown,—Ruffner v., 186.
 Brown,—Rusterholtz v., 21.
 Brown v. S. W. Pa. Ry., 693.
 Browne,—Lutz v., 355.
 Buck's Estate, 330, 331.
 Buffalo & Susq. R. R.,—Com. v., 36.
 B. & L. Ass'n, Anchor,—Com. v., 1.
 B. & L. Ass'n, Cash,—Com. v., 263.
 B. & L. Ass'n, Industrial,—Com. v.,
 B. & L. Ass'n, N. Y.,—McKean v.,
 B. & L. Ass'n, Washington German
 Krauter, 764.
 B. Ass'n, Lessing,—Lentz v., 257.
 Caldwell's Estate, 679.
 Campbell's Estate, 287, 497.

Capp,—Hale v., 285.
 Carr,—Waters v., 93.
 Carracher or Kiker's Estate, 185.
 Carter v. Blair, 749.
 Carter,—Brenner v., 457.
 Cash B. & L. Ass'n,—Com. v., 263.
 Cement Co.,—Supply Co. v., 491.
 Centerville Boro. Bridge, 636.
 Charlier,—Garman v., 38.
 Chesapeake & O. Ry.,—Sheetz v., 373.
 Chester v. Sinex, 620.
 Christ Church v. Golf Club, 666.
 Citizens' Trust Co. v. Howell, 65.
 City v. Gabell, 526.
 Claghorn's Estate, 91.
 Clark,—Com. v., 641.
 Clark's Estate, 378.
 Clearfield Trac. Co.,—Hoyt v., 767.
 Cleary,—Philadelphia v., 752.
 Cleveland Supply Co. v. Cement Co., 491.
 Coal Co., Brookwood,—Com. v., 254.
 Coal Co., Langcliff, v. Coal Co., 645.
 Coal Co., N. Y., &c.,—Coal Co. v., 645.
 Coal Co., Susq.,—Beresford v., 243.
 Coal & Coke Co.,—Wire Co. v., 285.
 Coal & Nav. Co.,—Anderson v., 14.
 Coal & Nav. Co.,—Zehner v., 380.
 College, Ursinus, v. Borough, 642.
 Collegeville Boro.,—College v., 642.
 Collins's Estate, 249.
 Columbia Tel. Co.,—Tpk. Co. v., 322.
 Commission,—Forestry Reservation, 676.
 Commissioners, Allegheny County,—
 Crawford v., 649.
 Commissioners, Plymouth Township,—
 Sweeney v., 617.
 Commonwealth v.
 Allport, 659.
 Anchor Building & Loan Ass'n, 167.
 Boettcher, 101.
 Brangan, 739, 760.
 Brookwood Coal Co., 254.
 Buffalo & Susq. R. R., 363.
 Cash Building & Loan Ass'n, 263.
 Clark, 641.
 Conrad, 342.
 Continental Trust Co., 451.
 Eley, 647.
 Gillespie, 393.
 Gingrich, 747.
 Hollop, 85.
 Hudusko, 230.
 Industrial Building & L. Ass'n, 263.
 Ivory, 277.
 Knorr, 535.
 Leonard, 673.
 Luck, 500.
 Lukan, 95.
 McFadden, 718.
 Manager House of Correction, 371.
 O'Neill, 227.
 O'Shea, 580.
 Perry, 279.
 Pflueger, 717.
 Pierce, 335.
 Priestly, 217.
 Reber, 683.
 Roenick, 51.

Commonwealth v.
 Roland, 410.
 Rooney, 745.
 Ruch, 648.
 State Insur. Co., 339.
 Stevens, 652.
 Stirling, 437.
 Swick, 35.
 Thompson, 634.
 Weaver, 533.
 Zuern, 26.
 Com'ith Trust Co.,—Sprigg v., 267.
 Compulsory Attendance Law, 576.
 Condryn,—Sheasley v., 56.
 Conneaut Township,—Richards v., 274.
 Conrad,—Com. v., 342.
 Construction, Act of May 11, 1901, 361.
 Construction Sewer on Evans Ave., 633.
 Continental Trust Co.,—Com. v., 451.
 Contributionship,—Penna. Co. v., 181.
 Conway's Estate, 509.
 Cooke v. Jones, 283.
 Cooper v. Duval, 475.
 Coray's Nomination, 716.
 Corbett's Estate, 59.
 Corporation Bonus, 646.
 Corr's Estate, 740.
 Coulter,—Bolivar Boro. v., 171.
 Craig's Estate, 755.
 Crawford v. Commissioners, 649.
 Creighton v. National Safe Co., 600.
 Cutter & Bro. v. Magaw, 146.
 Daly v. Iselin, 193.
 Davenport's Estate, 121.
 Davis,—Harris v., 7.
 Davis v. Sidle, 435.
 Deckard's Estate, 377.
 Delaware Avenue, Vacation of, 753.
 Del., L. & W. R. R.,—Zablocki v., 54.
 Denison v. Ryan, 495.
 De Noon Bros. v. Shew, 200.
 Devine's Estate, 273.
 Diener v. Wopsononock Hotel Co., 57.
 Di Jorio,—Pavona v., 83.
 Dinner v. McAndrews, 221.
 Dolan v. School District, 694.
 Douglass's Estate, 478, 479.
 Duval,—Cooper v., 475.
 Eastern & N. R. R.,—Mack v., 102.
 Ebe's Appeal, 367, 370.
 Edenborn's Estate, 184.
 Effinger v. Hain, 107.
 Electric Light Co.,—Mercur v., 10.
 Eley,—Com. v., 647.
 Emslie's Estate, 397.
 Equitable Trust Co.,—Phila. v., 395.
 Erdmann v. Mitchell, 701.
 Estate.
 Adams's, 237, 296.
 Appleton's, 441.
 Armstrong's, 670.
 Atcheson's, 297.
 Baizley's, 398.
 Baxter's, 97.
 Bennett's, 145.
 Bilderback's, 759.

Estate.

Boileau's, 213.
 Bollinger's, 223.
 Bonwill's, 98.
 Borda's, 117.
 Bott's, 122.
 Bouland's, 235.
 Boyd's, 87.
 Boyle's, 206.
 Brock's, 55.
 Brooke's, 447.
 Buck's, 330, 331.
 Caldwell's, 679.
 Campbell's, 287, 497.
 Carracher or Kiker's, 185.
 Claghorn's, 91.
 Clark's, 378.
 Collins's, 249.
 Conway's, 509.
 Corbett's, 59.
 Corr's, 740.
 Craig's, 755.
 Davenport's, 121.
 Deckard's, 377.
 Devine's, 273.
 Douglass's, 478, 479.
 Edenborn's, 184.
 Emslie's, 397.
 Evans's, 261.
 Fahy's, 399.
 Finley's, 272.
 Fleming's, 259.
 Forepaugh's, 144.
 Freas's, 333.
 Fry's, 493.
 Furlong's, 527.
 Gallagher's, 733.
 Gallen's, 262.
 Githens's, 375.
 Good's, 598.
 Goulden's, 216.
 Grier's, 354.
 Grubbs's, 443.
 Haines's, 677.
 Hall's, 215.
 Harrison's, 45.
 Hart's, 421.
 Heath's, 281.
 Hoffman's, 77, 669, 758.
 Homeyard's, 730.
 Horne's, 226.
 Horner's, 729.
 Hull's, 661.
 Hunter's, 120.
 Jennings's, 90.
 Johnson's, 233.
 Kase's, 497.
 Keim's, 252.
 Kelly's, 297.
 Kemble's, 320.
 Kuhn's, 742.
 Larocco's, 566.
 Leaming's, 389.
 Linn's, 534.
 Lisle's, 713.
 Lloyd's, 207.
 Lockard's, 192.
 Lukens's, 118, 294.

Estate.

Lusch's, 224.
 McCullough's, 353.
 McDowell's, 223.
 McIlroy's, 78.
 McKee's, 538.
 McKeown's, 131, 332.
 Magoffin's, 473.
 Maguire's, 238.
 Markle's, 756.
 Meyer's, 445.
 Morrell's, 319.
 Nathans's, 205.
 Neafie's, 70.
 Osborne's, 191.
 Pearson's, 189.
 Peters's, 669.
 Phillips's, 99.
 Pile's, 356.
 Powell's, 46.
 Powers's, 165.
 Raeder's, 282.
 Reed's, 162.
 Reliff's, 450.
 Root's, 712.
 Rorke's, 754.
 Salin's, 97.
 Samson's, 680.
 Scheetz's, 461.
 Schleicher's, 678.
 Scott's, 213.
 Scully's, 731.
 Semple's, 605.
 Singler's, 258.
 Sinkler's, 399.
 Smith's, 92.
 Stief's, 446.
 Stoker's, 375.
 Stough's, 547.
 Stuart's, 130.
 Sunderland's, 358.
 Thompson's, 276.
 Unruh's, 293.
 Van Syckel's, 744.
 Wailes's, 548.
 Witzel's, 462.
 Wright's, 133.
 Yerkes's, 204.
 Evans Avenue Sewer, 633.
 Evans's Estate, 261.
 Extension, Bethlehem Boro., 690.
 Fahy's Estate, 399.
 Ferree & Co. v. Pierce, 746.
 Finley's Estate, 272.
 Fisher,—Haas v., 150.
 Fitzpatrick,—Wanamaker v., 291.
 Flannery,—O'Shea v., 356.
 Fleming's Estate, 259.
 Forepaugh's Estate, 144.
 Forestry Reservation Commission, 676.
 Forman & Barsh,—Trattner v., 566.
 Fowkes,—Main Belting Co. v., 6.
 Freas's Estate, 333.
 Fritz v. Moyer and Hallman, 768.
 Fry's Estate, 493.
 Fuellhart,—United States v., 194.
 Furlong's Estate, 527.

- Furnace Co., Weir, v. Aushutz-Bradberry Co., 81.
 Fye,—Reams v., 242.
 Gabell,—City v., 526.
 Gable v. Bear, 630.
 Gallagher's Estate, 733.
 Gallen's Estate, 262.
 Garman v. Charlier, 38.
 Gillespie,—Com. v., 393.
 Gingrich,—Com. v., 747.
 Githens's Estate, 375.
 Glace v. Hummel, 110.
 Goff,—Supply Co. v., 637.
 Goldman v. Teitlebaum, 53.
 Golf Club, Bala,—Christ Church v., 666.
 Good's Estate, 598.
 Gouldey's Estate, 216.
 Granger v. Pigott 327.
 Grier's Estate, 354.
 Griffith v. Hendler, 632.
 Grubbs's Estate, 443.
 Haas v. Fisher, 150.
 Hain,—Effinger v., 107.
 Haines's Estate, 677.
 Hale v. Allinson, 13.
 Hale v. Capp, 285.
 Hall Ass'n of Washington Camp, 621.
 Hall's Estate, 215.
 Hallman's License, 447.
 Hanaur,—Weller v., 123.
 Harner v. Thomas, 487.
 Harris v. Davis, 7.
 Harris v. Richardson, 460.
 Harrisburg Brew'g Co.,—Rieker v., 406.
 Harrisburg Nat. Bank v. Moffitt, 22.
 Harrison's Estate, 45.
 Hart's Estate, 421.
 Heath's Estate, 281.
 Heebner,—Kennedy v., 569.
 Heikel,—Sitzman v., 673.
 Hendler,—Griffith v., 632.
 Heptasophs,—Reynolds v., 528.
 Hershey & Bro. v. Mylin, 551.
 Hetzel v. Sawyer, 29.
 Higby,—Whitman v., 39.
 Hipple v. Fraternal Mystic Circle, 317.
 Hoffman,—Lansdowne Boro. v., 660.
 Hoffman's Estate, 77, 669, 758.
 Hollop,—Com. v., 85.
 Homeyard's Estate, 730.
 Hoosier Cem. Co.,—Supply Co. v., 491.
 Horne's Estate, 226.
 Horner's Estate, 729.
 Hotchkiss & Bro. v. Pinney, 219.
 Hotel Co., Wopsononock,—Diener v., 57.
 Houck v. Whitaker, 244.
 House v. Life Assurance Co., 41.
 Howell,—Citizens' Trust Co. v., 65.
 Howell's Application, 504.
 Howland Pulp Co. v. Paper Co., 623.
 Hoyt & Sharpless v. Traction Co., 767.
 Hudusko,—Com. v., 230.
 Hughes,—Williamsport v., 607.
 Hull's Estate, 661.
 Hummel,—Glace v., 110.
 Hunter's Estate, 120.
 Industrial B. & L. Ass'n,—Com. v., 263.
 Infantry Battalion,—Mihlbauer v., 585.
 In re Delaware Avenue, 753.
 In re Liquor License, 447.
 In re Mary Wood, 374.
 In re Winslow & Washington Twps., 750.
 Ins. Co., Franklin,—Utter v., 50.
 Ins. Co., Old Wayne,—McCann v., 560.
 Ins. Co., Pref. Accident,—Muir v., 577.
 Ins. Co., State,—Com. v., 339.
 International Nav. Co.,—U. S. v., 480.
 Iron Works, Murphy,—Opdyke v., 68.
 Irwin,—Swenk, Benson & Co. v., 732.
 Iselin,—Daly v., 193.
 Ivory,—Com. v., 277.
 Jefferson County v. Poor District, 685.
 Jennings's Estate, 90.
 Jessup & Moore Co.,—Pulp Co. v., 623.
 Johnson's Estate, 233.
 Johnston & Co.,—Sullivan & Co. v., 73.
 Jones,—Cooke v., 283.
 Jones v. Pavey, 498.
 Juniata Telp. Co.,—Lewistown v., 562.
 Junior Order U. A. M., 5.
 Kahler,—Kindig v., 765.
 Kase's Estate, 497.
 Keeler v. Westgate, 240.
 Keim's Estate, 252.
 Keith v. Moore, 212.
 Kelly's Estate, 297.
 Kemble's Estate, 320.
 Kennedy v. Heebner, 569.
 Kiefaber v. Armour & Co., 383.
 Kiker's Estate, Carracher or, 185.
 Kindig v. Kahler, 765.
 Kirk,—House Co. v., 292.
 Knight,—Broat v., 140.
 Knights of Birmingham,—Lamb v., 883.
 Knorr,—Com. v., 535.
 Krauter,—B. & L. Ass'n v., 764.
 Kuhn's Estate, 742.
 Kunkel,—Steelton Mill Co. v., 289.
 Lackawanna Sch. Dist.,—Dolan v., 694.
 Lajoie,—Base-Ball Club v., 309.
 Lamb v. Knights of Birmingham, 383.
 Lancaster, &c., Ry.,—Minnich v., 126.
 Lancaster Paper Co.,—Adams v., 266.
 Lancaster Tpk. Co. v. Telp. Co., 322.
 Langcliff Coal Co. v. Coal Co., 645.
 Lansdowne Boro. v. Hoffman, 660.
 Larocco's Estate, 566.
 Lasher,—Lukens v., 385.
 Lathrop Poor Dist. v. Poor Dist., 324.
 Law, Compulsory Attendance, 576.
 Leaming's Estate, 389.
 Lehigh Coal & N. Co.,—Anderson v., 14.
 Lehigh Coal & N. Co. v. Zehner, 380.
 Lehman v. Winters, 147.
 Lentz,—Lessing Building Ass'n v., 257.
 Leonard v. Com., 573.
 Lessing Building Ass'n v. Lentz, 257.
 Levison v. Blumenthal, 412.
 Lewis,—Muir v., 639.
 Lewis,—Utter v., 50.
 Lewis,—Wilmer v., 137.

Lewistown v. Telephone Co., 562.
 License, Retail Liquor, Sureties, 209.
 Linsville Boro.,—McCurdy v., 546.
 Linn's Estate, 534.
 Linton,—Phila. v., 329.
 Liquor License, Hallman's, 447.
 Lisle's Estate, 713.
 List, Assessor's, of Voters, 624.
 Lloyd's Estate, 207.
 Lockard's Estate, 192.
 Lodge,—Thompson v., 602.
 Logan v. Logan, 738.
 Longenecker v. Barron, 429.
 Lower Towamensing Twp. Road, 581.
 Luck v. Com., 500.
 Lukan,—Com. v., 95.
 Lukens v. Lasher, 385.
 Lukens's Estate, 118, 294.
 Lusch's Estate, 224.
 Lutz v. Browne, 355.
 Lyndall v. Board of Education, 665.
 Lyons v. Lyons, 594.

McAndrews,—Dinner v., 221.
 McCahan v. Reeder, 298.
 McCann v. Insurance Co., 560.
 McCroskey,—Brown v., 583.
 McCullough's Estate, 353.
 McCurdy v. Linesville Boro., 546.
 McDowell's Estate, 223.
 McEnroe,—Brady v., 115.
 McFadden,—Com. v., 718.
 McGerrin v. Wanamaker, 725.
 McIlroy's Estate, 78.
 McKean v. B. & L. Ass'n, 197.
 McKee's Estate, 538.
 McKeown's Estate, 131, 332.
 McManus v. Phila., 552.
 McPherson v. Blair, 492.
 Mack v. Railroad, 102.
 Magaw,—Cutter & Bro. v., 146.
 Magoffin's Estate, 473.
 Maguire's Estate, 238.
 Manager House Correct'n,—Com. v., 371.
 Mfg. Co.,—Oberdick v., 463.
 Mfg. Co.,—Samuel v., 43.
 Mfg. Co.,—Stroheim & Romann v., 668.
 Marble Co., Avondale,—Vollmer v., 434.
 Markle's Estate, 756.
 Marsh,—Shafer v., 47.
 Mercur v. Electric Light Co., 10.
 Meyer's Estate, 445.
 Muhlbauer v. Infantry Battalion, 585.
 Milholland,—Bliss v., 201.
 Miller v. Black, 255.
 Miller v. Moyer, 9.
 Miners' Mill Boro.,—Brennan v., 64.
 Minnick v. Railway, 128.
 Mitchell,—Erdman v., 701.
 Moffitt,—Bank v., 22.
 Moore,—Keith v., 212.
 Morrell's Estate, 319.
 Mt. Joy Township Road, 490.
 Moyer and Hallman,—Fritz v., 763.
 Moyer,—Miller v., 9.
 Moyer,—Roush v., 392.
 Muir v. Baker, 700.
 Muir v. Lewis, 639.

Muir v. Preferred Accident Ins. Co., 577.
 Murphy Iron Works,—Opdyke v., 68.
 Mylin,—Hershey & Bro. v., 551.
 Mystic Circle,—Hipple v., 317.

Nathans's Estate, 205.
 National Safe Co.,—Creighton v., 600.
 Navigation Co.,—United States v., 480.
 Neafie's Estate, 70.
 Nether Providence, Town Clerk, 631.
 New York B. Ass'n,—McKean v., 197.
 New York Coal Co.,—Coal Co. v., 645.
 Nicholson Poor Dist.,—Poor Dist. v., 324.
 Nomination.
 Barnes's and Heydrick's, 681.
 Coray's, 716.
 Reed's and Amour's, 210.
 Norristown Boro. v. Railway, 539.
 Northwestern Assur. Co.,—House v., 41.

O'Neill,—Com. v., 227.
 O'Shea,—Com. v., 580.
 O'Shea v. Flannery, 356.
 Oberdick,—York Mfg. Co. v., 463.
 Ogden,—United States v., 1.
 Old Wayne Insur. Co.,—McCann v., 560.
 Opdyke v. Murphy Iron Works, 68.
 Osborne's Estate, 191.

Pack Mfg. Co.,—Stroheim v., 668.
 Paper Co., Jessup & Moore,—Co. v., 623.
 Paper Mills Co.,—Adams v., 266.
 Pavey,—Jones v., 498.
 Pavona v. Di Jorio, 83.
 Pearson's Estate, 189.
 Penna. Co. v. Phila. Contributionship, 181.
 People's Pass. Ry. v. Taylor, 343.
 People's Supply Co. v. Goff, 637.
 Perry,—Com. v., 279.
 Peters's Estate, 669.
 Petition, Simpler's, 141.
 Petition, Stroup's, 301.
 Petition, York Twp. School Dist., 667.
 Pflueger,—Com. v., 717.
 Phila. v. Athow, 187, 352.
 Phila. v. Atla. & Pac. Tel. Co., 376.
 Phila. v. Cleary, 752.
 Phila. v. Linton, 329.
 Phila.,—McManus v., 552.
 Phila.,—Seymour v., 439.
 Phila.,—Shields & Prettyman v., 247.
 Phila. v. Stewart, 395.
 Phila. Base-Ball Club v. Lajole, 309.
 Phila. Contributionship,—Pa. Co. v., 181.
 Phila. & R. Ry.,—Abington Twp. v., 719.
 Phila. & R. Ry.,—Norristown v., 539.
 Phila. Steel Co.,—Sanson v., 726.
 Phillips's Estate, 99.
 Pierce,—Com. v., 335.
 Pierce,—Ferree & Co. v., 746.
 Pigott,—Granger v., 327.
 Pile's Estate, 356.
 Pinner v. Widhson, 554.
 Pinney,—Hotchkiss & Bro. v., 219.
 Pittsburgh v. Railroad, 541.
 Pittsburgh, C. & W. R. R.,—Pittsburgh v., 541.
 Planing Mill Co. v. Kunkel, 289.

- Plymouth Twp. Com'rs v. Sweeney, 617
 Poor Dist., Lathrop, v. Poor Dist., 324.
 Poor Dist., Nicholson, —Poor Dist. v., 324
 Powell's Estate, 46.
 Powers's Estate, 165.
 Preferred Acc. Ins. Co., —Muir v., 577.
 Prettyman v. Phila., 247.
 Priestly, —Com. v., 217.
 Pringle v. Second National Bank, 674.
 Public Road, Potter and Tioga Co., 456.
 Pulp Co., Howland, v. Paper Co., 623.

 Quaker City House Co. v. Kirk, 292.

 Raeder's Estate, 282.
 Railroad, Buffa. & S., —Com. v., 363.
 Railroad, D., L. & W., —Zablocki v., 54.
 Railroad, E. & N., —Mack v., 102.
 Railroad, P., C. & W., —Pittsburgh v., 541
 Railroad, Schy. R. E. S., —Speese v., 515
 Railway, C. & O., —Sheetz v., 373.
 Railway, L., M., & C., —Minnich v., 126.
 Railway, People's, v. Taylor, 343.
 Railway, P. & R., —Borough v., 539.
 Railway, P. & R., —Township v., 719.
 Railway, Rock Glen, 592.
 Railway, S. W. P., —Brown v., 693.
 Raleigh Coal & Coke Co., —Co. v., 285.
 Reams v. Fye, 242.
 Reber, —Com. v., 683.
 Rector Christ Church v. Golf Club, 666.
 Reed and Amour's Nominations, 210.
 Reed's Estate, 162.
 Reeder, —McCahan v., 298.
 Reiff's Estate, 450.
 Reservation Commission, Forestry, 676.
 Retail Liquor License Sureties, 209.
 Reynolds v. Heptasophs, 528.
 Richards v. Conneaut Twp., 274.
 Richardson, —Harris v., 460.
 Rieker v. Brewing Co., 406.
 Road, Ashley Boro., 288.
 Road, Eastburn, Vacation of, 595.
 Road, Lower Towamensing Twp., 581.
 Road, Mt. Joy Twp., 490.
 Road, Potter and Tioga Counties, 456.
 Road, Rush Twp., 650.
 Road, Winslow & Washington Twps., 750
 Rock Glen Street Ry., 592.
 Roenick, —Com. v., 51.
 Roland, —Com. v., 410.
 Rooney, —Com. v., 745.
 Root's Estate, 712.
 Rorke's Estate, 754.
 Roush v. Moyer, 392.
 Ruch, —Com. v., 648.
 Ruffner v. Brown, 186.
 Rush Township, Road, 650.
 Rusterholtz v. Brown, 21.
 Ryan v. Ashbridge, 153.
 Ryan, —Denison v., 495.

 Safe Co., National, —Creighton v., 600.
 Sailer, —Wolf v., 601.
 Salin's Estate, 97.
 Samson's Estate, 680.
 Samuel v. Iron & Steel Mfg. Co., 43.
 Sanitary Agent, West Wheatfield, 76.

 Sanson v. Steel Co., 726.
 Sawyer, —Hetzel v., 29.
 Scanlan's Appeal, 448.
 Schleicher's Estate, 678.
 School District.
 Lackawanna Twp., —Dolan v., 694.
 Taylor Twp., —Stanciliff v., 697.
 Wyoming, —Stephens v., 135.
 York Twp., Petition, 687.
 Schuylkill Co., —Schuylkill Boro. v., 494
 Schuylkill Haven Boro. v. Schuylkill
 County, 494.
 Schuylkill R. E. S. R. R., —Speese v., 515
 Scott's Estate, 213.
 Scully's Estate, 731.
 Second Nat. Bank, —Pringle v., 674.
 Semple's Estate, 605.
 Sewer, Evans Avenue, 633.
 Seymour v. Phila., 439.
 Shafer v. Marsh, 47.
 Sheasley v. Condrin, 56.
 Sheetz v. Chesapeake & Ohio Ry., 373.
 Sheetz's Estate, 461.
 Shew, —De Noon Bros. v., 200.
 Shields v. Phila., 247.
 Sidle, —Davis v., 435.
 Simpler's Petition, 141.
 Sinex, —Chester v., 620.
 Singerly's Estate, 258.
 Sinkler's Estate, 399.
 Sitzman v. Heikel, 673.
 Smith, —Barrett v., 531.
 Smith's Estate, 92.
 Smith & Son v. Speakman, 699.
 Southwest Pa. Ry., —Brown v., 693.
 Speakman, —Smith & Son v., 699.
 Speese v. Schuylkill R. E. S. R. R., 515.
 Sprigg v. Com'th Trust Co., 267.
 Stambaugh v. Baker, 79.
 Stanciliff v. School District, 697.
 State Fencibles, —Mihlbauer v., 585.
 State Insur. Co., —Com. v., 339.
 Steel Co., Phila., —Sanson v., 726.
 Steel & Wire Co. v. Coal Co., 285.
 Steelton Planing Mill Co. v. Kunkel, 289
 Stephens v. School District, 135.
 Stevens, —Com. v., 652.
 Stewart, —Phila. v., 395.
 Stief's Estate, 446.
 Stirling, —Com. v., 437.
 Stoker's Estate, 375.
 Stough's Estate, 547.
 Stroheim v. Pack Mfg. Co., 668.
 Stroup's Petition, 301.
 Stuart's Estate, 130.
 Sullivan & Co. v. Johnston & Co., 73.
 Summerville Boro., —County v., 685.
 Sunderland's Estate, 358.
 Supply Co., —Cement Co. v., 491.
 Supply Co., People's, v. Goff, 637.
 Supreme Conclave of Heptasophs, —
 Reynolds v., 528.
 Supreme Ruling of Mystic Circle, —
 Hipple v., 417.
 Susquehanna Coal Co., —Beresford v., 243
 Sweeney, —Plymouth Twp. v., 617.
 Swenk, Benson & Co. v. Irwin, 732.
 Swick, —Com. v., 35.

- Taylor**,—**People's Ry. v.**, 343.
Taylor Twp.—**Stancliff v.**, 697.
Teitlebaum,—**Goldman v.**, 53.
Telegraph Co., **Atl. & Pac.**,—**Phila. v.**, 376.
Telephone Co.,—**Lewistown v.**, 562.
Telephone Co.,—**Turnpike Co. v.**, 322.
Thomas,—**Harner v.**, 487.
Thompson,—**Com. v.**, 634.
Thompson v. **Lodge**, 602.
Thompson's Estate, 276.
Times v. Wilkes-Barre, 691.
Toronto Street, **Vacation**, 349.
Township, **Abington, v. P. & R. Ry.**, 719.
Township, **Conneaut**,—**Richards v.**, 274.
Township, **Nether Providence**, **Town Clerk for**, 631.
Traction Co., **Clearfield**,—**Hoyt v.**, 767.
Trattner v. Forman & Barsh, 566.
Treasury Department Decisions, 28, 72, 124, 165, 245, 307, 404, 513, 671, 762.
Trust Co., **Citizens'**, **v. Howell**, 65.
Trust Co., **Com'th.**,—**Sprigg v.**, 267.
Trust Co., **Continental**,—**Com. v.**, 451.
Trust Co., **Western Pa.**,—**Bank v.**, 74.
Turnpike, **Lancaster, v. Telp. Co.**, 322.

United American Mechanics, 5.
United States v. Blair, 106.
United States v. Fuellhart, 194.
United States v. Inter. Nav. Co., 480.
United States v. Ogden, 1.
Unruh's Estate, 293.
Ursinus College v. Collegeville Boro., 642.
Utter v. Lewis, 50.

Vacation, **Delaware Avenue**, 753.
Vacation, **Eastburn Road**, 595.
Vacation, **Toronto Street**, 349.
Van Syckel's Estate, 744.
Venango County,—**White v.**, 482.
Vollmer & Register v. Marble Co., 434.
Von Bonnhorst,—**Woods v.**, 640.

Walles's Estate, 548.
Wanamaker v. Fitzpatrick, 291.
Wanamaker,—**McGerrin v.**, 725.
Washington Camp, **Hall Ass'n of**, 621.
Washington German B. & L. Ass'n v. Krauter, 764.
Waters v. Carr, 93.
Weaver,—**Com. v.**, 533.
Weir Furnace Co. v. Aushutz-Bradberry Co., 81.
Weller v. Hanaur, 123.
Westgate,—**Keeler v.**, 240.
West Wheatfield Sanitary Agent, 76.
Whitaker,—**Houck v.**, 244.
White v. Venango County, 482.
Whitman v. Higby, 39.
Widhson,—**Pinner v.**, 554.
Wilkes-Barre,—**Times v.**, 691.
Wilkes-Barre Times v. Wilkes-Barre, 691.
Williams v. Brice, 721.
Williamsport v. Hughes, 607.
Wilmer v. Lewis, 137.
Winslow & Wash'n Twps., **Road**, 750.
Winters,—**Lehman v.**, 147.
Wise v. Wright, 152.
Witzel's Estate, 462.
Wolf v. Sailer, 601.
Wood, Mary, In re, 374.
Woods v. Von Bonnhorst, 640.
Wopsononock Hotel Co.,—**Diener v.**, 57.
Wright,—**Wise v.**, 152.
Wright's Estate, 133.
Wyoming Sch'l Dist.,—**Stephens v.**, 135.

York Mfg. Co. v. Oberdick, 463.
York Twp. School District, **Petition**, 687.
Yerkes's Estate, 204.

Zablocki v. Railroad, 54.
Zehner,—**Coal & Nav. Co. v.**, 380.
Zuern,—**Com. v.**, 26.

TABLE OF CASES

In this and the Preceding Volumes, Affirmed or Reversed in
the Supreme and Superior Courts.

- Abbott's Estate, 9 D. 376. Affirmed, 198 Pa. 493.
Acker v. Conrad, 2 D. 469. Affirmed, 155 Pa. 586.
Adams v. Kennedy, 4 D. 421. Affirmed, 175 Pa. 160.
Alrey v. Kunkle, 6 D. 1. Affirmed, 7 Pa. Superior Ct. 112; 190 Pa. 196.
Allam v. Penna. R. R., 5 D. 54. Affirmed, 3 Pa. Superior Ct. 335; reversed, 183 Pa. 174.
Ames v. Pierson, 4 D. 392. Reversed, 174 Pa. 597.
Ashburner's Estate, 2 D. 776 and 828. Affirmed, 159 Pa. 545.
Atkins and Briscoe v. Payne and Wetter, 9 D. 401. Affirmed, 200 Pa. 557.
- Bailey v. City of Phila., 3 D. 543. Affirmed, 167 Pa. 569.
Baily v. Philadelphia, 6 D. 727. Affirmed, 184 Pa. 594.
Baker's Admin'r v. P., G. & N. R. R., 1 D. 301. Affirmed, 153 Pa. 160.
Bank v. Kern, 8 D. 72, 75. Affirmed, 193 Pa. 59, 67, 88.
Bank v. Whitaker, 3 D. 437. Affirmed, 170 Pa. 297.
Bannan v. Graeff, 6 D. 719. Affirmed, 186 Pa. 648.
Barr v. Philadelphia, 8 D. 19. Affirmed, 191 Pa. 438.
Batley v. Foederer, 3 D. 167. Reversed, 162 Pa. 460.
Battersby v. Castor, 6 D. 73. Affirmed, 181 Pa. 555.
Baum v. Birchall, 1 D. 123. Reversed, 150 Pa. 164.
Becker's Estate, 3 D. 513. Affirmed, 166 Pa. 313.
Beynon v. Pennsylvania R. R., 3 D. 308. Affirmed, 168 Pa. 642.
Bigler v. Canal Co., 5 D. 470. Affirmed, 177 Pa. 28.
Birchard's Estate, 1 D. 185. Affirmed, 154 Pa. 89.
Bitner v. Poike, 2 D. 792. Affirmed, 160 Pa. 522.
Boggs's Avenue, 2 D. 75. Reversed in part, 152 Pa. 135.
Borden v. American Surety Co., 2 D. 245. Affirmed, 159 Pa. 465.
Borough v. Tarbottom, 7 D. 540. Affirmed, 9 Pa. Superior Ct. 414.
Boyd's Estate, 10 D. 87. Affirmed, 199 Pa. 487, 497.
Boyer v. Chauncey, 8 D. 613. Affirmed, 12 Pa. Superior Ct. 526.
Bradley's Estate, 3 D. 470. Affirmed, 166 Pa. 300.
Broadnax v. Cheraw & Salisbury R. R., 1 D. 251. Affirmed, 157 Pa. 140.
Brower v. Kantner, 7 D. 702. Certified to Superior Ct., 9 Pa. Superior Ct. 95.
Brown v. Corry City, 4 D. 645. Affirmed, 175 Pa. 528.
Brownback v. Borough, 7 D. 324. Reversed, 10 Pa. Superior Ct. 227.
Bruch v. Philadelphia, 5 D. 718. Reversed, 181 Pa. 588.
Bryant's Estate, 4 D. 192. Reversed, 176 Pa. 309.
Bustleton & Somerton Turnpike Co., 8 D. 167. Reversed, 16 Pa. Superior Ct. 400.
- Campbell v. Foster Home, 2 D. 845. Affirmed, 163 Pa. 609.
Canal Co. v. Railway Co., 7 D. 244. Reversed, 10 Pa. Superior Ct. 413.
Carroll v. City, 6 D. 397. Reversed, 183 Pa. 55.

- Cascade Overseers v. Lewis Overseers**, 1 D. 690. Affirmed, 148 Pa. 333.
- Catawissa R. R. v. P. & R. R. R.**, 3 D. 111. Affirmed, 168 Pa. 544.
- Caven v. Agnew**, 3 D. 818; 4 D. 219. Affirmed, 186 Pa. 314.
- Century Co. v. Philadelphia**, 5 D. 222. Reversed, 176 Pa. 588; 180 Pa. 12.
- Chester v. Traction Co.**, 5 D. 609. Reversed, 4 Pa. Superior Ct. 575.
- Chestnut St. Bank v. Trust Co.**, 7 D. 108. Reversed, 186 Pa. 333.
- Clad v. Paist**, 5 D. 657. Reversed, 181 Pa. 148.
- Clark's Estate**, 7 D. 9. Affirmed, 195 Pa. 521, reversing Superior Court, 10 Pa. Superior Ct. 423.
- Clement's Estate**, 2 D. 341. Reversed, 160 Pa. 391.
- Coleman's Estate**, 6 D. 535, 777; 7 D. 731. Affirmed, 185 Pa. 437; 193 Pa. 605.
- Collins v. Dispatch Publishing Co.**, 1 D. 773. Reversed, 152 Pa. 187.
- Comly's Estate**, 6 D. 119. Affirmed, 185 Pa. 208.
- Com. ex rel. v. Bala & Bryn Mawr Turnpike Co.**, 2 D. 10. Affirmed, 153 Pa. 47.
- Com. ex rel. v. Dalzell**, 1 D. 657. Reversed, 152 Pa. 217.
- Com. v. Banks**, 9 D. 436. Affirmed, 198 Pa. 397.
- Com. v. Blackley**, 9 D. 381. Affirmed, 198 Pa. 372.
- Com. v. Brown**, 9 D. 731. Reversed, 17 Pa. Superior Ct. 520.
- Com. v. Donahue**, 1 D. 32. Affirmed, 149 Pa. 104.
- Com. v. Forrest**, 3 D. 797. Reversed, 170 Pa. 40.
- Com. v. Karpowski**, 3 D. 772. Affirmed, 167 Pa. 225.
- Com. v. Krause**, 9 D. 230. Affirmed, 198 Pa. 391.
- Com. v. McKean County**, 9 D. 395. Affirmed, 200 Pa. 383.
- Com. v. Matthews**, 2 D. 13. Affirmed, 152 Pa. 166.
- Com. v. Moore**, 4 D. 469. Reversed, 2 Pa. Superior Ct. 162.
- Com. v. Mudgett, alias Holmes**, 4 D. 739. Affirmed, 174 Pa. 211.
- Com. v. Northeastern Elev. Ry. Co.**, 3 D. 104. Reversed, 161 Pa. 409.
- Com. v. Norton**, 9 D. 132, 134. Affirmed, 16 Pa. Superior Ct. 423.
- Com. v. O'Donnell**, 6 D. 732; 7 D. 103. Reversed, 188 Pa. 14.
- Com. v. Pennsylvania Coal Co.**, 9 D. 486. Affirmed, 197 Pa. 551.
- Com. v. Philadelphia**, 5 D. 222. Reversed, 176 Pa. 589.
- Com. v. Press Company, Limited**, 2 D. 411. Affirmed, 156 Pa. 516.
- Com. v. Quay**, 7 D. 723. Petition dismissed, 189 Pa. 517.
- Com. v. Rodgers**, 6 D. 453. Affirmed, 6 Pa. Superior Ct. 284.
- Com. v. Sage**, 2 D. 553. Reversed, 160 Pa. 399.
- Com. v. Schollenberger**, 1 D. 437. Appeal quashed, 153 Pa. 625.
- Com. v. Schollenberger**, 2 D. 244. Reversed, 156 Pa. 201.
- Com. v. Tierney**, 1 D. 17. Affirmed, 148 Pa. 552.
- Com. v. Vrooman**, 3 D. 340. Reversed, 164 Pa. 306.
- Com. v. Warwick**, 6 D. 473. Reversed, 185 Pa. 623.
- Com. v. Western Land and Imp. Co.**, 1 D. 376. Affirmed, 156 Pa. 455.
- Com. v. Westfield Borough Officers**, 1 D. 495. Affirmed, 150 Pa. 152.
- Com. v. Westinghouse Air Brake Co.**, 1 D. 349. Affirmed, 151 Pa. 276.
- Com. v. William Mann Company**, 1 D. 345. Reversed, 150 Pa. 64.
- Com. v. Young**, 9 D. 562. Affirmed, 16 Pa. Superior Ct. 317.
- Com. v. Zacharias**, 5 D. 475. Reversed, 3 Pa. Superior Ct. 264; 181 Pa. 126.
- Com. v. Zuern**, 10 D. 26. Affirmed, 16 Pa. Superior Ct. 588.
- Conkrite v. Trexler**, 7 D. 64. Affirmed, 187 Pa. 100.
- Conway's Estate**, 5 D. 332. Affirmed, 181 Pa. 156.
- Corkery v. O'Neill**, 7 D. 88. Affirmed, 9 Pa. Superior Ct. 335.
- Crane, Parris & Co. v. National Bank**, 4 D. 131. Affirmed, 173 Pa. 566.
- Cresson Street**, 6 D. 319. Affirmed, 10 Pa. Superior Ct. 332.
- Cullen's Estate**, 7 D. 394. Affirmed, 8 Pa. Superior Ct. 494.
- Cummings's Estate**, 1 D. 485. Reversed, 153 Pa. 397.

- Dale v. Blue Mountain Manufacturing Co., 3 D. 763. Affirmed, 167 Pa. 402.
Danville Bank v. Creveling, 4 D. 419. Affirmed, 177 Pa. 271.
Davenport Co. v. Pennsylvania R. R., 2 D. 784. Affirmed, 166 Pa. 480.
Davey v. Ruffel, 3 D. 75. Affirmed, 162 Pa. 443.
Deni v. Pennsylvania R. R., 6 D. 15. Affirmed, 181 Pa. 525.
Denis's Estate, 4 D. 1. Affirmed, 169 Pa. 493.
Deutsch-Amerikanisher Volksfest Verein, 9 D. 753. Reversed, 200 Pa. 143.
Devereux's Estate, 6 D. 195. Affirmed, 184 Pa. 429.
Dickerman v. Eddinger, 3 D. 11. Reversed, 168 Pa. 240.
Dorscheimer's Estate, 7 D. 726. Affirmed, 12 Pa. Superior Ct. 34.
Downey v. Traction Co., 3 D. 81. Affirmed, 161 Pa. 588.
Duplaine's Estate, 6 D. 164. Affirmed, 185 Pa. 332.
Eby's Estate, 2 D. 326. Affirmed, 164 Pa. 249.
Ehret v. Gunn, 3 D. 311. Affirmed, 166 Pa. 384.
Eisenbrey's Estate, 5 D. 374. Affirmed, 180 Pa. 125.
Ellison's Estate, 2 D. 521. Reversed, 163 Pa. 315.
Engle's Estate, 3 D. 805. Affirmed, 167 Pa. 463.
Engles's Estate, 3 D. 397. Affirmed, 166 Pa. 280.
Evans v. Township of Willistown, 3 D. 395. Affirmed, 168 Pa. 578.
- Fairbanks v. Kirk, 8 D. 44. Affirmed, 12 Pa. Superior Ct. 210.
Farnum's Estate, 4 D. 389. Reversed, 176 Pa. 366.
Fidelity Trust Co. v. Gazzam, 2 D. 569. Reversed, 161 Pa. 536.
Finley's Estate, 8 D. 723. Affirmed, 196 Pa. 140.
Firmstone v. Spaeter, 1 D. 39. Reversed, 150 Pa. 616.
Fitzpatrick v. Engard, 4 D. 87. Affirmed, 175 Pa. 393.
Flynn v. Philadelphia, 9 D. 606. Affirmed, 199 Pa. 476.
Forepaugh's Estate, 10 D. 144. Affirmed, 199 Pa. 484.
Frank's Estate, 8 D. 86. Affirmed, 195 Pa. 26.
Frederick Street, 1 D. 283. Reversed, 150 Pa. 202.
Freeman v. Pennsylvania R. R., 3 D. 733. Affirmed, 173 Pa. 274.
Fry's Estate, 2 D. 426. Affirmed, 163 Pa. 30.
- Gallagher v. Maclean, 6 D. 315. Affirmed, 7 Pa. Superior Ct. 408 ; 193 Pa. 583.
Gallen's Estate, 10 D. 262. Affirmed, 18 Pa. Superior Ct. 365.
Gamble v. Philadelphia, 2 D. 560. Affirmed, 162 Pa. 413.
Gandy v. Dickson, 3 D. 411. Affirmed, 166 Pa. 422.
Gaw v. Railroad Co., 8 D. 605. Affirmed, 196 Pa. 442.
Gelger v. Turnpike Road, 4 D. 111. Reversed, 167 Pa. 582.
Germantown Brewing Co. v. Booth, 3 D. 142. Reversed, 162 Pa. 100.
Gibson's Estate, 3 D. 147. Affirmed, 161 Pa. 177.
Girard Trust Co. v. Mellor, 1 D. 182. Reversed, 156 Pa. 579.
Gleeson's Estate, 8 D. 46. Affirmed, 192 Pa. 279, 286.
Gockley v. Uhrich, 2 D. 350. Reversed, 162 Pa. 271.
Goddard's Estate, 9 D. 703. Affirmed, 198 Pa. 454.
Goodwin Gas Stove Co., Assigned Estate, 3 D. 483. Affirmed, 166 Pa. 296.
Gorgas's Estate, 3 D. 360. Affirmed, 166 Pa. 269.
Grace Church v. Dobbins, 1 D. 215. Reversed, 153 Pa. 294.
Grebble's Estate (Nos. 1 and 2), 9 D. 89, 441. Affirmed, 16 Pa. Superior Ct. 42, 45.
Grimes v. Pennsylvania R. R., 7 D. 417. Affirmed, 189 Pa. 619.
Grimm's Estate, 6 D. 21. Reversed, 181 Pa. 233.
- Hagar v. Donaldson, 1 D. 147. Affirmed, 154 Pa. 242.
Haines v. Passenger Ry., 1 D. 506. Reversed, 152 Pa. 153.

- Hale's Estate**, 3 D. 84. Affirmed, 161 Pa. 181.
Haley's Estate, 9 D. 116. Affirmed, 16 Pa. Superior Ct. 70.
Hancock v. Philadelphia, 4 D. 345. Affirmed, 175 Pa. 124.
Harper's Estate, 7 D. 532. Affirmed, 196 Pa. 137.
Harris v. Hall, 1 D. 221. Affirmed, 148 Pa. 345.
Heckman's Estate, Ward's Appeal, 3 D. 479. Affirmed, 172 Pa. 185.
Heller v. Insurance Co., 4 D. 433. Affirmed, 177 Pa. 262.
Henrie v. Columbia County, 9 D. 624. Affirmed, 16 Pa. Superior Ct. 339.
Henry's Estate, 8 D. 649. Affirmed, 198 Pa. 382.
Hicks's Estate, 6 D. 682. Affirmed, 7 Pa. Superior Ct. 274.
Hill v. Telephone Manuf. Co., 9 D. 445. Affirmed, 198 Pa. 446.
Himes's Estate, 7 D. 89. Affirmed, 10 Pa. Superior Ct. 124.
Hovey's Estate, 9 D. 183. Affirmed, 198 Pa. 395.
Howard v. Traction Co., 9 D. 99. Affirmed, 195 Pa. 391.
Howell's Estate, 5 D. 487. Affirmed, 180 Pa. 315.
Huey v. Prince, 7 D. 110. Reversed, 187 Pa. 151.
Hughes v. Canal Co., 4 D. 574. Reversed, 176 Pa. 254.
Huntingdon Borough Road, 1 D. 735. Affirmed, 149 Pa. 133.
Huston v. Clark, 3 D. 2. Affirmed, 173 Pa. 361.
- Ike's Estate**, 8 D. 501. Affirmed, 200 Pa. 202.
Ingersoll's Estate, 3 D. 399. Affirmed, 167 Pa. 536.
Insurance Co. v. Storage Co., 6 D. 54. Reversed, 6 Pa. Superior Ct. 288.
- Jamison's Estate**, 3 D. 217. Reversed, 163 Pa. 143.
Johnson v. P. & R. R. R., 2 D. 229. Affirmed, 163 Pa. 127.
Jones v. Brown, 3 D. 294. Affirmed, 167 Pa. 395.
- Kane's Estate**, 6 D. 553. Affirmed, 185 Pa. 544.
Keller v. Hestonville, etc., Pass. Ry., 1 D. 197. Affirmed, 149 Pa. 65.
Kelly v. Union Traction Co., 9 D. 69. Affirmed, 199 Pa. 322.
Kelly's Estate, 7 D. 750. Reversed, 193 Pa. 45.
Kern's Estate, 4 D. 73. Reversed, 171 Pa. 55; 176 Pa. 373.
Kerr's Estate, 2 D. 535. Affirmed, 159 Pa. 512.
Kinike's Estate, 1 D. 172. Affirmed, 155 Pa. 101.
Klein v. Livingston Club, 5 D. 85. Affirmed, 177 Pa. 224.
Knight's Estate, 3 D. 173. Affirmed, 167 Pa. 453.
Kohlhaus v. Veit, 3 D. 141. Reversed, 162 Pa. 108.
Konitz v. Teutonia Insurance Co. and Orient Insurance Co., 8 D. 575. Reversed, 17 Pa. Superior Ct. 557.
Krecker v. Shirey, 2 D. 24. Reversed, 163 Pa. 534.
Krumrine v. Bottorf, 1 D. 678. Affirmed, 155 Pa. 331.
- Lacey's Estate**, 6 D. 499. Affirmed, 191 Pa. 56.
Lafferty's Estate, 5 D. 75, 347; 9 D. 385. Affirmed, 181 Pa. 51; 184 Pa. 502; 198 Pa. 433.
Lancaster v. Flowers, 9 D. 241. Affirmed, 198 Pa. 614.
Landis v. Lewis, 3 D. 241. Affirmed, 170 Pa. 376.
Landreth v. McCaffrey, 9 D. 343. Reversed, 17 Pa. Superior Ct. 272, 276.
Lang v. Pennsylvania R. R., 2 D. 125. Affirmed, 154 Pa. 342.
Lauer v. Posey, 9 D. 399. Affirmed, 15 Pa. Superior Ct. 543.
Laughlin v. Solomon, 5 D. 282. Reversed, 180 Pa. 178.
Lawrence's and Appleton's Estates, 3 D. 356. Reversed, 169 Pa. 185.

- Lehigh Valley Coal & Nav. Co. v. Blakeslee, 7 D. 32. Affirmed, 189 Pa. 13.
Leibert v. Heitz, 7 D. 249. Affirmed, 193 Pa. 591.
Lejee's Estate, 5 D. 236, 311. Reversed, 181 Pa. 416.
Lennig's Estate, 6 D. 249. Affirmed, 182 Pa. 485.
Levy's Estate, 1 D. 217. Affirmed, 153 Pa. 174.
Levy's Estate, 3 D. 36. Affirmed, 161 Pa. 189.
Lewis's Estate, 1 D. 423. Affirmed, 152 Pa. 477.
Linton's Estate, 7 D. 129. Affirmed, 198 Pa. 438.
Lippincott's Estate, Reakirk's Appeal, 4 D. 251. Affirmed, 173 Pa. 368.
Loeser's Estate, 3 D. 817. Affirmed, 167 Pa. 498.
Loraw v. Nissley, 1 D. 410. Reversed, 156 Pa. 329.
Lucas v. Hunter, 1 D. 165. Affirmed, 153 Pa. 293.
Lytle v. Forrest & Hoover, 4 D. 292. Affirmed, 175 Pa. 408.
- McClelland v. Rush, 1 D. 370. Reversed, 150 Pa. 57.
McCrea's Estate, 5 D. 448. Affirmed, 180 Pa. 81.
McHugh's Estate, 1 D. 154. Reversed, 152 Pa. 442.
McKibbin v. Peters, 6 D. 67. Affirmed, 185 Pa. 518.
McNeilan's Estate, 4 D. 45. Affirmed, 167 Pa. 473.
MacMaster v. West Chester Normal School, 2 D. 753. Affirmed, 162 Pa. 280.
Maires's Case, 7 D. 297. Affirmed, 189 Pa. 99.
Man's Estate, 2 D. 830. Reversed, 160 Pa. 609.
Manning v. Klein, 4 D. 599. Affirmed, 1 Pa. Superior Ct. 210.
Mansel v. Fulmer, 4 D. 487. Modified, 175 Pa. 377.
Mansel v. Nicely, 4 D. 487. Reversed, 175 Pa. 367.
Markle's Estate, 5 D. 47. Affirmed, 182 Pa. 378.
Markle's Estate, 5 D. 47, 348. Reversed, 187 Pa. 639.
Markle's Estate, 5 D. 348. Modified, 182 Pa. 393.
Marsden's Estate, 3 D. 281. Affirmed, 166 Pa. 213.
Marsh v. Philadelphia, 8 D. 340. Reversed, 195 Pa. 130.
Martin's Estate, 2 D. 232. Affirmed, 160 Pa. 32.
Martin's Estate, 6 D. 58. Reversed, 181 Pa. 378.
Martin's Estate, 6 D. 484. Affirmed, 184 Pa. 221.
Matlack v. Bank, 5 D. 113. Affirmed, 180 Pa. 360.
Mayne v. Fidelity and Deposit Co., 8 D. 711. Reversed, 198 Pa. 490.
Medico-Chirurgical College's Petition, 7 D. 329. Affirmed, 190 Pa. 121.
Meigs v. Milligan, 4 D. 405. Affirmed, 177 Pa. 66.
Mifflin County Nat. Bank v. Fourth St. Nat. Bank, 8 D. 447. Affirmed, 199 Pa. 459.
Milleisen v. Senseman, 5 D. 723. Affirmed, 4 Pa. Superior Ct. 455.
Miller v. Billington, 6 D. 335. Modified, 184 Pa. 583.
Miller v. Lehigh County, 5 D. 588. Affirmed, 181 Pa. 622.
Miller's Estate, 2 D. 335. Reversed, 159 Pa. 562, and see also 159 Pa. 575.
Mintzer's Estate, 2 D. 584. Cited with approval in 163 Pa. 484.
Moore's Estate, 8 D. 84; 9 D. 675. Affirmed, 191 Pa. 600; 198 Pa. 611.
Moosic Borough, 7 D. 203. Affirmed, 12 Pa. Superior Ct. 353.
Morris v. Fisher, 8 D. 161. This case was reversed *per curiam* May 23, 1900, by agreement of counsel. Hence there was no judgment of the Supreme Court to report, and the case does not appear in the Supreme Court Reports.
Morrison's Estate, 5 D. 571. Affirmed, 183 Pa. 155.
Mosser's Estate, Kauffmann's Appeal, 3 D. 90. Affirmed, 161 Pa. 469.
Muckle v. Payne, 9 D. 413. Affirmed, 198 Pa. 444.
Mueller's Estate, 8 D. 70. Affirmed, 190 Pa. 601.
Mulligan's Estate, 1 D. 511. Affirmed, 157 Pa. 98.
Mustin's Estate, 8 D. 264. Affirmed, 194 Pa. 438.

- Nathans's Estate**, 7 D. 314. Reversed, 191 Pa. 404.
Neafie's Estate, 10 D. 70. Reversed, 199 Pa. 307.
Nester v. Continental Brewing Co., 2 D. 177. Affirmed, 161 Pa. 473.
Nevins's Estate, 7 D. 761. Reversed, 192 Pa. 258.
New Castle Ry. v. N. C. & S. V. R. R., 1 D. 768. Affirmed, 152 Pa. 96.
Newhard's Estate, 9 D. 764. Affirmed, 199 Pa. 389.
New York Tartar Co. v. French, 1 D. 601. Reversed, 154 Pa. 273.
- O'Donnell v. Broad**, 1 D. 650. Affirmed, 149 Pa. 24.
Oellers v. Horn, 5 D. 149. Affirmed, 3 Pa. Superior Ct. 537.
Ogontz Land Co. v. Johnson, 3 D. 642. Reversed, 168 Pa. 178.
Oil City v. Oil City Trust Co., 1 D. 661. Reversed (partially), 151 Pa. 454.
Orne's Estate, 7 D. 337. Affirmed, 192 Pa. 626.
Ott v. Sweatman, 3 D. 573. Affirmed, 166 Pa. 217.
- Padelford's Estate**, 7 D. 331, 711. Affirmed, 189 Pa. 634; 190 Pa. 35.
Palethorp's Appeal, 3 D. 144. Appeal quashed, 160 Pa. 316; Affirmed, 168 Pa. 98.
Palethorp v. Palethorp, 8 D. 135. Affirmed, 194 Pa. 408; 198 Pa. 395.
Parry's Estate, 6 D. 717. Reversed in part, 188 Pa. 33.
Partridge v. Powell, 4 D. 119. Affirmed, 180 Pa. 22.
Pavilion Co. v. Hamilton, 7 D. 747. Reversed, 15 Pa. Superior Ct. 389.
Peart v. Brice, 1 D. 713. Reversed, 152 Pa. 277.
Pennsylvania Co. v. Bank, 3 D. 93, 151. Affirmed, 195 Pa. 34.
Pennsylvania Co. v. Insurance Co., 5 D. 323. Affirmed, 181 Pa. 40.
Pennsylvania Co. v. Swain, 7 D. 406. Affirmed, 189 Pa. 626.
Penna. R. R. v. Braddock Electric Ry., 1 D. 626. Reversed, 152 Pa. 116.
Penna. R. R. v. Montgomery Co. Pass. Ry., 3 D. 58. Reversed, 167 Pa. 62.
Penna. R. R. v. Phila. Belt Line R. R., 1 D. 1. Affirmed, 149 Pa. 218.
Pepper's Estate, 1 D. 148. Affirmed, 154 Pa. 331.
Pepper's Estate, 2 D. 533, 611. Affirmed, 159 Pa. 508.
Peterson v. Railroad, 4 D. 327. Reversed, 177 Pa. 335.
Petition of Plains Twp. Taxpayers, 9 D. 379. Reversed, 16 Pa. Superior Ct. 262.
Philadelphia v. Bowman, 4 D. 359. Affirmed, 175 Pa. 91.
Philadelphia v. Ladies' United Aid Society, 1 D. 249. Affirmed, 154 Pa. 12.
Philadelphia v. McManes, 4 D. 445. Affirmed, 175 Pa. 28.
Philadelphia v. Odd Fellows' Hall Ass'n, 4 D. 3. Affirmed, 168 Pa. 105.
Philadelphia v. Passenger Ry., 3 D. 468. Affirmed, 169 Pa. 269.
Philadelphia v. Spring Garden Farmers' M. Co., 1 D. 231. Affirmed, 154 Pa. 98.
Philadelphia v. Stewart, 9 D. 228, 601. Affirmed, 198 Pa. 422.
Philadelphia v. Westminster Cemetery Co., 3 D. 151. Affirmed, 162 Pa. 105.
Phila. and West Chester Tpk. Co.'s Appeal, 6 D. 160. Affirmed, 186 Pa. 459.
Platt, Barber & Co. v. Johnson & Peterson, 4 D. 66. Affirmed, 168 Pa. 47.
Portuondo's Estate, 6 D. 462, 748. Affirmed, 191 Pa. 28.
Potts v. Philadelphia, 8 D. 728. Affirmed, 195 Pa. 620.
Potts v. Quaker City Elevated R. R., 2 D. 200; 3 D. 172. Affirmed, 161 Pa. 396.
Purves's Estate, 9 D. 5. Affirmed, 196 Pa. 161.
- Reck v. Hatboro L. S. Ins. Co.**, 2 D. 502. Reversed, 163 Pa. 443.
Reitzel v. Haines, 3 D. 523. Reversed, 170 Pa. 306.
Reynolds v. Creveling, 4 D. 419. Reversed, 177 Pa. 267.
Reynolds v. Lumber Co., 4 D. 573. Affirmed, 175 Pa. 437.
Rice v. Jackson, 3 D. 829. Affirmed for part of judgment, 171 Pa. 89.
Rice's Estate, Frake's Appeal, 3 D. 733. Affirmed, 173 Pa. 298.
Riegel v. American Ins. Co., 1 D. 721. Reversed, 153 Pa. 134.

Ritter v. Ewing, 4 D. 203. Reversed, 174 Pa. 341.
Roberts v. Sharp, 3 D. 136. Affirmed, 161 Pa. 185.
Robin's Estate, 4 D. 277; 5 D. 128. Reversed in part, 180 Pa. 630.
Rohrbacker's Estate, 3 D. 264. Reversed, 168 Pa. 158.
Rooflug and Sheet Metal Contractors' Ass'n, 9 D. 569. Reversed, 200 Pa. 111.
Roos v. Philadelphia, W. & B. R. R., 7 D. 405. Affirmed, 199 Pa. 378.
Root's Estate, 6 D. 77. Reversed, 187 Pa. 118.
Ross v. Railway Co., 7 D. 405. Affirmed, 13 Pa. Superior Ct. 563.
Rowson's Estate, 4 D. 91. Affirmed, 175 Pa. 150.

Saake v. Dorner, 3 D. 170. Affirmed, 167 Pa. 301.
Schofield & Son, Assigned Estate, 3 D. 511. Affirmed, 167 Pa. 479.
Schreibner v. Baer, 4 D. 633. Affirmed, 174 Pa. 482.
Schroeder v. Walters, 3 D. 775. Reversed, 173 Pa. 422.
Scranton v. Levers, 9 D. 176. Affirmed, 200 Pa. 56.
Scranton Traction Co. v. Canal Co., 4 D. 237. Affirmed, 1 Pa. Superior Ct. 409.
Seltzer's Estate, 7 D. 196. Reversed, 189 Pa. 574.
Seward v. Shields, 9 D. 583. Affirmed, 18 Pa. Superior Ct. 384.
Sewickley Borough v. Jennings, 1 D. 624. Reversed, 159 Pa. 194.
Shafer's Estate, 8 D. 221. Affirmed, 194 Pa. 420.
Shafer v. McIlhaney, 1 D. 765. Affirmed, 154 Pa. 58.
Shallcross's Estate, 9 D. 388, 690. Affirmed, 200 Pa. 122.
Sheehan v. P. & R. R. R., 3 D. 325. Affirmed, 166 Pa. 354.
Shelly v. Dampman, 4 D. 496. Reversed, 1 Pa. Superior Ct. 115; 174 Pa. 495.
Shephard's Estate, 1 D. 238. Reversed, 170 Pa. 323.
Sherry v. Sheppard, 1 D. 481. Affirmed, Sherry v. Jenks, 154 Pa. 368.
Shoemaker's Case, 5 D. 161. Affirmed, 2 Pa. Superior Ct. 27.
Siddall's Estate, 5 D. 102. Affirmed, 180 Pa. 127.
Sloan's Estate, 3 D. 145. Affirmed, 161 Pa. 237.
Smith v. Ervin & Toland, 3 D. 485. Affirmed, 168 Pa. 271.
Smith v. Reading Ry., 2 D. 490. Affirmed *pro forma*, 156 Pa. 5.
Smith v. Times Publishing Co., 4 D. 399. Reversed, 178 Pa. 482.
Smith v. Traction Co., 6 D. 471. Affirmed, 187 Pa. 110.
Smith's Estate, 5 D. 327; 7 D. 236. Affirmed, 181 Pa. 109; 189 Pa. 587.
Snider's Estate, Gelwick's Appeal, 4 D. 515. Reversed, 174 Pa. 620.
Sommers v. Howey, 4 D. 723. Affirmed, 1 Pa. Superior Ct. 318.
Souder's Estate, 3 D. 495. Affirmed, 169 Pa. 239.
Stahl v. Penna. R. R., 2 D. 286. Affirmed, 155 Pa. 309.
Steen's Estate, 4 D. 700. Affirmed, 175 Pa. 299.
Steinmetz's Estate, 3 D. 440. Affirmed, 168 Pa. 171, 175.
Stevenson's Estate, 5 D. 5. Reversed, 4 Pa. Superior Ct. 46.
Stork v. Philadelphia, 8 D. 339. Reversed, 195 Pa. 101.
Strauss's Estate, 3 D. 425. Affirmed, 168 Pa. 561.
Strock v. Cumberland County, 4 D. 321. Affirmed, 176 Pa. 59.
Struthers v. Railroad, 4 D. 675. Reversed, 174 Pa. 292.
Sulzer v. Ross, 8 D. 573. Affirmed, 12 Pa. Superior Ct. 206.
Supplee v. Hermann, 9 D. 27. Reversed, 16 Pa. Superior Ct. 45.
Suter v. Findley, 6 D. 253. Affirmed, 5 Pa. Superior Ct. 163.
Sweeney v. Horn, 7 D. 391. Affirmed, 190 Pa. 237.
Sweeny v. Torrence, 1 D. 622. Affirmed, in Murdoch v. Walker, 152 Pa. 595.
Swope v. Crawford, 8 D. 373. Affirmed, 16 Pa. Superior Ct. 474.
Swope v. Donnelly, 7 D. 448. Reversed, 190 Pa. 417.

Tamaqua Street Pass. Ry. v. Inter-County Ry., 4 D. 20. Affirmed, 167 Pa. 91.

Tasker's Estate, 5 D. 6. Reversed, 182 Pa. 122.
Taylor v. Bowling, 5 D. 605. Affirmed, 5 Pa. Superior Ct. 225.
Taylor v. Traction Co., 6 D. 365. Affirmed, 184 Pa. 465.
Taylor's Estate, 4 D. 477. Affirmed, 175 Pa. 60.
Thompson v. Kaufman, 6 D. 522. Affirmed, 9 Pa. Superior Ct. 305.
Thomson's Estate, 1 D. 139. Reversed, 153 Pa. 332.
Thouron's Estate, 6 D. 166. Reversed, 182 Pa. 126.
Titlow's Estate, 2 D. 512. Affirmed, 163 Pa. 35.
Township of Plymouth v. Railroad, 4 D. 8. Reversed, 168 Pa. 181.
Township of Rahn v. Passenger Ry., 4 D. 29. Affirmed, 167 Pa. 84.
Tully v. Felton, 5 D. 15. Reversed, 177 Pa. 344.
Tunis v. Hestonville, &c., Pass. Ry., 1 D. 207. Affirmed, 149 Pa. 70.
Tygert-Allen Fertilizer Co. v. Tygert Co., 7 D. 430. Affirmed, 191 Pa. 336.

Underhill v. McManus, 4 D. 404. Affirmed, 175 Pa. 39.

Vanderslice v. Insurance Co., 7 D. 51. Reversed, 9 Pa. Superior Ct. 233.
Vitrified Brick Co. v. Philadelphia, 3 D. 544. Reversed, 164 Pa. 480.
Volkenand v. Drum, 2 D. 161. Affirmed, 154 Pa. 616.

Waesch's Estate, 3 D. 176. Affirmed, 166 Pa. 204.
Waln's Estate, 2 D. 102. Affirmed, 156 Pa. 194.
Watkin v. West Philadelphia Pass. Ry., 1 D. 463. Reversed, 152 Pa. 153.
Watt's Estate, 3 D. 343. Affirmed, 168 Pa. 422.
Weaver v. Schuylkill County, 9 D. 467. Affirmed, 17 Pa. Superior Ct. 327.
Webb v. Cumming, 8 D. 320. Reversed, 12 Pa. Superior Ct. 412. Affirmed, 198 Pa. 493.

Weinbrenner's Estate, 3 D. 566. Affirmed, 173 Pa. 440.
West Branch Lumbermen's Ex. v. Fisher, 1 D. 419. Affirmed, 150 Pa. 475.
Whelen's Estate, 4 D. 478. Affirmed, 175 Pa. 23.
Whitaker's Estate, Robbins's Appeal, 4 D. 345. Affirmed, 175 Pa. 139.
White's Estate, 1 D. 508. Affirmed, 163 Pa. 388.
Wiley's Estate, 6 D. 691. Affirmed, 187 Pa. 82.
Williamson's Estate, 1 D. 159. Reversed (partially), 153 Pa. 508.
Wolf v. Railroad Co., 8 D. 1. Reversed, 195 Pa. 91.
Wood v. Pennsylvania R. R., 4 D. 119. Affirmed, 177 Pa. 306.
Wright's Estate, 1 D. 325. Affirmed, 155 Pa. 64.

Yocum v. Bank, 8 D. 631. Affirmed, 195 Pa. 411.
Yorke's Estate, 6 D. 321. Affirmed, 185 Pa. 61.
Youghiogheny Coal Co. v. Peairs, 2 D. 134. Affirmed, 153 Pa. 74.
Young v. Sons of Progress, 3 D. 209. Affirmed, 173 Pa. 302.
Young's Estate, 3 D. 282. Affirmed, 166 Pa. 645.
Young's Petition, 1 D. 357. Affirmed, 153 Pa. 34.
Yung's Estate, 9 D. 476. Affirmed, 199 Pa. 35.

Zane v. Rosenberry, 1 D. 436. Affirmed, 153 Pa. 38.

LIST OF JUDGES.

- 1st Dist.**—Philadelphia Co.
C. P. No. 1.—Craig Biddle, P. J. ; F. Amedee Brégy and Abraham M. Beitler, JJ.
C. P. No. 2.—Samuel W. Pennypacker, P. J. ; Mayer Sulzberger and William W. Wiltbank, JJ.
C. P. No. 3.—Thomas K. Finletter, P. J. ; Chas. B. McMichael and Henry J. McCarthy, JJ.
C. P. No. 4.—Michael Arnold, P. J. ; Robert N. Willson and Charles Y. Audenried, JJ.
C. P. No. 5.—J. Willis Martin, P. J. ; Robert Ralston and Maxwell Stevenson, JJ.
O. C.—William B. Hanna, P. J. ; William N. Ashman, Clement B. Penrose and Joseph C. Ferguson, JJ.
- 2nd Dist.**—Lancaster Co. John B. Livingston, P. J. ; Charles I. Landis, J.
- 3rd Dist.**—Northampton Co. W. W. Schuyler, P. J. ; Henry W. Scott, J.
- 4th Dist.**—Tioga Co. Jerome B. Niles, P. J.
- 5th Dist.**—Allegheny Co.
C. P. No. 1.—Edwin H. Stowe, P. J. ; Frederick H. Collier and Marshall Brown, JJ.
C. P. No. 2.—Robert S. Frazer, P. J. ; John D. Shafer and Elliott Rodgers, JJ.
C. P. No. 3.—John M. Kennedy, P. J. ; Samuel A. McClung and John A. Evans, JJ.
O. C.—William G. Hawkins, Jr., P. J. ; James W. Over, J.
- 6th Dist.**—Erie Co. Emory A. Walling, P. J.
- 7th Dist.**—Bucks Co. Harman Yerkes, P. J.
- 8th Dist.**—Northumberland Co. Clinton R. Savidge, P. J.
- 9th Dist.**—Cumberland Co. Edward W. Biddle, P. J.
- 10th Dist.**—Westmoreland Co. Lucien W. Doty, P. J. ; Alex. D. McConnell, J.
- 11th Dist.**—Luzerne Co.
C. P.—John Lynch, P. J. ; Galus L. Halsey and George S. Ferris, JJ.
O. C.—*Alfred Darte, P. J. ; Andrew M. Freas, P. J.
- 12th Dist.**—Dauphin Co. John W. Simonton, P. J. ; John H. Weiss, J.
- 13th Dist.**—Greene Co. R. L. Crawford, P. J.
- 14th Dist.**—Fayette Co. Edmund H. Reppert, P. J. ; R. E. Umbel, J.
- 15th Dist.**—Chester Co. Joseph Hemphill, P. J. ; William Butler, Jr., J.
- 16th Dist.**—Bedford and Somerset Counties. J. H. Longenecker, P. J.
- 17th Dist.**—Union and Snyder Counties. Harold M. McClure, P. J.
- 18th Dist.**—Clarion Co. E. Heath Clark, P. J.
- 19th Dist.**—York Co. John W. Bittenger, P. J. ; W. F. Bay Stewart, J.
- 20th Dist.**—Huntingdon and Mifflin Counties. John M. Bailey, P. J.
- 21st Dist.**—Schuylkill Co.
C. P.—Oliver P. Bechtel, P. J. ; William A. Marr and A. L. Shay, JJ.
O. C.—P. M. Dunn, P. J.
- 22nd Dist.**—Wayne and Pike Counties. George S. Purdy, P. J.

-
- 23rd Dist.—Berks Co.
 C. P.—James N. Ermentrout, P. J. ; Gustav A. Endlich, J.
 O. C.—H. Willis Bland, P. J.
 24th Dist.—Blair Co. Martin Bell, P. J.
 25th Dist.—Clinton, Cameron and Elk Counties. Charles A. Mayer, P. J.
 26th Dist.—Columbia and Montour Counties. Robert R. Little, P. J.
 27th Dist.—Washington Co. John Add. McIlvaine, P. J. ; James F. Taylor, J.
 28th Dist.—Venango Co. George S. Criswell, P. J.
 29th Dist.—Lycoming Co. Max L. Mitchell, P. J.
 30th Dist.—Crawford Co. Frank J. Thomas, P. J.
 31st Dist.—Lehigh Co. Edwin Albright, P. J.
 32nd Dist.—Delaware Co. Isaac Johnson, P. J.
 33rd Dist.—Armstrong Co. W. D. Patton, P. J.
 34th Dist.—Susquehanna Co. Daniel W. Searle, P. J.
 35th Dist.—Mercer Co. Samuel H. Miller, P. J.
 36th Dist.—Beaver Co. James Sharp Wilson, P. J.
 37th Dist.—Warren and Forest Counties. Wilton M. Lindsey, P. J.
 38th Dist.—Montgomery Co. Aaron S. Swartz, P. J. ; Henry K. Weand, J.
 39th Dist.—Franklin Co. John Stewart, P. J.
 40th Dist.—Indiana Co. Harry White, P. J.
 41st Dist.—Juniata and Perry Counties. Louis E. Atkinson, P. J.
 42nd Dist.—Bradford Co. A. C. Fanning, P. J.
 43rd Dist.—Carbon and Monroe Counties. Allen Craig, P. J.
 44th Dist.—Wyoming and Sullivan Counties. Edw. M. Dunham, P. J.
 45th Dist.—Lackawanna Co. Henry M. Edwards, P. J. ; John P. Kelly and
 J. W. Carpenter, JJ.
 46th Dist.—Clearfield Co. Cyrus Gordon, P. J.
 47th Dist.—Cambria Co. A. V. Barker, P. J.
 48th Dist.—McKean Co. and Potter Co. attached. Arthur G. Olmsted, P. J. ;
 Thomas A. Morrison, J.
 49th Dist.—Centre Co. John G. Love, P. J.
 50th Dist.—Butler Co. John M. Greer, P. J.
 51st Dist.—Adams and Fulton Counties. Samuel McC. Swope, P. J.
 52nd Dist.—Lebanon Co. Allen W. Ehrgood, P. J.
 53rd Dist.—Lawrence Co. William D. Wallace, P. J.
 54th Dist.—Jefferson Co. John W. Reed, P. J.
-

* Died during 1901.

The Legal Intelligencer Staff.

General Editor.

HOWARD W. PAGE, 700 West End Trust Building, Philadelphia.

State Editor.

HOWARD W. PAGE,
West End Trust Building, Phila.

Philadelphia Editor.

THEO. B. STORK,
West End Trust Building, Phila.

Allentown, Lehigh Co., James L. Schaadt.
Beaver, Beaver Co., F. H. Laird.
Bedford, Bedford Co., Daniel S. Horn.
Bellefonte, Centre Co., Wilbur F. Reeder.
Bloomsburg, Columbia Co., Wm. Chrisman.
Brookville, Jefferson Co., George W. Means.
Butler, Butler Co., J. C. Vanderline.
Carlisle, Cumberland Co., A. G. Miller.
Chambersburg, Franklin Co., William Alexander.
Clearfield, Clearfield Co., B. F. Chase.
Coudersport, Potter Co., A. S. Heck.
Clarion, Clarion Co., J. E. Wood.
Danville, Montour Co., Wm. Kase West.
Doylestown, Bucks Co., Henry O. Harris.
Easton, Northampton Co., Henry D. Maxwell.
Emporium, Cameron Co., Jas. P. McNarney.
Erie, Erie Co., J. M. Force.
Franklin, Venango Co., E. H. Lamberton.
Gettysburg, Adams Co., Charles S. Duncan.
Greensburg, Westmoreland Co., J. A. C. Ruffner.
Harrisburg, Dauphin Co., M. W. Jacobs, Wm. M. Hargest, Guy H. Davies and W. C. Farnsworth.
Honesdale, Wayne Co., F. P. Kimble.
Hollidaysburg, Blair Co., Robert W. Smith.
Huntingdon, Huntingdon Co., C. G. Brown.
Indiana, Indiana Co., J. Wood Clark.
Johnstown, Cambria Co., H. W. Storey.
Kittanning, Armstrong Co., Ross Reynolds.
Lancaster, Lancaster Co., Geo. Ross Eshleman.
Laporte, Sullivan Co.
Lebanon, Lebanon Co., Howard C. Shirk.
Lewisburg, Union Co., Andrew A. Leiser.
Lewistown, Mifflin Co., John A. McKee.
Lock Haven, Clinton Co., Wilson C. Kress.
Mauch Chunk, Carbon Co., Laird H. Barber.

McConnellsburg, Fulton Co., W. S. Alexander.
Meadville, Crawford Co., Otto Kohler.
Media, Delaware Co., W. Roger Fronefield.
Mercer, Mercer Co., Q. A. Gordon.
Middleburg, Snyder Co., F. E. Bower.
Mifflintown, Juniata Co., F. M. M. Pennell.
Milford, Pike Co., J. H. Van Etten.
Montrose, Susquehanna Co., A. B. Smith, Jr.
New Bloomfield, Perry Co., C. H. Smiley.
New Castle, Lawrence Co., Robert K. Aiken.
Norristown, Montgomery Co., Montg. Evans.
Philadelphia, Philadelphia Co., T. B. Stork.
Pittsburgh, Allegheny Co., Edwin L. Mattern,
216 Bakewell Law Building.
Reading, Berks Co., D. N. Schaeffer.
Ridgway, Elk Co., F. H. Ely.
Scranton, Lackawanna Co., Wm. A. Wilcox,
Thomas F. Wells.
Somerset, Somerset Co., James L. Pugh.
Stroudsburg, Monroe Co., Cicero Gearhart.
Smethport, McKean Co., J. W. Bouton.
Sunbury, Northumberland Co., C. M. Clement.
Tamaqua, Schuylkill Co., J. O. Ulrich.
Tionesta, Forest Co., S. D. Irwin.
Towanda, Bradford Co., R. H. Williams.
Tunkhannock, Wyoming Co., C. O. Dersheimer.
Uniontown, Fayette Co., Luke H. Frasher.
Warren, Warren Co., Watson D. Hinckley.
Washington, Washington Co., Jas. I. Brownson.
Waynesburg, Greene Co., James J. Purman.
Wellsboro, Tioga Co., F. H. Rockwell.
West Chester, Chester Co., Gibbons Gray
Cornwell.
Wilkes-Barre, Luzerne Co., Sidney R. Miner.
Williamsport, Lycoming Co., T. M. B. Hicks.
York, York Co., Richard E. Cochran.

REPORTS
OF
CASES DECIDED IN ALL THE
JUDICIAL DISTRICTS
OF
PENNSYLVANIA,
VOLUME X.

United States v. Ogden.

New trial—Juror—Reading of improper newspaper article—License of the press.

Much may be permitted to the zeal of the press in detecting and exposing public wrongs, and much freedom of expression is rightly allowed to those who are thus serving the public; but, after the preliminary stages have been passed and the inquiry has come before a court of law, it does serious harm to the cause of justice to pursue the prisoner with invective or to interfere with his trial by usurping the proper functions of the judge and the jury.

A new trial will be granted when it appears that while the jury were awaiting the charge of the court an article from the North American was read by a juror, containing comments on and invective against the prisoner, the publishing of which comments during the trial was a flagrant impropriety, being of such character that if the printed words had been spoken to a juror, or if they had been contained in a letter addressed to him, an offence punishable by fine and imprisonment would have been committed, it being little less blamable to take the not improbable chance of reaching the juror's mind by the method of publication in a widely-read journal.

Motions for new trial. District Court of United States, Eastern District of Pennsylvania, Nov. Sess., 1899, No. 25, May Sess., 1900, No. 37.

James B. Holland, United States District-Attorney, for plaintiff.

Dimmer Beeber, for defendant.

MCPHERSON, Dist. J., Dec. 15, 1900.—The testimony taken in support of this motion shows, that after the evidence and the arguments of counsel had been heard, and while the jury were awaiting the charge of the court, the following article from *The North American*, a newspaper published in the city of Philadelphia, was read by one of the jurors; that two other jurors read the displayed head-lines; and that the article was to some extent spoken of in the jury-room while the verdict was being considered:

“OLEO DEALER OGDEN'S BOASTED PULL OF NO AVAIL;
LONG PROTECTED MAN ON TRIAL IN FEDERAL COURT.

“Prosecuted for Eleven Offences by The North American and Butter Association After State Officials Fail.
VOL. 10—1

DISTRICT REPORTS.

United States v. Ogden.

"Protection for David S. Ogden, the Ridge avenue oleo dealer, is apparently a thing of the past. After long dodging the law, he was brought to trial yesterday in the United States District Court. A prospect of jail looms up.

"At his store, No. 2417 Ridge avenue, Ogden used to sell oleomargarine by the ton. He relied upon the state authorities to protect him in his illegal business, and frankly admitted that he stood high in favor. By this arrangement he prospered at the expense of the defrauded public until The North American last April began its crusade against the bogus butter swindlers and their official allies.

"When Farmer Joseph C. Sharpless, of Chester county, wrote to the Dairy and Food authorities directing attention to Ogden's oleo trade, Secretary of Agriculture John Hamilton sent a reply to the effect that the inspectors of the department, after an investigation, had been unable to find oleo in the store. Agents of The North American and the Pure Butter Protective Association had no trouble in finding it, however, and they promptly caused Ogden's arrest under the Federal law for selling the stuff in packages not properly stamped. The show-window of the Ridge avenue establishment was at that time heaped up with oleo, in the same manner it had been displayed there for months.

Ogden Skipped His Bail.

"Ogden was to have been tried in May, but he skipped his bail, fearing imprisonment. Some time later he surrendered himself, and his bail was increased from \$1000 to \$2500. Since then his case has been on the trial list.

"The protectors upon whom Ogden had counted to save him kept in the back-ground when he was brought into the Federal Court yesterday. With the evidence prepared by Luther S. Kauffman, counsel for The North American and the Pure Butter Protective Association, United States District-Attorney James B. Holland conducted the prosecution. It was Mr. Holland's first oleo case since assuming office, and he pressed it vigorously. Ogden was defended by ex-Superior Court Judge Dimmer Beeber. A number of prominent oleo dealers were among the spectators at the trial.

"Ogden's defence threw a lime-light upon the shortcomings of the State Dairy and Food authorities.

"'Why, this man hasn't tried to deceive any one,' declared ex-Judge Beeber, in his address to the jury. 'The evidence has shown that Mr. Ogden has been selling oleo openly and above board. He came to the government and paid his tax to sell oleo. If that's so, whom did he try to conceal it from? Why, nobody.'

State's Pretensions Shattered.

"Whatever pretended excuse the State authorities had for ignoring Ogden's case was shattered by yesterday's proceedings. One of the State Dairy and Food Commission's prosecuting attorneys was a spectator at the trial, and heard several witnesses swear that they had purchased oleo as butter at Ogden's store. With knowledge of such direct evidence of violation of the State law, the Dairy and Food Commission can no longer delay a separate prosecution of Ogden except in outright defiance of duty.

"As with all the oleo cases pushed to trial by The North American, the evidence against Ogden was strong and convincing. Five agents employed by this paper and the Pure Butter Protective Association testified to the purchases of oleo, on eleven occasions, ranging from March 6, 1899, to April 12, 1900. The first four times the oleo was bought in packages not stamped in any way. Twice it was secured in wrappers marked 'butterine,' whereas, the law requires the word 'oleomargarine.' The other five times the wrappers were properly

DISTRICT REPORTS.

3

United States v. Ogden.

stamped, but ~~the~~ corner of the paper was folded in a flap over the printing, to conceal it, thus making a violation of the law.

"A description of Ogden's window filled with oleo was given by George Eldredge, the agent, who supervised all the purchases. He told how the golden yellow packages were arranged in three piles, bearing placards as follows: 'Gloverdale, extra fine, 20 cents;' 'Farmers' dairy, gilt-edge, 25 cents,' and 'Darlington butter, extra fine, 20 cents.'

"Those names were enough to make the purchaser think he was right on the farm,' exclaimed District-Attorney Holland.

Ogden Did Not Testify.

"Ogden did not venture on the stand in his own defence. One point of his attorney's contention was that Ogden was not the proprietor of the oleo store, which was conducted under the name of the Ridge Avenue Beef Company. To meet this, George Kirkland, employed by The North American, testified that Ogden had told him he owned the place. Chief Clerk Milligan, of the Internal Revenue Office, said that Ogden had paid the United States tax in the name of the 'Ridge Avenue Beef Company, David S. Ogden, manager.' It was plainly shown that the company name was only a cover.

"Another argument of Mr. Beeber was that there was no violation of the law in turning a corner of the wrapper in oleo to conceal the required stamp. District-Attorney Holland thereupon read from the internal revenue regulations that packages of oleo must bear a brand 'so placed as to be plainly visible to the purchaser at the time of delivery to him.'

"Judge McPherson will deliver his charge to the jury this morning."

I need hardly say that the publishing of such comments during the course of the trial was a flagrant impropriety. If the printed words had been spoken to a juror, or if they had been contained in a letter addressed to him, an offence punishable by fine and imprisonment would have been committed; and it is little less blamable to take the not improbable chance of reaching the juror's mind by the method of publication in a widely-read journal. It is greatly to be deplored, that a practice, of which we see too many examples, should exist; and that persons accused of crime should be put on trial in the columns of newspapers, and should be declared to be guilty and denounced as criminals before there has been a careful and impartial trial in the proper and lawful tribunal. A report of facts is one thing, and due allowance should be made for the difficulties and inevitable disadvantages under which the reporter does what is often most excellent work; but after the facts have been ascertained as fully as possible and laid before the public, it is manifestly unfair to the defendant to assume that no more evidence can be produced, or to draw hasty conclusions from such facts as are known, without the safeguard of a public trial and a careful scrutiny of the evidence, and thereupon to declare the defendant guilty before a full and lawful investigation has been had. Moreover, such conduct is likely to make the administration of justice more difficult. Every one knows the frequent delay and trouble in obtaining an unbiased jury to try a case that has received this kind of treatment in the daily press; and the case in hand adds one more to the lists of verdicts that the courts have felt obliged to set aside for the same reason. That a second trial of this defendant must be had, is wholly due to the ill-timed zeal for conviction displayed by the article in question.

In the celebrated Hat Trimmings Case, 49 Fed. Repr. 32, Judge Acheson set aside a verdict in favor of the government for a similar reason. There, articles not unlike in tone to the article now under consideration appeared in several news-

papers of general circulation published in Philadelphia; and, although there was no proof that these newspapers had been read by the jurors, Judge Acheson declared it to be incredible that they had not been read, and upon this assumption, decided without hesitation that an improper influence had thus been brought to bear to obtain a verdict. Here, there is positive proof that the article was read, if the jurors were competent witnesses upon this subject. Objection to their testimony was made by the government, on the well-known ground that jurors are ordinarily not permitted to impeach their own verdict. But there is no doubt of their competency to testify to the mere fact of having read or seen the newspaper (*Mattox v. United States*, 148 U. S. 149), although they could not be permitted to testify that the article had, or had not, influenced their minds. This is an inference which the court is to draw in each particular case, and it will be a more or less probable inference according to the character of the comments complained of.

The character of the comments now in controversy is so clearly prejudicial to the defendant, that I need spend but little time upon that proposition. The article declares the defendant to have been a fugitive from justice, and to have long dodged the law. It asserts that he had combined with the state authorities to violate the state law concerning the sale of oleomargarine, and in effect accuses him of corrupt dealing with these authorities in order that he might secure protection in the carrying on of an illegal business. These charges may, or may not, be true. At all events, there was not a word of testimony about them at the trial, and no such testimony could have been received, even if it had been offered. The evidence that was produced was declared by the article to be strong and convincing; and in defiance of the constitutional provision that no man shall be obliged to testify against himself, attention was called to that fact, and it was asserted that the defendant did not venture to testify in his own behalf—an assertion which neither judge nor counsel would have been permitted to make during the course of the trial. It is unnecessary to say, that such comments upon a pending case violate the elementary rules that demand justice and fair play to a man accused of crime. Under our system of jurisprudence at least, cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay, and it is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him of which no evidence has been offered, or by urging upon the jurors, or suggesting to them, that the defendant is guilty and ought to be convicted.

I have no doubt that much of the newspaper comment that is open to the objections I have been endeavoring to state, is made hastily, without due reflection, and certainly without desire to do the prisoner a wrong. This may be true in the present case. I have no reason to suppose that the article in question was written in a malicious spirit, but its tendency was manifestly to do the defendant harm, and I must deal with it from that point of view. I sincerely hope that the newspapers of this city, now that their attention has been recalled to this subject, will lend their powerful aid toward making trials impressive, by a dignified abstention from hasty and ill-considered and sensational treatment of such vastly important subjects as the life or liberty of a citizen. Much may be permitted to the zeal of the press in detecting and exposing public wrongs. This is often very difficult work, and much freedom of expression is rightly allowed to those who are thus serving the public; but, after the preliminary stages have been passed and the inquiry has come before a court of law, it does serious harm to the cause of justice to pursue the prisoner with invective, or to interfere with his trial by usurping the proper functions of the judge and the jury.

A new trial is granted in each case.

10 DIST. R.

Junior Order of United American Mechanics.

Corporations of first class—Necessity for charter must exist.

A charter of **incorporation** will not be granted by the courts unless there is some necessity for it, and such **necessity** does not exist where it appears that the applicants can conduct their **business** as well **without** as with a charter.

Application for charters for Gratitude Council, No. 582, Sept. T., 1900, No. 425; Rescue Council, No. 15, March T., 1898, No. 331; Bridesburg Council, No. 135, Sept. T., 1900, No. 428. C. P. No. 1, Phila. Co.

Frank M. Cody, for charters.

PER CURIAM, Dec. 21, 1900.—In the application for charter for Rescue Council, the objects of the proposed corporation are stated to be :

1. To maintain and promote the interest of Americans and shield them from the depressing effects of foreign competition.
2. To assist Americans in obtaining employment.
3. To encourage Americans in business.
4. To establish a sick and funeral fund.
5. To maintain the public school system of the United States of America, and to prevent sectarian interference therewith and to uphold the reading of the Holy Bible therein.
6. To establish or erect an orphans' home as a home for the orphans of deceased members, and to maintain the same.

In the application of Bridesburg Council the purposes are stated :

"2. Said corporation is formed for the purpose of the maintenance of a society for beneficial or protective purposes to its members from funds collected therein."

In the application of Gratitude Council the purposes are stated in exactly the same language.

Each of these applications was referred to a master. Each master has reported in favor of the charter being granted, and in each case the master bases his favorable report upon the action of this court in granting a charter to Mantua Council of this order.

In the application for that charter the objects of the corporation were stated to be "to maintain and promote the interests of its members by assisting them in obtaining employment, encouraging them in business and establishing a sick and funeral fund from contributions made to said fund by members of the corporation."

We have been led to give this matter careful consideration because of the constant increase in the number of such applications.

The Act of April 29, 1874, § 2, authorizes the formation of corporations of the first class for a variety of purposes, including therein those for "IX. The maintenance of a society for beneficial or protective purposes to its members from funds collected therein."

The applications of Bridesburg Council and Gratitude Council state the objects of each in the exact language of this clause ix.

None of the objects stated in the application of Rescue Council are embraced in the Act of Assembly, except, possibly, the fourth, "to establish a sick and funeral fund," and the sixth, "to establish or erect an orphans' home as a home for the orphans of deceased members, and to maintain the same."

These councils are subordinate councils or lodges in an order governed by a superior or State council, and the State council, in turn, by a national council. The "general laws," constitution and by-laws offered in evidence before the master show that the subordinate council is rigidly held to the laws made by the State and national councils. One of the general laws states that "the funds

Junior Order of United American Mechanics.

of a council are accumulated by virtue of their charter as a council of the Junior Order United American Mechanics."

The constitution of this council provides (art. VI, § 12): "It shall be the duty of the trustees . . . to invest all moneys directed by the council in their own names as trustees for the council (except when councils are incorporated, in such case the investments shall be made in the name of the council), and to place all evidences of investment so ordered in the hands of the treasurer of the council for safekeeping," &c.

The "general laws," &c., referred to, show that the objects of all these councils and of the order of which they are part are as stated in the application of Rescue Council. If it was not that the applicants embody the "beneficial and protective purpose" stated in the Act, there could be no question that none of the other purposes stated in the application for charter are embraced in the Act of Assembly.

After a careful consideration of the matter, we have reached the conclusion that we should not charter these councils. They can conduct their business as well without as with a charter, and, as pointed out in application for charter of Deutsch-Amerikanischer Volksfest-Verein, 9 District Reps. 753, this consideration should alone prevent their incorporation.

The three applications are therefore refused.

Main Belting Co. v. Fowkes.

Suretyship—What amounts to—Affidavit of defence.

Rule for judgment for want of sufficient affidavit of defence. C. P. No. 4, Phila. Co., Sept. T., 1900, No. 209.

Action of assumpsit for recovery of the price of a belt delivered to the Keystone Paper Company. The plaintiffs declared upon the following writing signed by defendant, viz.:

"Philadelphia, December 1, 1889.

Main Belting Company, Philadelphia.

Dear sirs: Referring to the belt which you are supplying to the Keystone Paper Company on thirty days' time, I will see that you get the money for same.

Yours very truly,

(Signed) JAMES G. FOWKES."

The affidavit of defence averred that the undertaking of defendant was simply as guarantor and not as surety, and as plaintiffs had not made any effort by suit at law to collect the indebtedness from the Keystone Paper Company before bringing this suit, they could not recover.

Frank B. Stockley, for rule.—Whether the contract is one of suretyship or guaranty does not depend upon the use of the word "security" or "guarantee." It depends upon the nature of the contract and the circumstances of the case: *Riddle v. Thompson*, 104 Pa. 333; *Allegheny Light Co. v. Reinhold*, 7 District Reps. 385. Where the language of an agreement is such that it is not clearly defined whether a suretyship or guaranty is intended, the fact that there is a time mentioned when payment is to be made will influence the court to decide the agreement one of suretyship: *Riddle v. Thompson*, *supra*.

A. R. Dewey, contra.

PER CURIAM, Nov. 26, 1900.—Rule absolute.
10 DIST. R.

Harris v. Davis et al., Commissioners, and Dyer, Treasurer.

Taxes—Real estate—False return by collector—Sale of land to enforce collection of tax—Enjoining same.

Where a collector of taxes falsely returned that there was not sufficient personal property on the premises out of which the tax could be collected, but the return was regular on its face and the commissioners and treasurer proceed to sell the land by way of enforcing the collection of the tax, a court of equity will not enjoin the sale, but will leave the owner of the premises to an action for damages against the collector.

Bill in equity. Demurrer. C. P. Clearfield Co., Equity Docket, Sept. T., 1899, No. 1.

Cale & Moore, for complainant; W. C. Miller, contra.

GORDON, J., July 22, 1899.—Plaintiff, by her bill of complaint, seeks to perpetually enjoin defendants, as commissioners and treasurer of Clearfield county, from selling her property situate in Du Bois borough, as advertised, for seated taxes assessed thereon for the years 1897 and 1898, because during those years there was personal property on the premises liable to seizure sufficient to pay the same, and that the return of the property to the office of the county commissioners by the collector of taxes for Du Bois borough was unauthorized and illegal, and that, in consequence, a sale by the treasurer would pass no title to the purchaser, but would be a cloud upon complainant's title. These facts and the conclusion from them stated are admitted by the demurrer. Should the injunction be granted?

Ordinarily, where real estate is being sold by an officer of the law, whose sale will not pass the title, but would be a cloud upon it, equity will restrain the sale. Thus in *Houston, Smith & Co.'s Appeal*, 6 W. N. C. 162, real estate was advertised to be sold by a sheriff by virtue of a *levari facias* on judgment obtained on a mechanic's lien, to which the owner was not made a party. As the sale, if made, would not have passed the title, it was enjoined.

Courts of equity enjoin all judicial sales which, while they do not pass title, constitute a cloud upon it, and where the owner does not have an adequate remedy at law for his injury, especially so where proof of the invalidity or defect in the proceeding rests in parol and liable to be lost in time. But the question involved is, does the same principle apply to a sale being made by a county treasurer by direction of the commissioners, done in the exercise of the duties devolving upon them of providing revenues with which to carry on the functions of local government? I feel constrained to answer this question in the negative. While the law zealously regards the rights of the people, and will protect them from an imposition of an undue proportion of the public burden upon them; will restrain the collection of a tax, for the payment of which they or their property are not liable, yet it requires a strong and exceptional case where public officials will be restrained in the exercise of the functions of government vested in them, where their discretion is exercised within their jurisdiction. As was said by Thompson, J., in *Hughes v. Kline*, 30 Pa. 231, "It will not do to permit the collection of taxes to be interfered with unless in the clearest case of want of jurisdiction in the assessing or collecting officers. The effects would be mischievous and disastrous. The collector might be restrained from using his duplicate and warrant, the treasurer from selling the lands of delinquents, and, as a consequence of the want of means, the business of the county—the improvement of highway, the keeping of schools and the maintenance of the poor—be indefinitely suspended, and 'the wheels of government,' so far as the county is concerned, effectually stopped."

Here the acts sought to be restrained are those of county officials acting in a purely ministerial capacity. The proposed sale is based upon a collector's

Harris v. Davis et al., Commissioners, and Dyer, Treasurer.

return, in which it was certified there was not sufficient personal property on the premises out of which to collect the taxes. The proceeding is entirely regular in every respect, the only allegation of wrong done being that of the collector in making a false return. He had no right to return the real estate when there was personal property on the premises liable to seizure sufficient to enable him to collect the taxes, and he is liable to respond in damages to the owner for so doing: *Kean v. Kinnear*, 171 Pa. 642. Mitchell, J., for the Supreme Court, in that case, says: "The law has established the order of liability for taxes to be, first, the personal property on the premises; secondly, demand on the owner individually; and lastly, the land itself; and it is only on the failure to collect by either of the first two methods that resort can be had to the third, and the land be legally sold or returned for sale. The collector proceeding against the land, except under the prescribed conditions, is without warrant of law and liable as a trespasser."

But while the collector had no right to return the property, he did so with a false certificate of no personal property. The return was regular upon its face, and what was done by the commissioners and treasurer by way of enforcing collection of the tax was strictly in accordance with their duties. They were under no obligation to inquire into the truth or falsity of the return, and such being the case, their acts should not be restrained. Fortunately, we are not without direct authority upon the question. See *Cohen's Appeal*, 10 W. N. C. 230, in which the court below say: "The sixth paragraph of the plaintiff's bill contains the averment that there was sufficient personal property on the premises to have paid the taxes, etc. If this be the fact, no title can pass by the sale. But, as we said before, the treasurer acts only ministerially, and does not assume to give a good title. He is not bound, nor is he authorized, to go behind the return of the collector. So far as his authority to sell depends upon the fact that not sufficient goods were to be found on the premises, the return is the evidence. Being a public officer and acting ministerially, it would be a hardship upon him to compel him in a court of equity to prove in each case that the collector's return was true in fact, when the person aggrieved has an equally sure, speedy and adequate remedy by a bill in equity *quia timet* against the purchaser or in an action of ejectment. If a treasurer, in making sales of land, whether seated or unseated, for taxes, could be restrained for matters appearing outside of the record or in parol, upon the ground that a cloud would be placed on the title, there would be very few sales made. And if he can be restrained for such acts in a case like the present, we do not see why he might not, for the same cause, in a case of a sale of unseated lands. For example, in the latter case, if the land be seated, no title can pass, and yet it was never contended that the sale could be stopped for that cause. The cases seem to us to be analogous, and, as we have said, the present plaintiff has a sure, speedy and adequate remedy against the purchaser." Of which opinion the Supreme Court, by a *per curiam*, say: "We affirm this decree upon the able and conclusive opinion of the court below."

Under these authorities, the complainant, for remedy, must be relegated to an action for damages against the collector. This, in our opinion, is the only course that will do justice all round. It was stated by complainant's counsel, at argument, that a settlement has been had with the collector, unappealed from, in which he got credit for the taxes returned as uncollectible. Such being the case, if the treasurer be restrained from now collecting, no one would have any claim against the collector for false return, and the municipalities to whom the taxes are due would have to bear the loss without either fault or recourse; while, if the injunction is refused, recourse can be had against the wrongdoer.

Decree will be made in accordance with these views.

10 DIST. R.

Harris v. Davis et al., Commissioners, and Dyer, Treasurer.

Decree.—Now, July 22, 1899, this cause came on to be heard on demurrer to bill, and, after argument, it is ordered, adjudged and decreed that the demurrer be and is hereby sustained and the bill dismissed, at cost of complainant, to whom exception is noted.

From Benjamin F. Chase, Clearfield, Pa.

Miller v. Moyer.

Bailments — Horse unsound at time of hiring — Buggy, harness, etc. — Bailee's duty to return.

When a horse that was hired was lame and unsound at the time of hiring, and there is no proof of negligence on the part of the bailee in his use and treatment of the horse, the bailment is of that class which requires of the bailor the duty to reclaim his property at his own expense, and relieves the bailee of the liability for damages arising from the failure of the horse to be serviceable and his subsequent sale by the landlord of the hotel where he had been left by the bailee after he had given out.

It was the duty of the bailee, however, to return the buggy, harness, blanket, robes and whip, which he had hired at the same time he hired the horse, upon finding that the horse could no longer be used, and pay the expense of their return. Failure to do this, and the sale of the property and its consequent loss to the bailor, was a source of injury and damage to him.

Trial by court. C. P. Luzerne Co., March T., 1896, No. 431.

Frank T. McCormick, for plaintiff; *T. R. Martin*, for defendant.

WOODWARD, P. J., July 5, 1900.—This case was, by agreement of counsel, duly filed, tried under the Act of April 22, 1874, by the court without a jury. The facts of the case are as follows:

The plaintiff is a married woman, whose husband's name is A. A. Miller. In January, 1896, she was the owner of a livery stable in the city of Wilkes-Barre, which was conducted and managed by her husband as her agent. The defendant is a liquor merchant in the city of Philadelphia, and it was his custom to visit Luzerne county for the purpose of making sales to his customers throughout the county. In January, 1896, he hired a horse of the Miller livery, and also a buggy, and started on a business trip which brought him to Maltby, Wyoming and Babylon, to Scranton, in Lackawanna county, thence to Peckville. At the latter place the horse gave out, became stiff, and, with some difficulty, was placed in a hotel stable, where he was bled. The horse was, subsequently, driven to Hyde Park, where he again gave out, and was left in the stable of Fairchild's hotel by the defendant, who notified Miller of the facts. The latter did not remove the horse, but stated that he would look to the defendant for damages for failing to return the horse, buggy and other property. Subsequently, the hotel landlord sold all the property for \$24.

There is great discrepancy in the testimony relative to the value of the horse, as well as to the value of the buggy, blanket, robe and harness. The evidence on the subject is very unsatisfactory, and we are compelled to adopt a view of the subject which must be, to some extent, arbitrary.

Having now stated the material facts of the case briefly as possible, we find the following conclusions of law:

In the absence of any proof of negligence on the part of the defendant in his use and treatment of the horse, and in view of the fact that he was lame and unsound at the time of the hiring, we find that the bailment was of that class which requires of the bailor the duty to reclaim his property at his own expense, and relieves the bailee of liability for damages arising from the failure of the horse to be serviceable, and his subsequent sale by the landlord of the hotel where he had been left by the defendant. See *Millon v. Salisbury*, 13 Johns. 211. So far, therefore, as the horse is concerned, the plaintiff has no case.

Miller v. Moyer.

As to the buggy, harness, blanket, robes and whip, it was the duty of defendant, upon finding that the horse could not longer be used, to promptly return them to the plaintiff and to pay the expense of their return. See Story on Bailment, 388. The failure of the defendant to do this, and the sale of the property and its consequent loss to the plaintiff, was a source of loss and damage to the plaintiff for which he is entitled to judgment in this action.

The prothonotary is directed, in case no exceptions are filed within thirty days after service of notice, as provided by § 2 of the Act of April 22, 1874, P. L. 109, to enter judgment in favor of the plaintiff and against the defendant for the sum of \$50.

From Sidney R. Miner, Wilkes-Barre, Pa.

Mercur v. The Media Electric Light, Heat and Power Co.

Corporations—Electric light companies—Charges for service—Discrimination—Mandamus.

An electric light company cannot charge one consumer more for what he demands of it than is charged others for similar service, unless it can present a reason therefor, founded either in necessity or justifying business expediency. Such reason does not exist where the company refused to furnish light to one of its consumers under a contract for a fixed sum for which it furnished light to other consumers, notwithstanding the fact that such consumer had been furnished light under a contract for such sum, and had requested the company to abrogate it and put him on meter, which it did, the company's refusal again to furnish light on the former basis being based on a rule of the company, enacted prior to the change, that all new consumers and those old consumers who desired to go on a meter should have light furnished thereafter by meter only, when the contracts between the company and its old consumers specifically provided that the company could annul them upon thirty days' notice.

Mandamus is the proper remedy of the consumer to compel the company to furnish him light at the old rate.

Mandamus. C. P. Delaware Co., June T., 1899, No. 192.

Isaac Johnson and George T. Butler, for plaintiff.

W. Roger Fronefeld and O. B. Dickinson, for defendant.

BUTLER, J., 15th judicial district, specially presiding, April 23, 1900.—From the return to the alternative writ, and from the uncontroverted averments in the petition, the following facts may be taken as undisputed:

The defendant is a corporation, incorporated under the laws of the State of Pennsylvania for the purpose, *inter alia*, of furnishing electric light to the inhabitants of the borough of Media and vicinity who may desire to use the same. The plaintiff owns a house located a short distance from Media, which the defendant, prior to April, 1899, lighted under a contract for a fixed sum per month, in accordance with its general schedule of charges under which it was, and still is, furnishing light to others in the same community. During the month of April, 1899, at the request of the plaintiff, the contract under which he had been furnished light was abrogated, and he was put on a meter. Prior to this time the defendant made a rule that all new consumers, and those old consumers who desired to go on a meter, should have light furnished thereafter by meter only. On June 19, 1899, the plaintiff asked to have his meter removed, and to have light furnished under the schedule of fixed rates at that time generally in force, and under which, as before stated, his house had formerly been lighted. The defendant refused to furnish him light by contract under the schedule referred to, but offered him the alternative of a contract at a considerably higher rate than that fixed by the schedule in force with others, or light by meter. Upon the argument of the demurrer it was apparently conceded that the offer to furnish by contract at the figures named was no answer to

10 DIST. R.

Mercur v. The Media Electric Light, Heat and Power Co.

plaintiff's demand to have light according to the schedule in force with others; therefore, it may be said that the defendant refused, in accordance with its recently-adopted rule, to contract with plaintiff as requested, and insisted that he should take on meter.

The light desired by plaintiff would be much more expensive to him by meter *than under the schedule*. The defendant in all of its contracts reserved the *right to terminate* the same upon thirty days' notice. This right it did not exercise, but continued to furnish most of its consumers, and the plaintiff's neighbors, with light under the recited schedule at the same time that it refused to furnish light to him upon such basis. Indeed, it would appear that at the present time the old schedule is generally in force under contracts with the defendant's customers. No averment of any change in this respect appears of record, and on the argument of the demurrer the defendant depended entirely, as respects this feature of the case, upon its right to furnish light to its old customers who had not changed to meter, under the schedule, at the same time that new consumers, or those who had changed to meter, must take on meter.

On Aug. 12, 1899, the plaintiff presented his petition, charging the defendant with unjust discrimination to his disadvantage, and requested the court to compel the defendant by writ of mandamus to furnish him light upon the same terms as it was being furnished to customers generally.

The defendant by its return contends that the plaintiff is not entitled to the relief he seeks for a number of reasons.

1. The judge, in vacation, cannot award an alternative mandamus.

The Act of June 8, 1893, P. L. 345, expressly provides that he may.

2. The defendant is under no legal duty to furnish the plaintiff with electric current, and if so, the plaintiff would not be entitled to a writ of mandamus to enforce the duty, as he has other adequate and complete remedy.

The defendant is authorized to furnish electricity for lighting purposes to the inhabitants of Media and vicinity. Its "corporate powers are the measure of corporate duties:" *Bailey v. Fayette Gas Fuel Co.*, 193 Pa. 175. Moreover, the defendant actually has been, and still is, exercising these powers.

The plaintiff, who resides in the vicinity of Media, who has, in the past, been furnished with current, whose neighbors are now being furnished with it, is entitled on demand, upon proper, fair terms, to be furnished by the defendant with its current, and if it refuses to discharge its duty under the law in this respect, a writ of mandamus is manifestly the proper remedy. In such case, there would be a clear legal right in the plaintiff, a corresponding duty in the defendant, and a want of any other adequate and specific legal remedy.

This brings us to the substantial objection raised by the defendant to plaintiff's application for a writ of mandamus, an objection which goes to the merits of the controversy between the parties, namely, a denial that any unjust discrimination to the disadvantage of the plaintiff has been attempted by the defendant. It contends that it has a right to continue its current, under contracts based upon the schedule of fixed rates, to old customers who have not changed to meter, at the same time that it refuses current on other terms than meter service to the plaintiff who changed to meter, even though, as is averred and not denied, such terms would not only be different from those accorded to "most of its consumers and the neighbors of the petitioner," but also would result in greater expense to the plaintiff.

No citation of authority is required for the proposition that the defendant cannot thus charge the plaintiff more for what he demands of it than is charged others for similar service, unless it can present a reason therefor, founded either in necessity or justifying business expediency. It cannot be claimed that, by virtue of outstanding contracts with its old consumers, the defendant was bound

Mercur v. The Media Electric Light, Heat and Power Co.

to continue furnishing them current upon the schedule of rates, because those contracts specifically provided for annulment by the defendant upon thirty days' notice. It therefore appears that the defendant had elected, prior to the time when the petition was filed, to continue the old contracts; to, in effect, renew them each month, and thus voluntarily, without any obligation to do so, permit most of its customers to have current charged for on the schedule, while the new order of things, current by meter, making increased cost to plaintiff, was to be accepted by him and other outsiders. We are entirely satisfied that there is no necessity nor justifying business expediency for this discrimination. Under the rule sought to be upheld by the defendant, the plaintiff, simply because he resorted to meter service for a short time, finds himself excluded from advantages which are voluntarily continued in favor of the defendant's customers generally. If it was and is fair, wise and expedient, as the defendant contends, to furnish current on meter, and not on the schedule now almost universally in force, it should upon thus resolving have so stated to its customers, and have insisted upon all alike partaking of the scheme. The consumers could not have complained. The defendant would simply for a good and sufficient reason have exercised its right under the subsisting contracts, and all consumers would have been placed upon an absolute equality. The defendant cannot refuse the plaintiff the benefit of one of these contracts so long as it elects to continue them with any of its customers, much less so long as it continues them with most of its patrons, all of whom, for anything appearing in the case, standing in similar situation with the plaintiff as to all conditions which could reasonably affect the charge for service. No doubt the defendant may make and enforce a rule that consumers of a certain class, who would be likely to use current, for business or other purposes, substantially in excess of average consumption, should pay special rates or take on meter. So, probably, the defendant could make and enforce a rule that all customers who should be found to abuse the confidence imposed in them by unreasonable and excessive use of current would be refused service on any other than a meter basis. Indeed, any cause for discrimination, which would rest in a fair, reasonable effort of the defendant to conserve and protect its business interests, would justify the discrimination.

We can discover no such reason here. Assuming that the charge by meter is, as the defendant avers, really the only fair and proper mode of exacting payment for current furnished, the defendant's customers could not, and, presumably, would not, seriously have demurred to a change to this basis, and neither necessity nor fairness and business expediency justify the defendant's election to allow a great majority of its customers to enjoy benefits which are sought to be refused the plaintiff. Having elected to continue furnishing current to its customers upon contract, based on the schedule of fixed charges, the defendant must extend the privilege to the plaintiff.

The defendant's additional answer, filed Dec. 21, 1899, sets out that its pole line is several hundred yards distant from the plaintiff's house. This is a matter that need not complicate the real controversy between the parties. The connection between the pole line and the plaintiff's house will be made upon the same terms and conditions as are applicable to other customers. If, under such terms, it is the duty of the plaintiff to bear the expense, he will do so here. If not, the defendant will incur it.

The demurrer is sustained, and a peremptory mandamus is directed to issue against the defendant, requiring it to furnish current to the plaintiff by contract based upon the schedule of fixed rates now in force. The connection between defendant's line and plaintiff's house to be made in the usual manner and upon such terms and conditions as prevail with other consumers.

Hale, Receiver, v. Allinson et al.

Foreign receiver—Stockholder's liability—Equitable jurisdiction—Demurrer—Adequate remedy at law.

A demurrer ~~will~~ be sustained, on the ground that there was an adequate remedy at law, to a bill filed by a foreign receiver, appointed especially to enforce the additional liability of forty-seven stockholders in an insolvent Minnesota corporation, where the bill alleged that the liability of the defendants had been fixed to the full amount of their holdings, and that the decree of the Minnesota court was conclusive upon them.

It seems (1) that the complainant's appointment as receiver by the Minnesota court does not entitle him to sue as such in the Circuit Court of the United States for the Eastern District of Pennsylvania; (2) that the defendants below are not bound by the proceedings in Minnesota.

Appeal to the Circuit Court of Appeals from the judgment of the Circuit Court of the United States, Eastern District of Pennsylvania, in Equity, Oct. Sess., 1898, No. 26, sustaining demurrer to bill. Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge. Affirmed opinion by DALLAS, J.

John G. Johnson (with him *Walter C. Rodman, Albert B. Weimer, Townsend, Elliott & Townsend, Byerly Hart, William C. Hannis, J. Campbell Lancaster, Malcolm G. Campbell, John Sparhawk, Jr., and William S. Wallace*), for demurrants.

W. E. Hale and M. H. Boutelle (with them *Charles C. Lister*), for plaintiff.

DALLAS, J., Jan. 4, 1901.—This suit was begun by a bill in equity filed by two persons, one a creditor and the other the receiver of the Northwestern Guaranty Loan Company; but leave having been asked and granted to dismiss the creditor from the suit, it was treated below, and has been considered here, as if it had been brought in the first instance by the receiver alone. He asserted the right to sue as receiver by virtue of his appointment to that office under the laws of Minnesota, by a court of that State, in a proceeding which had been instituted against the Northwestern Guaranty Loan Company and certain of its stockholders at the instance of certain of its creditors. The bill alleged that, under the constitution and laws of Minnesota, the stockholders were severally liable to an amount not exceeding the par value of their respective shares for any deficiency in the assets of the corporation to meet its indebtedness; that in the proceeding before mentioned, the existence of such a deficiency was ascertained, and was found to be so great as to require every stockholder to contribute to the full amount of his said liability; that the Minnesota court had, in the same proceeding, decreed that the stockholders should pay accordingly, and had directed the complainant as receiver to collect the sums so ordered to be paid; and that the defendants were respectively holders of shares as in the bill particularly stated. Thereupon it was asked that they should "be adjudged liable to pay and contribute to the extent of the par value of their several holdings of stock, for the equal benefit of the creditors of the said corporation." Several demurrers were interposed, but it is not necessary to refer to them separately or in detail. The points urged in their support are, in substance, (1) That the complainant's appointment as receiver by the Minnesota court did not entitle him to sue as such in the Circuit Court of the United States for the Eastern District of Pennsylvania. (2) That the defendants below were not bound by the proceeding in Minnesota. (3) That, irrespective of any other question, a suit in equity was not maintainable, because there was an adequate remedy by separate action at law against each of the stockholders who were joined as defendants in the bill.

We strongly incline to the opinion that the two points first stated might well

DISTRICT REPORTS.

Hale, Receiver, v. Allinson et al.

have been sustained. This receiver is but the creature of the court which appointed him, and no legal title is vested in him. Therefore, his asserted right to sue in another jurisdiction cannot be conceded, unless the law as declared in *Booth v. Clark*, 17 How. 322, has been changed in this respect by the decision in *Relfe v. Rundle*, 103 U. S. 222, and we are not prepared to say that it has been: *Hale v. Hardon*, 89 Fed. Repr. 283. None of the defendants was a party to the proceeding in the Minnesota court, and while we do not now decide the matter, because it is unnecessary to do so, it is not to be inferred that we assent to the proposition that because the stockholders of a corporation are so far privy in interest as to be bound by a judgment against it, they are also bound by a decree that they, individually, shall wholly or partially pay its indebtedness, although they have never had a day in court to controvert the existence of the facts upon which their obligation to do so is dependent: *Hawkins v. Glenn*, 131 U. S. 319; *Hancock Nat. Bank v. Farnum*, 178 U. S. 640; and see the dissenting opinion of Colt, J., in *Hale v. Hardon*, 95 Fed. Repr. 777.

But the court below dismissed the bill solely upon the ground that the complainant had an adequate remedy at law, and the learned judge dealt with that subject so fully and satisfactorily as to render any further discussion of it superfluous. We adopt his opinion as our own, and, for the reasons it presents, the decree is affirmed.

NOTE.—For the opinion of McPHERSON, J., in the Circuit Court below, see 9 Pa. District Reprs. 408.

Anderson v. Lehigh Coal and Navigation Co. et al.

Pleading, equity—Bill in equity—Demurrer.

A bill must state the names of all parties by whom an injury complained of is done, and is multifarious when it joins defendants who have not conspired together or joined in committing the wrong complained of.

Bill in equity. C. P. Schuylkill Co., Nov. T., 1899, No. 3, in Equity.

G. H. Gerber, for plaintiff.

John W. Ryon, Guy E. Farquhar, S. H. & D. W. Kaercher, F. G. Farquhar, J. F. Whalen, W. K. Woodbury, G. M. Roads, B. W. Cummings, S. P. Wolverton, and F. Bertolette, for defendants.

MARR, J., Nov. 19, 1900.—The bill filed, as amended, embraces seventy-seven complainants and sixteen defendants, to which separate demurrers have been filed, containing from six to twenty-six causes of demurrer, many of which relate to defects which are amendable, and will only be considered so far as they may relate to the discussion of the bill and causes of demurrer in the present disposition of the case.

The bill as originally filed and demurred to was sustained by the late Judge Wadlinger, with leave for the complainants to amend as suggested in the opinion filed. An amended bill having been filed and demurred to, was fully argued and is now for disposition. The main grounds are the uncertainty, misjoinder of parties and the multifariousness of the bill, which, if sustained, will relieve the necessity of discussing the other grounds, except so far as they are involved in the discussion of these reasons. An examination of the bill shows that seventy-seven complainants, owning real estate in different municipalities within the county of Schuylkill, and situated on or near to the Schuylkill river

Anderson v. Lehigh Coal and Navigation Co. et al.

or its tributaries, charge the sixteen defendants, as the owners or lessees of coal mines or washeries, as being or have been engaged in mining, washing and preparing coal for the market; that they are depositing, and for some time past have been depositing, or have deposited into the said river or its tributaries, or upon the banks thereof, large quantities of coal dirt, culm and refuse material from their said mines, coal breakers or washeries; and that they permit coal dirt, previously deposited upon their said lands, to escape into the said river and its tributaries; and that they are discharging into the said Schuylkill river and its tributaries the water from their said coal operations or washeries, charged with culm, coal dirt and refuse material.

We, therefore, have the defendants charged with being severally the owners of coal mines or of washeries, and with being the lessees of coal mines or washeries; that they have been engaged or are engaged in mining, washing and preparing coal for the market from their mines, lands and washeries; with depositing and for some time past have been depositing, or have deposited into said river or its tributaries, or upon their banks, coal dirt, culm and refuse material; or that they permit coal dirt, previously deposited upon their said lands, to escape into the said river and its tributaries; and that they are discharging into the said river and its tributaries water from their said coal operations or washeries.

Nowhere in the averments, contained in referred to paragraph of complainants' bill, being the third paragraph, or in any other paragraph, is there any distinction as to owners and lessees. They are not charged with being the owners of the land, except, perhaps, in an indirect way, upon which the mines or washeries are claimed to be located, but they are charged with permitting coal dirt previously deposited upon their said lands to escape into the said river and its tributaries. By whom the coal dirt was deposited is not averred, nor when it was deposited, and yet the lessees are charged with permitting said coal dirt to escape into the river and its tributaries. It is well known that many of the banks of culm, coal dirt and refuse material along the banks of the Schuylkill river and its tributaries have been deposited there from twenty to fifty years ago by parties who then either owned the lands and mines, or were the lessees of the mines, and the present owners or lessees had nothing to do with depositing the culm and refuse material which is found in large banks, covering acres of ground, at old workings, and ranging from two to twenty feet in height upon the banks of the Schuylkill river and its tributaries. The present lessees or owners of the coal mines or washeries have no control over these banks of culm and refuse material, unless the washeries have acquired control of the banks of refuse material for the purpose of preparing the same for market, and are under no legal or equitable obligation to prevent them escaping into the river, except so far as they may be disturbed by their present operations. To compel the present lessees of mines or washeries to prevent coal dirt previously deposited upon lands, which may be embraced in their leases, from escaping into the river would involve them in great expense, and yet that is what is prayed for in the second prayer of the complainants' bill, to wit: "That the said defendants may be required to prevent the coal dirt, culm or refuse material from their mines and washeries heretofore deposited upon their lands from escaping into the said river and its tributaries." If it is claimed that this relates to the coal dirt, culm and refuse material deposited by defendants, why is it not thus averred, and thereby give specific notice to defendants with what they are charged in that respect? Why not aver whether they are charged as lessees of coal mines or washeries, whether they are the owners of the coal mines or the washeries, in order that each defendant may know how he is charged, and with what alleged torts or trespasses? Is it an answer to say, that the defendants know whether

Anderson v. Lehigh Coal and Navigation Co. et al.

they are owners or lessees and what torts, if any, they commit? If they are charged as lessees specifically, they may admit the averments and thereby save being mulcted in costs; on the other hand, if they are charged with being the owner of the land upon which the culm or refuse material has been previously deposited, they may deny the averment and stand upon the evidence produced in the case. As the bill is drawn, it is, in effect, if you do not commit the alleged wrongs as the lessees of a washery, you do it as the lessees of a coal mine, or as the owners of same, or as the owners of the land upon which the washeries or coal mines may be erected, and you know which tort you are guilty of, and we are not compelled to tell you how we charge you.

The charge of the complainants is in the disjunctive as to the character of the business and as to the time and how the alleged torts were or are committed. It is well known that most collieries (coal mines) are usually owned by one party, whilst the land upon which the mine or colliery is situated is owned by another party, and the owner of the land is in no ways responsible for the acts or negligence of his lessee (the owner of the mine), and the lessee is not responsible for the piles of culm and refuse matter placed upon the ground before he became the lessee; therefore, it is important for the defendant to know how he is charged, in order that he may be able to confess or deny.

It must be borne in mind that the defendants are not charged as joint tortfeasors, and, therefore, their liability should be specifically set forth. To do this entails no hardship on the complainants, as they certainly must have in mind the character in which each defendant is charged, the nature of his torts or trespasses and the time when they were committed. As the bill is drawn, each defendant must not only answer all the averments contained in the bill, but must go to the expense of preparing his evidence as to all the averments, and come to trial ready to show that he belonged only to the one class or to neither class. He would be unable to tell, beforehand, how much of his labor and preparation would be useless and unnecessary.

In *Fricke v. Quinn*, 188 Pa. 474, the Supreme Court pointedly says: "This court does not intend to encourage loose, careless or inaccurate pleadings; but technical objections that do not touch the merits of the case, nor subject either party to unfair burdens or unjust results, should be promptly made or be considered waived." In the present case, the objections to the bill have been promptly made by filing demurrers.

"The rights of the several parties, the injury complained of and every other necessary circumstance, as to time, place, manner or other incident, ought to be plainly, yet succinctly, alleged. Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision:" Story's Equity Pl., § 528.

"Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated:" Story's Equity Pl., § 28.

"Although the same precision of statement is not required in bills in equity as in pleadings at law, yet it is absolutely necessary that such a convenient degree of certainty should be adopted as may give the defendant full information of the case which he is called upon to answer:" Daniell's Chancery Pl. & Prac., vol. 1, *368.

"The bill should support itself and should state every necessary fact distinctly and not by way of argument or inference:" Brewster's Equity Practice, 167.

The prayers of the bill are uncertain and indefinite. They ask that the defendants be restrained by prohibitory injunction, by mandatory injunction, and that there be an assessment of damages.

Bearing in mind that there is no attempt to hold the defendants as joint trespassers or wrongdoers, it is evident that an injunction, if issued, must be such

Anderson v. Lehigh Coal and Navigation Co. et al.

as will bind each defendant, so far as he is a tort-feasor; and if the bill is taken *pro confesso*, how is a court to determine from an inspection of it who of the defendants are to be restrained by prohibitory injunction and who by mandatory injunction, or are the injunctions of a prohibitory and mandatory character to be issued generally against all of the defendants, and thereby add unnecessary costs and have injunctions issued of a mandatory character, which the defendants, or some of them, are unable to comply with, and, upon an answer filed to same, would have to be set aside or modified? Also, upon a bill *pro confesso*, the court is asked to assess damages against each of the defendants, and in favor of each of the complainants, thereby requiring the entering of 1232 decrees for damages, as the damage of each complainant against each defendant necessarily should be set forth. An examination of the bill furnishes no information by which the court would be able to enter such decrees. To this, it is argued that a court could call for evidence as to the amount of damages each complainant suffers, and the proportionate responsibility of each defendant for his torts. An examination of this character would be long, tedious and necessarily would involve not only the defendants but all others who may own coal lands, collieries, coal mines or washeries, or who may be lessees of the same, along the Schuylkill river and its tributaries, as it would be manifestly unfair to assess all the damages incurred against the defendants mentioned in the bill, when there may be, and in this case it is well known there are, other parties who have been and are contributing as much, if not more, to the injury complained of than those who are mentioned as defendants. If the present bill is filed as a convenience to complainants and to avoid multiplicity of suits, it should aver that the defendants are all the parties who are contributing to the wrong complained of, so that in assessing damages all parties will be before the court, thereby enabling the court to adopt a proper measure and not assess all damages against the defendants in the bill, when other parties are equally liable, and who, perhaps, may have settled with complainants for the full value of their lands or property injured. There is no averment in the bill that the defendants are all the parties who are guilty of the alleged torts.

In *Little Schuylkill Navigation Co. v. Richards*, 57 Pa. 142, it is held that the cause of the injury is the throwing dirt into the stream and the subsequent deposit of dirt only a consequence, and, therefore, each party's liability began with his act on his own land, and was wholly separate and independent of concert of action, and each one was only liable for his proportion of dirt thrown in the stream as a measure of damages.

We think the bill is, therefore, uncertain in its prayer for relief, and in order that proper injunctions might be issued and proper damages assessed, that there should be averments in the bill that the defendants are all the parties who are engaged, or have been engaged, in the alleged torts, and that the character of the defendants or wrongdoers should be set forth, and that it should be averred when and where they have committed the alleged trespasses.

The complainants having chosen the present remedy should not be relieved from a compliance with the rules of equity, because it would be burdensome for them to comply with such rules.

"A bill is bad that does not state the names of all parties by whom the injury complained of is done. It should state that the injury complained of is caused by the defendants alone:" Story's Equity, §§ 27 and 96.

"All parties in interest should be joined, and it should be stated that no others are interested:" Brewster's Prac., vol. 2, § 1964; vol. 4, § 4812.

"It is a general rule that all parties interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs or defendants, however numerous they may be, so that there may be a complete

Anderson v. Lehigh Coal and Navigation Co. et al.

decree which will bind them all. By this means, the court is able to make a complete decree between the parties and prevent future litigation by taking away the necessity of a multiplicity of suits, and make it perfectly certain that no injustice is done, either to the parties before it, or to the others who are interested in the subject-matter by a decree which might otherwise be grounded upon a partial view of the real merits:" Story's Equity Pl., § 72.

Amongst other causes of demurrer as assigned by the defendants are those of misjoinder and multifariousness, which may be considered together. In discussing these causes, it is important to bear in mind that the nuisance complained of is the throwing dirt, culm and refuse material, either into the Schuylkill river or its tributaries, or depositing same upon the banks of said river and its tributaries, and permitting the same to escape into the river.

There is no allegation that the sixteen defendants acted in concert, or that there was or is any common intent between them. The bill charges them as severally the owners or lessees of coal mines or washeries, and as such as being guilty of the alleged torts or trespasses.

In the *Little Schuylkill Navigation Co. v. Richards*, 57 Pa. 142, it is held that the wrongful act is the throwing the dirt in the stream, which was a wholly separate act, and each wrongdoer acted independent of the other.

In *Gallagher v. Kemmerer*, 144 Pa. 509, it is held that the several operations were entirely independent of each other. . . . That there was no concert of action for a common purpose or design which would support the theory of joint injury.

"Where two or more commit separate trespasses or do separate acts tending to produce injury to another without concert, there is no joint liability, and, consequently, there can be no joint recovery:" *Howard v. Union Traction Co.*, 195 Pa. 391.

From these authorities and many others which might be cited, it is well-settled that there is no joint action, no common intent, and, therefore, no joint liability. When there is no concert of action there can be no joint liability, and, therefore, a suit of this character cannot be sustained in a court of law. It is, however, earnestly contended that this bill can be sustained in equity as a matter of equity as well as of convenience, and that it is an adequate remedy, and many authorities are cited in support of this contention, to some of which we refer.

In the Appeal of *Brush Electric Light Co.*, 114 Pa. 585, we find two plaintiffs and one defendant. It is a bill praying for the specific execution of a contract which the defendant could either affirm or deny, and which the court held, that whilst the common law remedy would apply, yet it was neither complete, adequate or satisfactory.

In *Warner v. McMullin*, 131 Pa. 370, an assignee of a bank filed a bill against three defendants, one of whom was the president of the bank, one an employee, and the third a depositor. Chief Justice Paxson, in sustaining the bill, says: "The case is extremely close, but we think the jurisdiction can be sustained upon the ground that the remedy at law is inadequate. . . . It would be difficult to reach all its ramifications upon a jury trial. There is such a mass of accounts and complications that it would be next to impossible for a jury to reach an intelligent result. Whilst the case is on the very border-line of jurisdiction, we have come to the conclusion, after much reflection, that the remedy at law is inadequate."

In *Drake v. Lacoe*, 157 Pa. 17, a bill was filed by the heirs of one Drake, who was a lessor of certain mining rights, against three defendants, who were lessees, asking for an account of coal mined. An answer was filed, and a large amount of testimony taken, when the question of jurisdiction was, for the first time, 10 Dist. R.

Anderson v. Lehigh Coal and Navigation Co. et al.

raised, and the master said, if this objection had been taken to the bill on demurrer before it was amended, it might have been sustained. The Supreme Court sustained this view of the case, saying: "After a full hearing, involving heavy costs, a doubt as to equitable jurisdiction is not sufficient to oust it."

In *Rafferty v. Central Traction Co.*, 147 Pa. 579, it was held that the cause of complaint is one common to all the plaintiffs, the right under which all claims is precisely the same as to each, the complaint of all is against the same defendant for the doing of acts which affected all alike and in the same manner, the defence set up is common to all the plaintiffs, and the testimony, proofs and decree are alike as to all the plaintiffs.

In connection with the above, we have examined the other authorities cited by complainants, and find none that exhibit a state of facts as set forth in the present bill, and none that can be fairly said, in our opinion, to support this bill. Some of these authorities intimate that if the question of jurisdiction or multifariousness had been raised at the proper time, it would have been sustained, but none of the cases cited are parallel in their facts or in their joinder of plaintiffs and defendants to the present case. Under the equity rules, each one of the defendants might demand a trial by jury for the settlement of damages, which might lead to serious complications. It is the special province of a jury to pass upon the measure of damages, and if that right is demanded, a court would not refuse to submit the questions to a jury to be settled by them.

There is no inflexible rule by which we can determine whether or not a bill is multifarious. It is a matter which is generally to be determined in each case by its own circumstances, and we herewith cite some authorities, showing the principles which control the determination of this question.

"A court of equity will not, in one suit, take cognizance of separate and distinct claims of different persons, though standing in the same relative situations:" *Sand's Suit in Equity*, 12, §§ 18 and 19.

"The principle which renders it improper to mix up in the same bill demands against different persons, arising out of distinct transactions, renders it improper to include in one suit separate infringements of the same patents by different defendants, and, for the same reason, when a copyright has been infringed, bills must be filed against each book-seller taking spurious copies for sale, and so joint and separate demands cannot be united in the same bill:" *Daniell's Chancery Pl. & Prac.*, vol. 1, page 389.

"Multifariousness in pleading is the improper joining in one bill distinct and independent matters, and thereby confounding them; the blending in one bill matters which are in their nature separate and distinct. A bill is multifarious when it improperly unites in one bill against one defendant several matters perfectly distinct and unconnected, or where it demands several matters of a distinct and independent nature against several defendants in the same bill. . . . When a bill is multifarious, it is so for two reasons, either because of a misjoinder of parties, complainants or defendants, or a misjoinder of distinct and separate matters of equitable cognizance between the same parties, of so dissimilar a character as to render it unfit that they should be litigated in the same suit:" *Am. and Eng. Ency. of Law*, vol. 15, page 947.

"A bill is held to be multifarious which joins in the same suit, either as complainants or defendants, parties who are without a common interest in the subject of litigation, and have no connection with each other:" *Ency. of Pl. and Prac.*, vol 14, pages 195 and 201, inclusive.

"The authorities concur in the test that a bill is multifarious when there is a joinder or distinct, independent and separate causes of complaint, requiring different defences and different decrees:" *Story's Equity Pl.*, §§ 271 and 272.

Anderson v. Lehigh Coal and Navigation Co. et al.

"A bill is multifarious when there is a misjoinder of distinct and independent causes of action:" *Brady v. McCosker*, 1 N. Y. 221.

"Complainants with distinct causes of action, alleging distinct injuries, cannot unite in the same bill. To authorize them to join as complainants, their cause of action must be the same, the injury the same, and they must be entitled to the same remedy:" *Beach's Equity Prac.* § 119, note 6.

"A bill to enjoin a nuisance was held to be multifarious because it also prayed that the defendant be decreed to pay the damages caused by the nuisance:" *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

"Where several complainants have each a separate cause of action against one or another of several defendants, on the ground of misrepresentations made by the several defendants to the several complainants, with reference to a common enterprise, and the circumstances of each several misrepresentations differ, and there is an ascertained legal measure of damages applicable to each, the proper remedy is an action at law by each person injured against each person who injured him. A bill in equity filed by all so injured against all who injured them to enforce their rights is multifarious and defective for misjoinder of parties:" *Pennell's Appeal*, 38 Legal Intell. 104.

"A bill in equity which joins separate respondents acting in different capacities, upon different rights, and not chargeable with any joint liability or interest in the relief sought, is defective:" *Artman v. Giles*, 155 Pa. 409.

"A bill is multifarious by the joinder of distinct, independent and separate causes of complaint, requiring different defences and different decrees:" *Cumberland Valley R. R. Co.'s Appeal*, 62 Pa. 218.

Applying the principles stated in the foregoing authorities, it is difficult to escape the conclusion that the present bill is multifarious, and should not be sustained. It is not proper to join defendants in the same action who have not conspired together or joined in committing the wrong complained of. The injuries described are separate and distinct to each complainant and are charged against the defendants, who have no common interest in the subject, have no connection with each other, either as to the manner, time or cause of the alleged injuries. Each complainant seeks relief for the special injury to his own property, or for the property he or they may represent as administrator or guardian. Each defendant will be compelled to file a separate and independent answer, setting forth a defence adapted to himself. Whilst the evidence of the complainants as to the injury to the property of each one may be applicable to all the defendants, yet the evidence of each defendant will necessarily be, in part, at least, separate and adapted only to his special case, and will, in part, be antagonistic to his co-defendants. Some of the defendants may demand a trial by jury to assess the amount of damages, if any, and other defendants may not do so, and this may lead to serious complications. Some of the defendants are charged with present continuing trespasses, and others with trespasses of the past; and yet who belong to one class and who belong to the other, or both classes, is not pointed out, and it is manifest that a restraining or mandatory order applicable to some would not be applicable to others. To sustain this bill may lead to a state of uncertainty and confusion, which would not be advantageous to complainants, and may lead to great injustice to the defendants. If this bill is to be sustained, will it not be better for all parties to have this question determined by the court of last resort before great expense to all parties is incurred?

And now, Nov. 19, 1900, the demurrers are sustained for the reasons herein set forth, and the bill is dismissed, at the costs of complainants.

Cf. Anderson v. Lehigh Coal and Navigation Co., 9 District Reps. 273.

From J. O. Ulrich, Tamaqua, Pa.

Rusterholtz v. Brown.

Judgment—Properly entered and indexed—Postponing lien.

It is the duty of a party taking a judgment note to see that it is signed by the maker in his correct name, and the holder of such note, when he has it entered in judgment, must see, at his peril, that it is properly entered and indexed.

Land was owned by the defendant in the name of George Brown, and he so signed his name on every occasion but one. On that occasion he signed a judgment note George Brown, Sr.; why does not appear, and the judgment was so entered and indexed. Held, the lien of the judgment was postponed to judgments subsequently entered against George Brown.

Exceptions to auditor's report. C. P. Erie Co., Nov. T., 1899, No. 26.

D. A. Sawdey, for exceptions; H. L. Moore and W. J. Young, contra.

WALLING, P. J., June 11, 1900.—The question raised by the exceptions is as to the correctness of the decision of the auditor in postponing the lien of the Sterrett judgment to that of judgments subsequently entered. The deed for the land was made to George Brown. All the other judgments, some twelve in number, including those entered after as well as before the Sterrett judgment, were entered and indexed against George Brown, while the Sterrett judgment was entered and indexed against George Brown, Sr., upon a note so signed by defendant. So far as appears, that was the only time he ever signed his name in that way. He has a son, George O. Brown, who was probably a minor at that time. Under such circumstances, the conclusion of the auditor would seem to be sound. It may be, as held in *Bidwell v. Coleman*, 11 Minn. 78, that the addition of the word "junior" or "senior" is no part of a name; but it does not follow that such description or designation is immaterial when it comes to entering and indexing a judgment as giving legal notice thereof to third parties.

If two men of the same name, to wit, John Smith, live in this county, one at North East and the other at Girard, and if the one at Girard sign his name "John Smith, of North East," and it be so entered in judgment and indexed, in my opinion, such judgment would not be valid against John Smith, of Girard, as to subsequent judgment creditors. So if there be in this county John Smith, Sr., and John Smith, Jr.; and if John Smith, Jr., make a note and sign it John Smith, Sr., on which judgment be so entered and indexed, and then sign other notes John Smith, Jr., on which judgments are subsequently entered, in my opinion, the subsequent judgments would be entitled to priority against the land of John Smith, Jr., over the judgment entered upon the note signed John Smith, Sr. This result would follow, not because the word "senior" or "junior" was a part of the name, but because such words are used for the purpose of identification, and because the judgment so entered is misleading and does not afford proper notice. It is the duty of a party taking a judgment note to see that it is signed by the maker in his correct name, and the holder of such note, when he has it entered in judgment, must see, at his peril, that it is properly entered and properly indexed.

In the case at bar, the land was owned by the defendant in the name of George Brown, and, so far as appears, on every other occasion, both before and after signing the Sterrett note, he so signed his name. Why he signed his name on that occasion George Brown, Sr., does not appear. But he did so, and the judgment was so entered and indexed, and it was misleading and not sufficient record notice to affect a subsequent purchaser or subsequent judgment creditor.

George Brown is a common name, and a person knowing that to be the defendant's name, and knowing that his land was deeded to him in that name,

Rusterholtz v. Brown.

and that he so signed his name, would naturally be misled by seeing a judgment entered against George Brown, Sr.

The auditor is sustained by the authorities which he cites, and I agree with him that this case is ruled by that of *Crouse v. Murphy*, 140 Pa. 335. There, Daniel J. Murphy signed the note Daniel Murphy, and it was so entered and indexed, and was held invalid as against a subsequent purchaser. The same result would have followed had the man's name been "Daniel" and had he written it "Daniel J." In my opinion, the same result must follow where his name is "Brown" and he writes it "Brown, Sr.," to the one paper and Brown on all other occasions.

And now, June 11, 1900, the exceptions to the auditor's report in above case are overruled, and the report is confirmed and distribution ordered accordingly.

From J. M. Force, Erie, Pa.

Harrisburg National Bank v. Moffitt, Executor.

Banks and banking — Liability of endorser — Demand note — Reasonable time — Release of.

A note being made payable on demand, the failure of the payee to demand payment from the maker until the lapse of more than thirty-three months after the note was made and endorsed and delivered, discharges the endorser for liability on his endorsement. To impose liability on the endorser demand must be made within reasonable time.

Action of *assumpsit*. C. P. Dauphin Co., June T., 1899, No. 112.

Wolfe & Bailey, for plaintiff; *M. W. Jacobs* and *E. B. Mitchell*, for defendant.

SIMONTON, P. J., March 8, 1900.—This case was by agreement of the parties tried without a jury, as provided by the Act of April 22, 1874. We find the following to be the facts:

On May 15, 1893, John W. Reily signed a promissory note, of which the following is a copy:

"MAY 15, 1893.

"On demand after date I promise to pay to the order of C. M. Reily, at the Harrisburg National Bank, Seven Thousand Dollars, with interest, without defalcation, for value received.

"Credit the Drawer.

JOHN W. REILY."

Renewal of note same amount.

This note was, on the same day, endorsed by the payee, C. M. Reily, now deceased, for the accommodation of the maker, and was, thereupon, discounted by the Harrisburg National Bank for the benefit of the maker.

The endorser lived in the city of Harrisburg and the maker at Fort Hunter, some five or six miles from Harrisburg, and the note was held by the Harrisburg National Bank until March 7, 1896, more than thirty-three months after it was discounted, before formal demand of payment was made on the maker and notice of dishonor was given to the endorser. The endorser denied liability; hence this action.

Plaintiff contends on these facts that the note in question did not become due until demand for payment was made on March 7, 1896, when due notice was given to the endorser of demand and failure to pay by the maker; while, for the defence, it is claimed that the holder was bound to make demand within a reasonable time, and that as more than thirty-three months had elapsed after the note was discounted before demand was made and notice was given, demand was not made within a reasonable time, and therefore the endorser was discharged.

10 DIST. R.

Harrisburg National Bank v. Moffitt, Executor.

We have not been referred to, and we do not know of, any case in this State which decides the identical question thus raised. But cases have been cited, the reasoning of which, if adopted, necessarily supports the contention of the defendant.

In *McKinney v. Crawford*, 8 S. & R. 351, it was decided that where a promissory note, payable on demand, was endorsed eight months after its date, demand on the drawer and notice to the endorser must be proved in order to charge the endorser. This, it will be seen, was not the precise question now before us; and indeed, if the decision had been put on the ground that the note had not become due when it was endorsed, it might have been claimed, at least, to weigh in favor of the contention of the plaintiff. But it was put on directly opposite ground. The court below instructed the jury that as eight months had elapsed since the making of the note and the parties lived near to each other, the note was to be considered over-due, and the law-merchant as to demand and notice to the endorser did not apply. The Supreme Court reversed on the ground that, although the note was over-due, demand and notice were necessary, Justice Duncan, delivering the opinion of the court, saying: "That in the case of all notes, whether over-due or not, to render the endorser liable, there must be a demand on the maker and notice to the endorser, is a doctrine now well settled, unless a contract of a different nature from that of endorsement is to be implied from special circumstances and the understanding of the parties at the time of the transaction. The contract is not one of absolute, but conditional responsibility. . . . The Court of Common Pleas erred in stating that the note being over-due, the law-merchant did not apply, and, therefore, demand and notice were not necessary." And speaking of endorsement of a note payable on demand, he said: "When the endorsement is made, a new party is introduced, and new qualities are attached to the note. It then resembles an inland bill of exchange; it becomes one in fact, as to the terms on which the endorser, who may be considered the drawer, becomes liable. . . . As it respects the promisor himself, he is answerable immediately to the promisee or endorsee, and he may be sued on a note payable on demand the instant he gives his signature; but the condition on which the endorser is liable is, that payment shall be demanded within a reasonable time, and the earliest notice possible given of a refusal. This time may vary according to the circumstances and situation of the parties, to be determined by the jury under the direction of the court. On a bill payable on demand or sight, it is impossible to fix any precise time. It must be demanded and notice given as soon as it can be conveniently done, taking into view all the circumstances of the holder and drawer. There is a difference between a note payable on demand and one payable at a day certain. The latter requires a strict attention to make immediate demand when the note becomes due; the former does not, of necessity, in all cases, require an instant demand, and if endorsed after it becomes due, a reasonable time must be allowed to make demand on the promisor. These are the opinions of Chief Justice Parker, in *Field v. Nickerson*, 13 Mass. 131, who truly observes, that it is remarkable that the law relating to so familiar a species of written contract, as a note payable on demand, should, at that late period, be doubtful; yet, so it was, that in England no decisions were to be found bearing on the question. These opinions are recommended by their good sense and particular application to the nature of the contract and the reason of the thing. I am at a loss to distinguish between the necessity of the demand of the maker, where the note is not over-due when endorsed, and where it is over-due."

The whole tenor of the opinion in this case shows that the view of the court was that the liability of the endorser of a note payable on demand is not a continuing liability at the option of the holder.

Harrisburg National Bank v. Moffitt, Executor.

In *Brenzer v. Wightman*, 7 W. & S. 264, the precise point decided was that, when demand is made on the promisor in a due bill and he refuses to pay, immediate notice must be given by the holder to the endorser; but Justice Sergeant, speaking of the due bill, said: "This due bill, as originally drawn, was not a negotiable instrument. But the payee, by endorsing it payable to order, made it negotiable; after that it became, as between the endorser and the holder, an inland bill of exchange, in which the endorser stood in the light of a new drawer of a bill payable to the order of the endorsee; and the holder, by taking it in this character, took it subject to all the rules that regulate the relation between endorser and endorsee in negotiable instruments: *Leidy v. Tammany*, 9 Watts 353. No time of payment being mentioned, it resembled a note payable at sight or on demand. There was no necessity for a demand at any particular time, as there is where a note is made payable at an appointed day; but, like such a note endorsed after it becomes due, a reasonable time is allowed to make the demand on the promisor: *McKinney v. Crawford*, 8 S & R. 354."

In *Patterson v. Todd*, 18 Pa. 426, the court decided that the endorser of a promissory note in negotiable form, endorsed when over-due, or then passed away with his endorsement previously made, is not liable thereon, unless the note be presented to the drawer for payment within a reasonable time after its transfer, and if not paid, notice of non-payment given to the endorser. Justice Lewis, delivering the opinion of the court, said: "That the endorsement of a note over-due is equivalent to drawing a new bill payable at sight, upon which the endorser is liable only upon proof of a demand upon the maker within a reasonable time, and immediate notice of the default is fully established by the following decisions made by the highest courts of our sister States, and pronounced by judges whose learning and experience in this particular branch of the law entitle their opinions to the highest regard:" citing a number of cases, including *Field v. Nickerson*, *supra*. And near the close of the opinion he says: "We fully adopt the language of Mr. Justice Duncan, in *McKinney v. Crawford*, in which he declares that it is now a doctrine well settled that in the case of all notes, whether over-due or not, to render the endorser liable, there must be a demand on the maker and notice to the endorser, unless a contract of a different nature from that of endorsement is to be implied from the special circumstances and the understanding of the parties at the time of the transaction. A note over-due and a note payable on demand are, in legal effect, identical, and therefore the decision in *McKinney v. Crawford* is a direct decision on the question involved in this case."

In *Tyler v. Young*, 30 Pa. 143, it was decided that where a person endorses an over-due note, he is entitled to notice of demand and non-payment, the same as if it had been endorsed before maturity, and that it is the duty of the endorsee to present such note to the maker for payment, within a reasonable time, and in case of non-payment, immediately to give notice to the endorser. Justice Porter delivering the opinion of the court, said: "Was the defendant entitled to notice of demand and non-payment? As much so as if the notes had been endorsed before maturity. The wonder is not that the error committed in *Jordan v. Hurst*, 12 Pa. 269, should so soon have been corrected in *Patterson v. Todd*, but that it should have occurred. The endorsement of a note, due or not due, always expresses a conditional as opposed to an absolute obligation; otherwise a new note would be resorted to. The endorsement of a note over-due has been invested by the modern decisions with a very distinct character: *Leidy v. Tammany*, 9 Watts, 353. It is a bill of exchange drawn on the party primarily liable, payable at sight. On this theory, the necessity of demand and notice is an essential element: not notice on a given day, as in the case of a maturing note, possible in that case, but impossible in the other, for the day appointed by the former

10 Dist. R.

Harrisburg National Bank v. Moffitt, Executor.

maker and the new acceptor has passed; but notice after the holder has had reasonable time to make the demand on the maker, and has employed that time with diligence. The delay which occurred between September and May, or even between January and May, in giving this notice, was too long to be reasonable.

The necessary inference from these decisions and from the premises on which they are based is that the endorser in the case before us, if demand was not made within a reasonable time, cannot be held liable. If "a note over-due and a note payable on demand are, in legal effect, identical," as is said in *Patterson v. Todd*, *supra*, and if the endorser of an over-due note is entitled to notice of demand and non-payment within a reasonable time after the endorsement is made, as is decided in *Tyler v. Young*, *supra*, it necessarily follows that the endorser of a note payable on demand is entitled to the same notice. And if an over-due note is "a bill of exchange drawn on the party primarily liable, payable at sight," as is said in *Tyler v. Young*, and if, as every one knows, the endorser of a bill of exchange is entitled to notice of demand and non-payment within a reasonable time, the same conclusion necessarily follows. And if a note payable on demand when endorsed becomes a bill of exchange, as is said in *McKinney v. Crawford*, "the necessity of demand and notice is an essential element" of such a note so far as relates to the endorser.

The courts have not laid down any hard and fast rule on the question what is a reasonable time within which demand of payment must be made on a note payable on demand. There is no case, however, that decides that a delay of thirty-three months is reasonable, and it certainly is not.

We do not think the fact that the note in this case was drawn payable with interest should affect the result. Several of the cases cited by counsel for defendant, and referred to below, decide that the principle is the same whether the note is payable with or without interest.

We have not thought it necessary to discuss the cases cited from other States in support of defendant's position. We think our judgment can rest safely on our own cases cited and discussed above; to which should be added *Cromwell's Executors v. Arrot*, 1 S. & R. 180. But as the cases from other States discuss more fully than our own the reasons for holding that a note payable on demand is not a continuing security, we refer to some of them, in addition to *Field v. Nickerson*, *supra*, which is the leading case: *Sylvester v. Crapo*, 15 Pick. 92; *Rice v. Wesson*, 11 Metc. 400; *Lockwood v. Crawford*, 18 Conn. 361; *Sice v. Cunningham*, 1 Cow. 397; *Perry v. Green*, 19 N. J. L. 61; s. c., 38 Am. Dec. 536; *Mudd v. Harper*, 1 Md. 110; s. c., 54 Am. Dec. 644; *Jones v. Robinson*, 11 Ark. 504; s. c., 54 Am. Dec. 212; *Bassenhorst v. Wilby*, 45 Ohio, 333; *Thielman v. Gueble*, 32 La. Ann. 280; s. c., 36 Am. Reps. 267; *Turner v. Iron Chief Mining Co.*, 74 Wis. 355; s. c., 17 Am. St. Rep. 168; *Leonard v. Olson*, 89 Iowa, 162; s. c., 61 Am. St. Rep. 230 and 35 L. R. A. 381; *Home Savings Bank v. Hosie*, 77 N. W. Rep. 625 (Mich.); *Jerome v. Stebbins*, 14 Cal. 457; *Keyes v. Fenstermaker*, 24 Cal. 329.

Merritt v. Todd, 23 N. Y. 28, seems to be the leading case for the opposite view. It has, however, been much criticised in later decisions in the same State, and we know not if it has been followed elsewhere. Certainly the great weight of authority in this country is against it. But, apart from this, on the authority of the principles recognized in our own cases, we reach the following

Conclusion of law.

By the failure of plaintiff to demand payment of the note in controversy in this case from the maker until the lapse of more than thirty-three months after the note was made and endorsed and delivered to plaintiff, the endorser was discharged from liability on her endorsement.

Harrisburg National Bank v. Moffitt, Executor.

The prothonotary is therefore directed to enter judgment in favor of the defendant, if exceptions be not filed within the time limited by law.

April 6, 1900.—Exceptions to the findings of facts and conclusions of law overruled and judgment entered in accordance with the opinion heretofore filed.

NOTE.—No appeal was taken from this judgment.

From William M. Hargest, Harrisburg, Pa.

Commonwealth v. Zuern et al.

Criminal law—Conspiracy—Indictment—Count—Necessary averments.

Where, under an indictment for conspiracy to cheat and defraud, a count under the statute does not state that the conspiracy to cheat and defraud was to the prejudice of the public, a conviction can nevertheless be sustained if the evidence on the trial shows that it is to the prejudice of the public.

Criminal law—Conspiracy—Verdict—Evidence to sustain same.

In a trial for conspiracy, where the jury were told that, before they could convict any of the defendants, they must be satisfied beyond reasonable doubt, not only that there was a conspiracy, but that there was a common purpose in which each and every man convicted was engaged, and the evidence has in it the elements from which these facts may be found, and the jury find for conviction, their verdict will not be set aside on the ground that some of the circumstances were connected with one contract and some with another, and that therefore they were necessarily different conspiracies and there could be no conviction.

Criminal law—Verdict—Juror impeaching same.

A juror cannot be called to testify that he misunderstood the evidence and thus impeach his verdict.

Motion for arrest of judgment and new trial. Q. S. Northumberland Co., May T., 1900, No. 56.

D. W. Shipman, J. W. Gillespie and P. A. Mahon, for Commonwealth.

W. H. M. Oram, James Scarlet, W. W. Ker, W. K. Stevens, Voris Auten, and Knight & Loeb, for defendants.

JOHNSON, P. J., 32nd judicial district, specially presiding, Oct. 6, 1900.—The indictment in this case contains two counts, and, in substantially the same language, charges the defendants with conspiracy to cheat and defraud the borough of Shamokin. One of the counts is evidently intended to be a charge at common law and the other under the statute. Some criticism was made as to the count under the statute, because it does not state that the conspiracy to cheat and defraud was to the prejudice of the public, but, after a careful consideration of this question, I am of the opinion that the offence is sufficiently charged, and that the conviction can be sustained if the evidence on the trial shows that it is to the prejudice of the public.

The defendants who were convicted consisted of five members of the borough council of Shamokin and three other persons, who, it was alleged, were interested in furnishing brick for the paving of the streets of the borough. The allegations of the Commonwealth are, that the conspiracy was to control the awarding of brick or paving contracts by bribing members of council. The evidence in the trial consisted of showing the ordinances directing the paving and authorizing the payment of the bills therefor; that the brick men were bidders, some of whom received contracts. The presence of some of them at the bidding and in company with the councilmen, entertainment of some of the councilmen at restaurants and theatres, payment of money to members of council for votes for certain brick, declarations of the alleged conspirators that money being paid was from the funds being represented by some of the bidding brick men, some evidence of defective brick on one street, the dismissal of the inspector, who

had or was about reporting against them, and other circumstances, many of them slight.

The court left to the jury the question as to whether there was a conspiracy. Also as to which of the defendants were shown to have been connected with it; the charge was full upon all of these questions, and, as I view it, free from error.

There was ample evidence from which the jury could find that two or more of the persons charged were engaged in the conspiracy, and there were circumstances connected with each of the persons convicted, from which the jury might find they were engaged in it. It was most strenuously and ably argued that because some of these circumstances were connected with one contract and some with another, that they were necessarily different conspiracies, and that there could be no conviction; but the jury were plainly told that, before they could convict any of the defendants, they must be satisfied beyond reasonable doubt, not only that there was a conspiracy, but that there was a common purpose in which each and every man convicted was engaged. The evidence having in it the elements from which these facts may be found, and they being peculiarly within the province of the jury in such a case as this, the court cannot, in any proper exercise of its discretion, set aside the verdict on this ground. Two of the defendants on trial were named Dixey; one, William B. Dixey, and the other, Henry M. Dixey.

On the trial, it was testified by Mr. Phillips, one of the witnesses, that Henry M. Dixey gave him certain envelopes, containing money for himself and other councilmen.

On the motion for arrest of judgment and a new trial, the depositions of two of the jury are presented, in which they say they voted for the conviction of William B. Dixey under the impression that he gave the envelope to Mr. Phillips, and had they known it was Henry M. Dixey, instead of William B. Dixey, they would not have voted for his conviction. If the court can hear this evidence, it is a very strong appeal for arresting the judgment and giving him a new trial.

One of the causes of delay in disposing of this motion has been the consideration I have been giving this question. Can a juror be called to testify that he misunderstood the evidence and thus impeach his verdict? With great reluctance, I have arrived at the conclusion he cannot. In *Cluggage v. Swan*, 4 Binney, 150, there was an offer to prove, by one of the jurors, that the jury had decided the cause by drawing lots. Justice Yeates, after reviewing the law on this subject, both in England and this country, says: "Upon the whole, after the fullest consideration, I am of the opinion that the testimony of jurors ought not to be admitted to invalidate their verdict."

In *White v. White*, 5 Rawle, 61, an offer was made to impeach the finding of an inquest by one of the jurors. Gibson, C. J., in delivering the opinion, said: "It is settled by *Cluggage v. Swan*, 4 Binney, 150, and an unbroken current of modern decisions, that affidavits of jurors are inadmissible to inculpate their fellows or themselves."

In *Willing v. Swasey*, 1 Brown, 123, the court refused to hear the deposition of a juror, saying it ought to be rejected, because it tends to defeat his own solemn act under oath, where third persons are interested.

It ought to be rejected, because its admission would open a door to tamper with jurymen after they have given their verdict. It ought to be rejected, because it might be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it. It ought to be rejected, because it would unsettle all the verdicts in the country.

In *Hutchinson et al. v. Sandt*, 4 Rawle, 234, the court below admitted the testimony of a juror to impeach his finding on an inquest. This was reversed

by the Supreme Court, Justice Kennedy saying: "In the case of *Cluggage v. Swan*, 4 Binney, 150, it was ruled by this court that jurors were not admissible to invalidate their verdict on the ground of misconduct; and by the Common Pleas of the city and county of Philadelphia, in *Willing v. Swasey*, the same principle was settled."

McMicken v. Com., 58 Pa. 213, was a suit on a sheriff's recognizance. The recorder of deeds was called to show that it had never been acknowledged. The offer was refused. The Supreme Court affirmed the court below. Justice Sharswood said: "On the same principle of policy, it has been settled that the testimony of jurors is inadmissible to prove their own misconduct, or that of their fellows, in the jury-box, by a decision of the Supreme Court of Pennsylvania, which has been followed and sustained by an overwhelming weight of authority in our sister States: *Lessee of Cluggage v. Swan*, 4 Binn, 150, U. S. Dig., New Trial, and this, too, merely on a motion or rule for a new trial. After a verdict is rendered and the jury have separated, the affidavit of a juror that he did not voluntarily consent to the verdict cannot be received to impeach it: *Cook v. Sypher*, 3 Iowa, 484; *Boetge v. Landa*, 22 Texas, 105; *McCombs v. Chandler*, 5 Harring. 423; *Mercer v. The State*, 17 Ga. 146. These cases are all put on the ground of policy, and especially the danger there would be that jurors would be tampered with if such evidence were allowed."

To the same effect is 12 Am. & Eng. Ency. of Law, 378. It offers great temptation to the tampering with jurors. It is against public policy, and it is against the law.

The objection to the admissibility of the deposition is sustained.

About twenty reasons were filed for arrest of judgment and a new trial, many were not pressed or referred to in the argument. All, however, are dismissed.

The defendants convicted will present themselves for sentence.

From C. M. Clement, Sunbury, Pa.

Notes of Treasury Department Decisions.

From December 7 to December 21, 1900, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 3, of 1900.]

Accounts of Gaugers, Storekeeper Gaugers and Storekeepers.

No. 258, December 15, 1900. 3 Treasury Decisions, No. 51, page 16.

Distilled Spirits.

No. 254, December 7, 1900. 3 Treasury Decisions, No. 50, page 21.

Exempting Provision, Section 4, Act of March 1, 1879.

Special tax. No. 255, Dec. 7, 1900. 3 Treasury Decisions, No. 50, page 22.

Mexican Bank Notes.

Circulation tax. No. 257, Dec. 14, 1900. 3 Treasury Decisions, No. 51, page 15.

Pool Tables.

Special tax. No. 259, Dec. 21, 1900. 3 Treasury Decisions, No. 52, page 51.

Use of Microscopes by Internal Revenue Collectors, etc., for the Detection of Oleomargarine.

No. 256, December 11, 1900. 3 Treasury Decisions, No. 51, page 15.

10 DIST. R.

Hetzel v. Sawyer et al.

Assignment for creditors—Rights passing to assignee.

An assignment for creditors passes to the assignee only such estate or property as the assignor could himself sell or dispose of.

Specific performance—Pledge of stock by assignor—Rights of pledgee—Standing of assignee to contest.

Where a corporation, in consideration of money loaned to it, which money so obtained was actually used for the benefit of the corporation, agrees to deliver to the lender in pledge full-paid stock of another corporation not then issued, such contract, being upon sufficient consideration, took effect as a pledge as soon as the capital stock of the other company came in case.

The title of the assignor to the stock being that of a pledgor, no other right or title thereto passed to the assignee, and he has no standing to contest the claim of the pledgee to have the stock issued to him in accordance with the terms of the agreement of loan made prior to the date of the assignment.

Bill for specific performance, answers and proofs. C. P. No. 3, Phila. Co., Sept. T., 1900, No. 627.

Frank R. Savidge, for plaintiff.

Francis G. Taylor, for Benjamin Hallowell, Jr., assignee.

Rudolph M. Schick, for Bauer Gas Fixture Works.

MCCARTHY, J., Jan. 8, 1901.—This cause came on to be heard on Dec. 4 and 5, 1900, before me, sitting as chancellor. The plaintiff and the contesting defendants were represented by counsel. The evidence of witnesses produced on behalf of the plaintiff was heard in open court. No testimony was offered on the part of the defendants. After the evidence was heard, the case was fully argued by counsel.

Abstract of pleadings.

The bill avers that the Sawyer Manufacturing Company, on July 17, 1900, sold to one Smith a manufacturing plant, under an agreement that the vendee would procure the incorporation of a stock company, convey the plant to the company and procure the issuance of full-paid stock of the same to the Sawyer Company or its appointee to the par value of \$5000; that the Sawyer Company, through its president, produced the said agreement to plaintiff on Aug. 9, 1900, and promised to deliver to him the stock mentioned in it as soon as issued as collateral security for the endorsement by plaintiff for accommodation of the Sawyer Company of four certain promissory notes, described at length; that, upon the faith of that promise, plaintiff did endorse the said notes; that he has since been obliged to pay two of the same notes, and will probably be compelled to pay the others; that the Bauer Gas Fixture Works is a company, incorporated in pursuance of the first-mentioned agreement, and has received and is operating the said manufacturing plant in accordance therewith; that on Sept. 7, 1900, the Sawyer Company and its president both made assignments for the benefit of creditors to one Hallowell; that the Bauer Works refuse to issue the said stock in the name of the Sawyer Company, and to deliver it to plaintiff to be held and used by him as collateral.

The prayers are for: (1) an order directing the issue of the stock and delivery of same to plaintiff; (2) an order directing the execution to plaintiff of a power of attorney to sell the stock in the manner in which stock held as collateral is usually sold; (3) an order for delivery to plaintiff of any agreements between the Sawyer Company, its president and Smith, relating to the stock; (4) general relief.

By the answers filed, the Sawyer Company and Sawyer, its president, confess the entire bill; the Bauer Gas Fixture Works and Smith, its president, admit

Hetzel v. Sawyer et al.

all of the averments of the bill excepting those setting out the agreement between plaintiff and the Sawyer Company and plaintiff's action thereunder, and ask proof of the same. Hallowell, the assignee for the benefit of creditors of Sawyer and the Sawyer Company, avers that he has no knowledge of the facts charged, and prays proof of the same; that he has possession of the Smith-Sawyer Company agreement; that he has demanded of the Bauer Company issuance and delivery to him, as assignee, of certificates of its capital stock (upon what ground, or in what amount, is not stated), and that he submits himself to the decree of the court.

Findings of fact.

From the bill, answers and proofs, I find the following facts are fully established:

1. The Sawyer Manufacturing Company was incorporated about two years ago under the laws of the State of New Jersey. Harry H. Sawyer is its president, and has been in that office since the incorporation. There are three directors, of whom the said H. H. Sawyer is one. The company adopted certain by-laws, the following extracts from which are alone applicable to the case:

Article 5, relating to "Powers of Directors," by its section 4, provides, that the board of directors shall have power "to determine who shall be authorized to sign on the company's behalf, bills, notes, receipts, acceptances, endorsements, checks, releases, contracts and documents."

Article 6, relating to "Duties of Officers," provides: Section 1. "The president shall be the chief executive officer and the head of the company, and (in the recess of the board of directors and of the executive committee) shall have the general control and management of its business and affairs." The same article, by section 3, provides: "The treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the company, and shall deposit all moneys and other valuable effects in the name and to the credit of the company in such depositories as may be designated by the board of directors," and further provides that the treasurer shall disburse the funds of the company as may be ordered by the board, shall render accounts of his transactions and of the company's financial condition, and make a full report to the annual meeting of the stockholders.

There was no evidence to show the existence of any executive committee, nor any clear evidence that the board of directors had exercised their power to authorize any one to sign the commercial and other instruments specified in the above-recited by-law. It did clearly appear, however, that H. H. Sawyer, the president, was the active manager of the business of the company; was in control of it, and acted as the company to all intents and purposes; that he, at numerous times, made and endorsed notes in the name and for the benefit of the company without consulting any officer whatsoever, with the knowledge of at least two out of the three directors, and without objection ever being made by any one.

2. On July 17, 1900, articles of agreement were entered into, bearing that date, between the Sawyer Manufacturing Company and S. Wheaton Smith, whereby the company sold to Smith a certain plant for the manufacture of gas fixtures and metal work, in consideration for which the said Smith covenanted to obtain within two months from the date of the articles a charter for the incorporation of a company for the operation of the said plant, and that he would procure to be issued and delivered to the Sawyer Company, or any one designated by it, certificates of paid-up stock of the capital of the said new company to the par value of \$5000, being one-third of the whole amount of the capital stock. In pursuance of this agreement, the manufacturing plant was delivered to Mr. Smith. On Aug. 20, 1900, letters-patent were issued by the State of Pennsylvania

10 DIST. R.

Hetzel v. Sawyer et al.

incorporating the Bauer Gas Fixture Works. By the articles of association of the said corporation, which are recorded at Philadelphia in Charter Book No. 25, page 396, it is provided, by the eighth paragraph, that \$10,000 of the capital stock, full-paid and non-assessable, will be issued for the property mentioned in an attached inventory, which inventory embraces the manufacturing plant above mentioned.

On Aug. 27, 1900, by a resolution of the stockholders of the Bauer Gas Fixture Works, it was resolved that the plant, as mentioned in the inventory so made a part of the certificate of incorporation should be purchased of Mr. Smith, and that he be paid therefor full-paid and non-assessable capital stock of the company to the par value of \$10,000.

The Bauer Gas Fixture Works are in full operation. They have, however, not delivered the \$5000 worth of stock mentioned in the bill. It was admitted by their counsel in open court that the plaintiff and the assignee of the Sawyer Manufacturing Company hereinafter mentioned have both made demand upon the Bauer Gas Fixture Works for the delivery of the stock mentioned in the bill, and that the Gas Fixture Works have declined to deliver the stock to either party until after this court has determined to whom the stock belongs.

3. As the result of a course of dealing between the plaintiff, George C. Hetzel, and the Sawyer Manufacturing Company, represented by Harry H. Sawyer, its president, the said Sawyer Company was, on Aug. 9, 1900, indebted to the plaintiff for moneys loaned by plaintiff to the company to the aggregate amount of \$4500. This indebtedness was evidenced by three items: (1) a demand note for \$500; (2) a note for \$2250, which would mature within a few days after the date last mentioned; and (3) a note drawn by H. H. Sawyer to the order of the Sawyer Manufacturing Company, endorsed by them, for \$1750, maturing Sept. 10, 1900. The first two items are not mentioned in the bill filed in this cause; the last item is the first note mentioned in paragraph 4 of the said bill.

The plaintiff did not have any collateral security for the repayment of any portion of this debt.

4. On Aug. 9, 1900, H. H. Sawyer visited the plaintiff at his home at Ridley Park; stated that he was in need of money; that the Brooks Company of Washington owed the Sawyer Company several thousand dollars and that he could get their notes in part settlement of the debt, and asked the plaintiff to procure money for him by the discount of those notes and a further note of his own. The plaintiff objected to increasing the indebtedness of the Sawyer Company to himself. Sawyer then produced the agreement with Smith, dated July 17, 1900, and handed it to the plaintiff, who read it over. Sawyer then said he would turn over to the plaintiff the \$5000 worth of stock mentioned in the agreement as collateral security for the entire indebtedness of the Sawyer Company to the plaintiff, as well the indebtedness already existing as that which would be incurred by the endorsement and discounting of the new notes. He explained to the plaintiff that the stock could not be delivered at once because the company mentioned in the agreement had not yet been chartered, but that application had been made for the charter, and that as soon as he got the stock he would turn it over to the plaintiff. The plaintiff thereupon agreed that he would discount the notes and turn the proceeds over to Sawyer.

5. On Aug. 11, 1900, the transaction which had been agreed to on Aug. 9, 1900, actually took place. H. H. Sawyer visited the plaintiff's place of business at Chester on that morning, and produced the following notes:

(1) Promissory note of H. H. Sawyer, to the order of the Sawyer Manufacturing Company, dated Philadelphia, Aug. 13, 1900, at two months after date, for \$1250, endorsed "Sawyer Manufacturing Company, H. H. Sawyer, president."

(2) Promissory note of the E. F. Brooks Company, to the order of Sawyer

Hetzel v. Sawyer et al.

Manufacturing Company, dated Washington, Aug. 10, 1900, at three months after date, for \$1500, endorsed "Sawyer Manufacturing Company, H. H. Sawyer, president," and "H. H. Sawyer."

(3) Promissory note of the E. F. Brooks Company, to the order of the Sawyer Manufacturing Company, dated Washington, Aug. 10, 1900, at four months after date, for \$1500, endorsed "Sawyer Manufacturing Company" and "H. H. Sawyer."

These three notes aggregated the sum of \$4250; they were discounted by George C. Hetzel & Company, at the request and for the account of George C. Hetzel, individually, and, after deducting the discount of \$70.33 and \$500, being the amount of the demand note mentioned in the third finding of fact, *supra*, the balance of the said amount of \$4250, namely, \$3679.67, was handed to H. H. Sawyer in a check drawn by George C. Hetzel & Company to the order of H. H. Sawyer, dated Chester, Pa., Aug. 11, 1900, upon the Delaware County National Bank, for the said amount of \$3679.67. On receipt of the check, Sawyer presented the same at the bank and received the amount of it in cash.

6. After receiving the cash upon the check mentioned in the last finding, Sawyer applied \$2250 of it to the payment of a note of that amount, being the second note specified in the third finding of fact, *supra*, and which had then matured. He telegraphed \$1000 more to the E. F. Brooks Company of Washington, to take up some commercial paper which had been discounted for the Brooks Company by the Sawyer Company. The balance of the money was used to pay wages due by the Sawyer Company to its employees. The whole of the proceeds of this transaction were used for the benefit of the Sawyer Manufacturing Company in payment of its debts and obligations. All the moneys previously loaned by the plaintiff to the Sawyer Manufacturing Company through the instrumentality of H. H. Sawyer were used for the benefit of the Sawyer Manufacturing Company. The final result of the transaction just described was that the indebtedness of the Sawyer Company to the plaintiff was increased from \$4500 to \$6000, evidenced by the four promissory notes which are described in paragraph 4 of the plaintiff's bill. Of these notes, the first, second and fourth have been protested for non-payment and have been taken up and paid by the plaintiff. The third note matures Dec. 10, 1900, in accordance with its terms. The plaintiff assumes that he will have to pay it, and nothing appears in the evidence to lessen the force of this assumption.

7. On Sept. 7, 1900, the Sawyer Manufacturing Company made an assignment for the benefit of its creditors to Benjamin Hollowell, Jr. On the same date, Harry H. Sawyer individually made the like assignment to the same assignee.

Findings of law.

The Sawyer Company, and Sawyer, its president, and the defendant, S. Wheaton Smith, do not oppose the plaintiff's recovery. The Bauer Company admitted in open court, through its counsel, that its position was merely that of a stakeholder, and that it stands ready to issue and deliver the stock to the person whom the court shall decide to be entitled thereto. The case thus narrows down to a contest between the plaintiff, a creditor claiming to be the equitable pledgee of the stock, on the one hand, and Hollowell, an assignee for the benefit of creditors, claiming the stock under his general assignment, on the other. It is, therefore, of the first importance to determine what standing the assignee for the benefit of creditors has before the court to contest the claim of the plaintiff; for, if he has none, the other contentions, which are raised by him alone, will drop out of the case and need no consideration.

1. I find that the title of Hollowell, the assignee for the benefit of creditors of the Sawyer Manufacturing Company, to the stock in controversy was neither
10 Dist. R.

Hetzel v. Sawyer et al.

greater nor less than the title of his said assignor thereto at and immediately before the execution and delivery to him of the assignment.

In a very recent case arising under an assignment for the benefit of creditors, Mr. Justice Brown, delivering the opinion of the Supreme Court, says: "The deed of assignment is the voluntary act of the assignor, conveying nothing to the assignee as a purchaser. The embarrassed or insolvent debtor adopts it for his relief or for the equal distribution of his estate among his creditors. Perhaps nothing is better settled in this State by uniform and numerous decisions than this, that a voluntary assignee is the mere representative of the debtor, enjoying his rights only, and no others; and is bound where he would be bound; that he is not the representative of the creditors, and is not clothed with their power; that he is but a volunteer, and not a *bona fide* purchaser for value. . . . He is, in short, but the hand of the assignor in the distribution of his estate among his creditors: *Fulton's Estate*, 51 Pa. 204. The assignor passes to the assignee only such estate or property as he himself could sell or dispose of, and, in the case of real estate, only such interest in it as he, if married, could convey without his wife joining in the deed:" *Mills v. Ritter*, 197 Pa. 353.

2. I find that the Sawyer Manufacturing Company was bound by the acts of its president, H. H. Sawyer, in his transactions with the plaintiff. It is clear from the by-laws of the company that its treasurer had no authority to sign the commercial paper or intermeddle with the ordinary business transactions of the company. Whether the president was or was not the authorized agent of the company for the transaction of such business as was carried on with the plaintiff need not be considered, because, even if he were unauthorized, there are two clearly established facts which would estop the Sawyer Manufacturing Company from setting up his want of authority against the plaintiff. These are: (1) that in a course of dealing extending over some time the president had held himself out to be authorized to act for the company, with the knowledge of a majority of its board of directors and without objection on their part, and (2) that every dollar of the money so obtained by him from the plaintiff was actually used for the benefit of the Sawyer Company in the payment of its debts and obligations: *Millward Cliff Cracker Company's Estate*, 161 Pa. 157.

3. I find that the contract made on Aug. 9, 1900, by the Sawyer Manufacturing Company, through its president, H. H. Sawyer, with the plaintiff, to deliver to the plaintiff in pledge full-paid stock of the Bauer Gas Fixture Works to the par value of \$5000, was a valid contract upon sufficient consideration, which took effect and attached as soon as the capital stock of the said Bauer Company came in case, and that all persons claiming under the Sawyer Manufacturing Company, excepting purchasers for value without notice, of whom there appear to be none, are bound equally with the Sawyer Manufacturing Company by the said contract, and that the rights of the general creditors of the said company and of its assignee for the benefit of such creditors are inferior and subordinate to that of the plaintiff, who, in equity, is to be considered as the pledgee of the said stock. While it is the general requirement of law that possession of the subject of the pledge should accompany it in the hands of the pledgee in order to validate his lien, yet this requirement may be dispensed with if such is the agreement of the parties, and especially where the subject of the pledge is to come into existence after the contract of pledge is made. Under such circumstances, the moment the subject of the pledge comes into existence it is subject in equity to the operation of the pledge, and the Sawyer Manufacturing Company is, therefore, bound to procure the issuance and delivery to the plaintiff of the certificates of stock, the subject of its agreement with him: See *Collins's Appeal*, 15 W. N. C. 5.

The case of *City Fire Ins. Co. v. Olmsted*, Admin'x, 33 Conn. 476, cited VOL. 10—8

and relied upon by counsel for the assignee for the benefit of creditors, differs radically in its facts from the case here under consideration. In the Connecticut case, A was indebted to the insurance company as endorser and guarantor of certain commercial paper which had not matured, and executed an agreement with them, reciting this existing indebtedness, and agreeing that he would transfer to them forty shares of their own capital stock belonging to him, at or before the maturity of the said paper, and would also make certain specified payments on account of the indebtedness, in consideration of which and of the collateral security of the said shares of stock the company agreed not to press for payment of the full amount of the debt for the term of one year. In point of fact, at the date of the contract, A had already transferred twenty of the said shares to a third party as collateral security for another debt. This, however, did not appear in the contract. As to the remaining twenty shares, there was no reason apparent why the same should not have been forthwith delivered to the company. None of the shares were ever delivered to the company, and six months after the execution of the agreement, A died, deeply insolvent. In the action reported, the plaintiff company sought to enforce the lien, which they alleged they had upon the said forty shares of stock by virtue of the agreement, but the court held that they never had any lien upon the stock; that the decedent agreed to transfer the stock at a future date, but never did transfer it, and that, therefore, the company stood only on the same footing as the general creditors of the estate. That was manifestly a different case from the one before me. In that case the subject of the pledge was in existence. The agreement was not for the present pledging of the stock, but for pledging it at some future time not specified, and, in point of fact, it never was pledged. The case was clearly under the general rule which requires delivery of possession of the subject of the pledge into the hands of the pledgee in order to create a lien thereon in favor of the pledgee, and, as the pledgee never received it, the court rightly held that no lien had attached. In the present case, the agreement is for a delivery of stock not yet in existence immediately upon its coming into being, and falls within one of the well-recognized exceptions to the general rule.

4. I find that, inasmuch as the title of the Sawyer Manufacturing Company to the stock in question at and immediately before the execution of its assignment for the benefit of creditors on Sept. 7, 1900, was in equity that of a pledgor of the said stock to the plaintiff as collateral security for the repayment to him of the indebtedness of the said company to the said plaintiff, as hereinbefore specified in the sixth finding of fact, no other or further right or title to the said stock passed to Hallowell, the assignee for the benefit of creditors of the said company, and the said assignee has, therefore, acquired only the right to a return of the said pledge upon payment by him of the principal debt for which the said stock was so pledged and interest accrued thereon, or to an account of the proceeds of the sale of the said collateral and payment of any balance which may be found due to him as assignee of the pledgor after such sale and payment out of the proceeds of the principal debt, with interest, and all legal costs and charges attending the transaction.

In conclusion, therefore, I find that the defendant, Benjamin Hallowell, Jr., has no standing to contest the claim of the plaintiff in this cause, but that his rights to the stock in question are subordinate to those of the plaintiff, and that, therefore, as none of the other defendants oppose the suit of the plaintiff, the latter is entitled substantially to the relief which he seeks. In order, however, to avoid unnecessary complications, since the undertaking of the Sawyer-Smith agreement of July 17, 1900, is to procure the issue and delivery of the stock to any one designated by the Sawyer Company, it will be considered that the Sawyer Company has designated the plaintiff as the person to whom the stock

shall be issued, and the Bauer Company will be directed to issue the stock directly to the plaintiff, who shall receive the same, to be dealt with in the manner customary for the treatment of such pledges.

A form of decree has been prepared in accordance herewith, and will be entered in the cause within ten days from the filing hereof, unless exceptions shall be filed with the prothonotary before that date.

Com. ex rel. Martin, Administrator, v. Swick.

Appeal from justice—Precedent payment of costs by administrator, defendant.

The payment of costs by an administrator, defendant, is not a condition precedent to his right to appeal from the judgment of a justice of the peace, and it follows that a justice is not entitled to demand and receive from such administrator, defendant, the costs in the case before the making and delivery of the transcript for the appeal.

Alternative mandamus. C. P. Lackawanna Co., Nov. T., 1899, No. 124.

M. J. Martin, for plaintiff; *H. D. Carey*, for defendant.

SIMONTON, P. J., 12th judicial district, specially presiding, Jan. 5, 1900.—A judgment having been rendered against M. J. Martin, administrator of the estate of Letty Ann Ruland, deceased, by W. B. Swick, a justice of the peace, an application was made to the justice by Martin, in due time, for a transcript for appeal to the Court of Common Pleas, which was refused by the justice on the ground that the administrator was not entitled to such appeal until he had paid the costs that had accrued. Thereupon, a petition was presented by Martin to the Court of Common Pleas, upon which an alternative writ of mandamus to the justice was awarded, and the question now to be determined is whether the petitioner, the defendant in the judgment rendered by the justice, has the right to appeal without the payment of the accrued costs.

The respondent claims that the Act of June 24, 1885, P. L. 159, requires the payment of the costs by the administrator, defendant, as a condition precedent to the right to appeal. This Act provides "that in all cases of appeal from the judgment of an alderman or a justice of the peace, the said alderman or justice shall be entitled to demand and receive from the appellant the costs in the case before the making and delivery of the transcript for said appeal."

The Act of April 20, 1876, P. L. 43, relative to costs on appeal, referred to in some of the cases to be cited, enacts that: "In all cases in which judgment shall have been rendered by any justice of the peace or alderman in this Commonwealth for wages of manual labor, before the defendant shall be entitled to an appeal from the judgment of the justice or alderman, . . . the said defendant shall be required to give good and sufficient bail for the payment of the debt and costs, to be paid when finally adjudged to be due the plaintiff by the court, in all cases for labor." And the local Act of March 2, 1868, P. L. 257, which includes the then county of Luzerne, enacts that "from and after the passage of this Act the justices of the peace" (within the counties named) "shall be entitled to demand and receive from the appellant, . . . before giving a transcript of appeal, or other transcript, all costs that may have accrued in the said action."

In *Koontz's Administrator v. Howsare*, 100 Pa. 506, it was decided that an executor or administrator against whom, in his representative capacity, a judgment has been rendered in a suit before a justice of the peace for wages of manual labor, may appeal from such judgment to the Common Pleas without filing an affidavit and entering security for the debt and costs prescribed by the Act of

Com. ex rel. Martin, Administrator, v. Swick.

April 20, 1876, P. L. 43. Mr. Justice Sterrett, delivering the opinion of the court, said: "While the phraseology of the Act itself is sufficiently comprehensive to include personal representatives, we think they are not within its spirit, when it is properly construed in connection with previous legislation on the subject of appeals from justices of the peace, especially the general Act of 1810, in which they are expressly excepted from the provisions requiring appellants to give security. These Acts are *in pari materia*, and should be construed together. We can readily understand why the legislature should require those defending in their own right, against claims for manual labor, to make the affidavit and give security, not only for the costs, but also for the claim; but it would be extremely difficult to assign a satisfactory reason for applying the same provision to those sued in a representative capacity, and previously exempt from giving security in any form. The reasons which induced the exception contained in the Act of 1810 apply with greater force to the Act of 1876; and in the absence of a clearly-expressed intention to the contrary, we are constrained to conclude that the Act does not apply to personal representatives. In thus limiting the operation of the Act to those defending in their own right against the class of claims mentioned therein, we give it all the effect the legislature intended, and certainly all that it reasonably should have." And the learned justice refers to *Maule v. Shaffer*, 2 Pa. 404, where it was held that the Act of July 26, 1842, P. L. 431, providing for appeals from *nisi prius* to the court *in banc*, which required the party appealing to give absolute security for the payment of all damages and costs, if the proceedings were affirmed, never could have been intended to require an executor or administrator to give the security, the court saying "it would be most highly unjust and unreasonable to require such security of an executor or administrator who may have no assets of the estate in his hands wherewith to pay damages and costs. The inevitable consequence would be, in almost every case where a judgment should be rendered against an executor as such, though highly unjust and illegal, that it would have to be submitted to."

"This view also accords with the judicial construction given to rules of court, requiring in general terms the filing of affidavits of defence. It has been uniformly held that they do not apply to persons defending in a representative capacity: *Umberger v. Zearing*, 8 S. & R. 163; *Read v. Bush*, 5 Binn. 455. The reason given is that it is not to be supposed that an executor has sufficient knowledge of his testator's affairs to justify him in making oath on the subject." Also, as to affidavits of defence: *Edwards v. Ewing*, 4 Yates, 235; *Leibert v. Hocker*, 1 Miles, 263; *Vandusen v. Graham*, 1 W. N. C. 103; *Seymour v. Hubert*, 83 Pa. 346; *Orne v. Ritchie*, 4 W. N. C. 477; *Wright v. Cheney*, 30 Leg. Intell. 77; *Wood v. Chamberlain*, 7 Pa. C. C. Reps. 612; and *Malone & Son v. Philadelphia*, 7 Pa. C. C. Reps. 613.

Koontz v. Howsare was followed in *Gamble v. Lebanon City*, 3 Pa. C. C. Reps. 594, by Judge McPherson, deciding that municipal corporations are not bound to pay costs under the local Act of March 2, 1868, or the general Act of June 24, 1885, before taking an appeal; citing *Robinson v. Jefferson County*, 6 W. & S. 16; *Monaghan v. Philadelphia*, 28 Pa. 209; *Pottsville v. Curry*, 32 Pa. 443; *Watson v. Chester*, 2 Delaware Co. Reps. 383; *King v. District of Penn.*, 1 Phila. 402, and adding: "No reason appears or is suggested for reversing this legislative policy, and we see no need to conclude that such a reversal was intended by the Acts of 1868 and 1885. Taking the whole course of legislative decision concerning appeals of municipal corporations—and the statutes will be found in the cases above cited—we are satisfied that such corporations are not within the spirit of the Acts of 1868 and 1885, and are not bound by their provisions as to payment of costs upon appeal."

10 DIST. R.

Com. ex rel. Martin, Administrator, v. Swick.

Koontz v. Howe was also relied upon as controlling authority by Judge Green, of Schuylkill county, in *Beech v. Evans*, 7 Pa. C. C. Reps. 241, deciding that an executor may appeal from the judgment of a justice of the peace or alderman without payment of costs under the Act of March 2, 1868; and in *Com. v. Batdorf*, 7 Pa. C. C. Reps. 243, deciding that a municipal corporation may appeal from a judgment of a justice of the peace without payment of costs.

Callender's Administrator v. Keystone Ins. Co., 23 Pa. 471, declares principles that tend to the same conclusion, the point decided being that where an executor or administrator prosecutes a claim of the estate in good faith and fails, he is not personally liable to the defendant for his costs. In the course of the opinion, Mr. Justice Lowrie says: "The old English statute giving costs against plaintiff have always been construed not to apply as against executors and administrators; . . . the statute 3 Jac. 1, ch. 8, requires bail in error for debt and costs; but this is held not to apply to administrators, plaintiffs in error, because they are not personally liable for either debt or costs: *Cro. Jac.* 350; 4 *Mod.* 245. And such, for the same reason, is the construction of the terms of appeal from an award under our Act of 1810: 5 *Binn.* 508; and from *nisi prius*, 2 Pa. 404;" and he adds, that we find the same rule existing in many of our sister States, quoting a number of cases.

The case cited by Justice Lowrie from 4 *Mod.* 245 is *Gale v. Till*, where the court said: "By the statute of 3 Jac. 1, ch. 8, it is enacted: 'That no execution shall be stayed by writ of error unless plaintiff in the said writ give bail to the plaintiff in the action in double the sum recovered to pay the damages and costs if the judgment should be affirmed.' It is always held that an administrator who brings a writ of error shall not give bail, though he is not exempted by the statute; neither shall he pay costs in this case." And the case from *Cro. Jac.* 350 is the case of *Goldsmith v. Lady Platt, Executrix*, where it was argued that the executrix should not have a *supersedeas* without special sureties, but "the court resolved that this case was out of the statute; for although it is general, yet it is to be intended to mean such cases where it is against the party himself upon his obligation, or where the judgment is general against the executors; but where the judgment is special, the execution shall be of the goods of the testator and damages only *de bonis propriis*; but it is not reasonable (nor the intent of the law it should be otherwise) that the party should be enforced to find surety to pay the entire condemnation with his own goods;" and Coke, Chief Justice, said: "It had been ruled in the Common Pleas when he was there."

In *Insurance Co. of Pennsylvania v. Hewes*, 5 *Binn.* 508, it was decided that under the arbitration law of March, 1810, executors were entitled to an appeal without entering into a recognizance, paying costs or making affidavit. The Act granted an appeal to either party under certain rules, regulations and restrictions contained in the 11th, 12th, 13th and 14th sections. Chief Justice Tilghman referred to these at length, citing the proviso at the end of the last section: "That where executors and administrators may be the party appellant they shall have an appeal as is by law allowed in other cases;" and saying: "Here is an Act of Assembly establishing a set of rules under which appeals are to be entered. They begin in the eleventh and are continued through four sections, forming, in the whole, one system. But it was evident that this system would be unjust with regard to executors and administrators, who, whether plaintiffs or defendants, appear in court only as trustees for the rights of others, and who are not so well acquainted with the matter in contest as their testator or intestate. It would be hard to exact from such persons an oath as to the justice or injustice of the case, and very hard, indeed, to make them pay costs, which, in the event of a suit, they might never recover again. The consequence of such

Com. ex rel. Martin, Administrator, v. Swick.

hardships would be that executors and administrators might rather acquiesce in an unjust award than enter an appeal; and in such case on whom would the loss fall? Not on themselves, but on those entitled to the estate of the deceased person; very often widows and infant children." *Murray's Executors v. Sharp*, 72 Pa. 360, deciding that executors and administrators may appeal from awards of arbitrators without payment of costs or entering into a recognizance, although they may have taken out the rule of reference, tends in the same direction. Mr. Justice Agnew, after reviewing and comparing the Acts of Assembly relative to appeals by executors and administrators, says: "In view of the legislation since 1836, and the current of decisions upon non-liability of executors and administrators personally for costs, we are of the opinion that the legislature did not intend to revive the qualification as to the party taking out a rule of reference in the 81st section of the Act of 1836. An opposite intention would often compel the executor or administrator to pay the costs out of his own pocket, or else sacrifice the interests of his trust by refusing to appeal."

In view of this array of precedents for the restriction of general terms used in Acts regulating practice and procedure, in order to prevent them from being applied to cases not within their spirit, we have no hesitation in deciding that the petitioner in this case is entitled to an appeal without the payment of costs, and a peremptory mandamus is, therefore, awarded against the respondent, as prayed.

From William A. Wilcox, Scranton, Pa.

Garman v. Charlier.

Practice, C. P.—Promissory note—Affidavit of defence—Delay in filing same—Opening judgment.

Suit was commenced on a promissory note due June 15, 1898, on Oct. 20, 1899, and a statement filed on the same day. Nov. 13, 1899, defendant filed a demurrer, which was overruled May 4, 1900, and defendant given fifteen days to file an affidavit of defence, which time was extended to June 8, 1900. No affidavit was filed, and on June 11, 1900, judgment was taken for want of an affidavit of defence. After judgment was taken, and on same day, an affidavit of defence was filed, and, on the same day, a petition was filed, asking for a rule to show cause why the judgment should not be opened and defendant let into a defence, counsel stating that "it was impossible to obtain the facts necessary to prepare the affidavit of defence until June 11, 1900, on account of the illness of the defendant." Fifteen months after the note was due, defendant wrote to counsel for plaintiff, saying there was no need to bring suit, and made no mention of the defence set up in the affidavit. *Held*, defendant was guilty of laches and the judgment should not be opened.

Rule to open judgment and let the defendant enter a defence. C. P. Delaware Co., Sept. T., 1899, No. 97.

George B. Lindsay, for plaintiff; *J. B. Hannum*, for defendant.

JOHNSON, P. J., June 24, 1900.—This was a suit by the payee to the use of another against the maker on a promissory note for \$600, dated Jan. 15, 1898, payable in six months. On Nov. 13, 1899, the defendant filed a demurrer to plaintiff's statement. This was, on May 4, 1900, overruled by the court, and defendant given fifteen days within which to file an affidavit of defence. This time, on application of counsel for defendant, was extended to June 8, 1900. No affidavit of defence was filed, and on June 11, the plaintiff took judgment for want of an affidavit of defence. After judgment was taken, and on the same day, an affidavit of defence was filed, and, on the same day, a petition was filed, asking for a rule to show cause why the judgment should not be opened and defendant let into a defence.

10 DIST. R.

Garman v. Charlier.

The affidavit of defence sets up that the note was given because of a threatened arrest of defendant's son, given to save him from arrest for a debt, which it was claimed, had been fraudulently contracted—that she has learned that the claim against the son was false.

We do not think that the affidavit is sufficient: *Fulton v. Hood*, 34 Pa. 365; *Newbold v. Pennock*, 154 Pa. 591. She was not as prompt in making this defence as she should have been to relieve her from her default. The suit was commenced Oct. 20, 1899, and the statement of claim was filed on the same day. On Nov. 13, 1899, defendant filed a demurrer, alleging that the statement was insufficient, which was overruled May 4, 1900, and defendant given fifteen days in which to plead. Judgment might have been entered against her at this time, but she was given time to make defence if she had any. Time was given, and twice extended by the court. And, in the end, judgment was taken against her by default, from which she asks to be relieved. True, her counsel says, in the petition signed by himself as her attorney, that "it was impossible to obtain the facts necessary to prepare the affidavit of defence until June 11, 1900, on account of the illness of the defendant."

The affidavit of defence was filed on June 11, three days after the expiration of the time given by the court. She must have known she was then in default, and yet, in the affidavit signed by herself, she says nothing about her inability to make it sooner on account of illness.

This note became due on July 15, 1898, and, in an answer to a demand for its payment, on Oct. 16, 1899, she wrote Mr. Lindsay, counsel for plaintiff, the following letter:

"CHESTER, October 16, 1899.

Mr. GEORGE B. LINDSAY:

Dear sir: I have just received your communication and shall give it my earliest attention. There is no occasion to bring suit, for I shall attend to it.

Very truly yours, I. V. D. CHARLIER."

Thus, nearly fifteen months after the note became due, she says there is no occasion to bring suit, and promises to give it her earliest attention. Not a word about the defence now set up. We cannot relieve her.

Rule discharged.

From W. Roger Fronefield, Media, Pa.

Whitman v. Higby.

Practice, C. P.—Sheriff's return—Amending same.

Where a party complaining of a sheriff's return was a party to the action in which the returns were made, the sheriff can amend the return when guilty of no delay in moving for the amendment and the amended return is in accordance with the facts, which were known to the party complaining or his attorney at the time they occurred.

Rule to show cause why amended returns of sheriff should not be set aside and discharged. *C. P. Crawford Co.*, Sept. T., 1899, Nos. 75 and 76, Ex. Dock.

D. T. and H. G. McKay, for plaintiff; *T. J. Prather*, for defendant.

THOMAS, P. J., Oct. 1, 1900.—It is alleged in this case that the court committed error in permitting the sheriff to amend his returns after suit had been brought, by the plaintiff in the writs, against the sheriff for the recovery of \$31.90, which he alleges are costs, which the original returns would indicate had been collected by the sheriff, but which have not been paid over to the plaintiff in the writs.

The amendments were allowed on the sheriff's affidavit, showing that the plaintiff in the writs in which the returns were made had settled said claims with the defendants at the time the writs were in his hands, and that said plaintiff's attorney came to the office of the sheriff, and there informed him that the plaintiff had received his money on his claims in full, and directed the sheriff to return said writs, personally dictating to him the returns which they desired to be made; and that the amended returns as allowed by the court are in accordance with the actual facts, at the time known to the sheriff and to the plaintiff or his attorney.

It is a common and well-known principle of law, as well as of justice, that a return which is irregular or erroneous as to the facts may always be amended, on application to the court by the proper officer, so as to conform to the truth: *Brundred v. Egbert*, 164 Pa. 615; *Shamburg v. Noble*, 80 Pa. 158.

This, however, is subject to the limitation that the amendment of the return shall operate only against parties and persons affected with notice; and it is not too late for an officer to amend his return, even after proceedings have been commenced against him, providing justice requires it: *People v. Ames*, 35 N. Y. 482.

Lapse of time is not a bar to the allowance by the court of an amendment of a return, but it is to be considered by the court with all the other circumstances: *Peck v. Whitaker*, 103 Pa. 297.

In this case the proponents of the rules rely upon *Scott v. Seller*, 5 Watts, 235, as an authority that the court had no right to allow the amendments. That case clearly rules that an amendment may be allowed when application is made within a reasonable time, and also rules that it ought not to have been allowed under the circumstances surrounding that case, for the reason that it appeared upon the sheriff's own affidavit that he ought not at any time to have been allowed the amendment.

It does not appear from the facts developed in this case that the sheriff was guilty of any delay whatever in moving for the amendment.

The record of the case, entered to No. 129, February Term, 1900, was offered in evidence upon the argument. It appears from that record that a suit was brought before Dugan, J. P., and the summons issued Dec. 12, 1899, upon a claim for \$31.90.

The record does not set forth upon what this claim is based, nor is there anything disclosed by said record that the defendant therein, George N. Wilcox, who did not appear, could have had any notice whatever as to the basis of said claim.

From the record it appears that the statement of claim was filed Feb. 15, 1900, and that another one was filed June 21, 1900. The statement on file in the office is endorsed as having been filed June 21, 1900, and on June 25, 1900, the sheriff presented his affidavit, and was granted leave to make the amendments which are herein complained of.

This is not a case affecting subsequently accrued rights, nor the rights of innocent parties. The party complaining of the returns was a party to the actions in which the returns were made, and frankly acknowledges that the amended returns are in accordance with the facts, which facts were certainly known to him or his attorney at the time they occurred; and to say that the court cannot or ought not to permit an amendment of a return, for the sole purpose of enabling the plaintiff to recover an unjust verdict from the sheriff who made the return at his attorney's dictation, would certainly be a travesty on justice.

The rule in each case is, therefore, discharged.

From Otto Kohler, Meadville, Pa.

House, Executrix, v. Northwestern Life Assurance Co.

Policy of life insurance—Construction.

Under a clause in a certificate of membership in a mutual benefit association, by which the association undertakes "to pay to the policy-holders, devisees, or, if no will specifically bequeathing the benefits which shall be payable on account of this certificate shall appear and be brought to the knowledge of this association within sixty days after the death of the insured, then to the heirs-at-law of such insured," in the absence of a description of persons designated by the testator as those intended to take the benefits arising from the certificate, the fund goes to the next of kin and not to the residuary legatee.

Case stated in interpleader. C. P. No. 4, Phila. Co., June T., 1900, No. 103.

Frank P. Prichard and John G. Johnson, for plaintiff.

J. M. Mitcheson, for defendant.

WILSON, J., Jan. 5, 1901.—Upon a dispute arising as to who are entitled to receive moneys which the defendant admitted to be due under a certificate of membership, the sum of \$8000 was paid into court by the defendant, and this sum, less \$100 deducted for counsel fee, is the subject of the interpleader proceedings that are intended to be covered by the agreement for a case stated.

On April 29, 1885, and Sept. 15, 1891, George House, the husband of the plaintiff, applied to the defendant association, which then had the name of the Northwestern Masonic Aid Association, for membership therein. In each case, in answer to a question as to whom he desired the money to be paid in case of his death, he answered, "to my devisee." These applications, however, were both merged in another, which he made on March 22, 1892, when he applied to the same association for leave to surrender the certificates of membership granted him on those applications, and to have another certificate issued to him under article 4 of the by-laws, with the benefits payable as follows: "To the devisees under my will, or, in case of my death, to my heirs-at-law." Accordingly, a certificate of membership in the sum of \$10,000 was issued to him by the association, to which copies of the application referred to were annexed, and the certificate contained the following provision: "The Northwestern Masonic Aid Association, in consideration of the payment of the required membership fee and the representations, agreements and warranties made to it in the application of George House . . . does promise and agree to pay to his devisees, or, if no will specifically bequeathing the benefits which shall be payable on account of this certificate shall appear and be brought to the knowledge of this association within sixty days after the death of the said insured, then to the heirs-at-law of the said insured" the said sum. George House died on Jan. 22, 1900, without issue, leaving a will, whereby, after providing for payment of his debts, etc., he directed as follows: "Second. I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, to my wife, Patia S. House, absolutely."

She was also named as executrix in the will, and letters testamentary were duly issued thereon. The testator left surviving him his widow; a sister, Jessie House; a brother, Sebastian M. House, and two minor children of a deceased brother, Francis House, namely, Herbert House and Irene House, of whom Charles H. White has been appointed guardian *ad litem*. The question submitted to the court by the case stated is, "Whether the whole of said fund is payable to the said Patia S. House under the terms of said policy and will, either as devisee or executrix of the said George House, or whether the other parties to this issue are entitled to any portion of the said fund, and, if so, to what portion each party is severally entitled?"

Whatever claim any of these persons named may have must, of course, arise under the contract which was entered into between George House and the

defendant association. In each of the applications which he made for membership, he stated that he desired the amount of benefits which were to arise upon his death to be paid to his devisees, and it is contended here, on behalf of his wife, that she is entitled to take the whole fund, because she occupies a position which must be regarded as that which was described by the term "devisees." She is, no doubt, under the terms of the will, a full and absolute legatee and devisee of all the property which the testator left, and while the term "devisees" would not be scientifically appropriate to describe a person claiming a right to personal property, yet it cannot be questioned that if that were the only difficulty in the way of the plaintiff, her road would be an easier one, because we could not tolerate that a misdescription, scientifically, should defeat a right which was plainly intended to be conferred.

The principal difficulty in this case, as it presents itself to us, arises from the fact that in the contract of the Association to be found in its certificate of membership, it is provided, that the benefits payable upon the death of the insured shall be paid "to his devisees, or, if no will specifically bequeathing the benefits which shall be payable on account of this certificate shall appear . . . then to the heirs-at-law of the said insured." In a strict technical sense, it is, of course, true that these benefits could not pass under the will of the testator to his widow or anybody else by a bequest or devise, for the simple reason that they were not a part of the testator's estate and never could have become so: *Hodge's Appeal*, 8 W. N. C. 209; *Anderson's Estate*, 85 Pa. 202. All that he could do was to exercise a power of appointment, and yet it seems to us that if the certificate of membership had simply provided that the benefits should be paid to his devisees, or, in default of any, to his heirs-at-law, it would have been a rational and natural disposition to make of the case to say that the contract could fairly and should be interpreted as meaning that the benefits should be paid to the widow in her own right as a general legatee or devisee under the will. If the contract of the parties stood simply upon the direction given in the applications filed by the testator, the disposition of the benefits would have been in her favor. But the actual contract was different. Mr. House was content to take from the association an agreement which made their obligation to pay the money different from that which it would have been if the language of his application had been literally followed. He accepted from them, and the parties must now claim under, a contract which would seem to bind the association to pay the benefits only to a devisee or legatee to whom those benefits should be specifically bequeathed, and in default of such specific disposition, to the heirs-at-law of the testator.

We regret that we cannot reach some other conclusion than this, for the reason that we cannot avoid the conviction that, in point of fact, it was Mr. House's desire and intention that his wife should get the entire benefits arising from the certificate of membership; but the language of the contract seems to us to be too explicit and clear to enable this purpose, if it existed, to be effected. It seems to us that the language excludes the thought that a devisee or legatee generally named in the will can be the recipient of the benefits. If that were the proper view to take, we see no purpose to be served by the words already quoted providing that, in the absence of a specific bequest, the benefits should go to the heirs at law. The clause providing for such specific bequest must, in our opinion, restrict and limit the description of the devisees so as to confine them to a particular class, that is, of persons specially designated as those whom the testator intended should take the benefits arising from this certificate of membership. If we are right in regarding the contract which is to determine the disposition of the fund in question as actually found in the body of the certificate, and in construing the clause in the certificate in the manner already indicated,

House, Executrix, v. Northwestern Life Assurance Co.

then the conclusion necessarily results that the fund must be distributed among the heirs-at-law of the testator, who, for the purposes of this case, must be regarded as the next of kin: Hodge's Appeal, *supra*. The question is purely one of interpretation and construction and cannot be made any more clear or conclusive by amplification. We feel constrained to take the view which we have expressed, and, in accordance with the terms of the agreement for the case stated, the fund for distribution must be divided, one-half to the plaintiff, Patia S. House, in her own right, and the remaining half in three equal parts, one of which will go to Jessie House, another to Sebastian M. House, and the third, in equal parts, to the minors, Herbert House and Irene House, all of whom have been previously mentioned in this opinion.

Samuel v. American Iron and Steel Manufacturing Co.

Practice, C. P.—Service of process on corporation.

A service of summons, made by leaving a true and attested copy with an adult member of the family at the residence of the president in Philadelphia, held to be good, it appearing that the corporation did business in Philadelphia and held its directors' meetings there, although its mills or factories were located in Lebanon county.

Rule to set aside return to writ. C. P. No. 1, Phila. Co., Sept. T., 1900, No. 211. Simpson & Brown, for plaintiff; Sinkler & Heebner, for defendant.

BEITLER, J., Jan. 4, 1901.—To an *alias* writ of summons *assumpsit*, returnable the first Monday of November, 1900, the sheriff made return: "Served the American Iron and Steel Manufacturing Company by leaving, Nov. 24, 1900, a true and attested copy of the within writ at the dwelling-house of Arthur Brock, president of said company, residing at 2101 Spruce street, with an adult member of his family. So answers," &c.

Thereupon the president procured the rule now before us upon the following affidavit: "Arthur Brock, being duly sworn according to law, deposes and says as follows: My domicile or place of fixed and permanent abode is at Lebanon, Lebanon county, Pennsylvania. I am president of the American Iron and Steel Manufacturing Company, the defendant hereinabove named. The said company was duly incorporated under the laws of the State of Pennsylvania for the purpose of manufacturing iron and steel products and for other similar objects. The factories or manufacturing plants of said corporation are located at Reading, Berks county, Pennsylvania, and at Lebanon, Lebanon county, Pennsylvania, and there are no such establishments or places of business of the said corporation situate in the county of Philadelphia."

The reasons assigned why the sheriff's return of the writ should be set aside are: 1. That the domicile or fixed habitation of the president of the defendant corporation, upon whom service is averred to have been made, is not within the county of Philadelphia. 2. That the factories or manufacturing plants of the defendant corporation are located in Lebanon and Berks counties and not in the county of Philadelphia aforesaid. 3. That the Court of Common Pleas of Philadelphia county has no jurisdiction of the matter in dispute between the parties hereinabove named.

To the petition and affidavit filed by the defendant, the plaintiff made answer under oath as follows: "Frank Samuel, being duly sworn according to law, deposes and says, in answer to the rule to set aside the service in the above case, that the residence of Arthur Brock, the president of the defendant corporation, was, at the time the service of the writ was made upon him, at the northwest corner of 21st and Spruce streets, in the city of Philadelphia; and that the place of meeting of the directors of said corporation is in the city of Philadelphia,

Samuel v. American Iron and Steel Manufacturing Co.

and that they held a meeting in this city during the course of the present month."

By these pleadings, if we may so term them, we may gather the facts upon which this rule must be determined, for no depositions have been taken. Briefly stated, they are: That at the time of service the president's residence was at the place the writ was served; that later, when this affidavit was filed, it was at Lebanon, Lebanon county; that the factories or manufacturing plants of the company defendant are at Reading, in Berks county, and at Lebanon, in Lebanon county, and "there are no such establishments or places of business of said corporation situate in the county of Philadelphia," but that the "place of meeting of the directors of said corporation is in the city of Philadelphia, and that they held a meeting in this city during the course of the present month" (December). The affidavit to the petition for the rule avoids stating where the company's office is.

The Acts of Assembly relating to service of writs against corporations are the following:

The Act of March 22, 1817, 6 Sm. Laws, 438, which enacts: "Suits may be brought against corporations by their corporate names, before any court or magistrate of competent jurisdiction, by summons, which may be served on the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation."

The Act of June 13, 1836, § 41, P. L. 568, which enacts: "Every corporation, aggregate or sole, shall be amenable to answer upon a writ of summons as aforesaid, and in the case of a corporation aggregate, except counties and townships, service thereof shall be deemed sufficient if made upon the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation, in the manner hereinbefore provided."

The Act of March 17, 1856, § 1, P. L. 388, which provides, that when an action is begun in any county in which the property of the corporation is located, if the president, treasurer, secretary or chief clerk do not reside in such county or cannot be found, process may be served on a director thereof.

It is quite evident, from the petition for the rule and the answer, that the defendant corporation, while it has its manufacturing plants in Lebanon and Berks counties, has its office and headquarters in Philadelphia. It is just like the Cambria Steel Company, the Pennsylvania Steel Company, the Susquehanna Iron Company and many others of which we all have general knowledge. These several companies have their mills and factories outside of Philadelphia. Some of them have several factories or furnaces or mills in several counties, and one, at least, has a large plant in another State. Yet they do business in Philadelphia. They are regarded as Philadelphia corporations. Here their directors meet; here their offices are located; here one must go to have stock transferred. Why should one having a claim against the Cambria Iron Company or the Susquehanna Iron Company, based on contract, be compelled to go to a county where he can find a mill, furnace or factory of the company when he can make service here?

We cannot believe that *Bailey v. The Williamsport and North Branch R. R. Co.*, 174 Pa. 115, was meant to go so far. There the company sued was a railroad company. It had the right to construct a railroad between fixed *termini*, and the road was entirely in Lycoming and Sullivan counties. The treasurer of the company was served at a hotel in this county, while temporarily stopping here. The action was in trespass. What the Supreme Court said in that case of the hardship of compelling the company to bring its witnesses several hundred miles to defend the suit has no application to the case before us. In fact, had this suit been brought in Lebanon county, the defendant company might have

10 DIST. R.

Samuel v. American Iron and Steel Manufacturing Co.

made just complaint that it was compelled to bring its books and officers from the county where the directors meet to another, merely because it has a "factory or manufacturing plant there."

Believing that the suit was properly brought in this county, the rule is discharged.

Harrison's Estate.

Testamentary law—Gifts to classes—Lapse.

A gift to a class, the members of which are not individuated, is simply and necessarily a gift to the persons then in existence who form the class. It cannot by any process of reasoning be made to include persons who had ceased to exist when the class was defined.

Act of July 12, 1897.

The Act of July 12, 1897, P. L. 256, is confined in its operation to cases of death of a member of the class to whom the gift is made after the date of the will in the lifetime of the testator.

Act of July 12, 1897—Republication of will by codicil.

The republication of a will executed before the passage of the Act of July 12, 1897, P. L. 256, by a codicil executed after that date, does not make the will speak as of the date of the codicil so as to bring it within the operation of the Act.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1898, No. 173.

E. G. Hamersly, for accountant.

Ira Jewell Williams and *James F. Hagen*, for exceptants.

Richard C. Dale and *William M. Stewart*, contra.

HANNA, P. J., Jan. 5, 1901.—Testatrix by her will, executed Oct. 3, 1896, gave the residue of her estate to the accountant in trust to pay out of the income certain annuities, the surplus income, if any, to be paid to "the children of my sisters in equal shares." The bequest is therefore to a class, and only those children of her sisters living at the death of testatrix will be entitled to take as members of the class: *Gross's Estate*, 10 Pa. 360.

And, in *Guenther's Appeal*, 4 W. N. C. 41, it was held that, under a devise "to my brothers and sisters, share and share alike," a child of his sister who was dead at the date of the will takes nothing. And the Act of May 6, 1844, P. L. 565, did not apply to the case of one of a class of legatees whose interest does not vest until the death of the testator. The exceptants here are not children of sisters of testatrix, but grandchildren of a niece, who died prior to the execution of the will and to the death of testatrix. It is conceded they have no status either under the will or the Act of May 6, 1844, to participate in the fund. But it is contended on their behalf that by the execution by testatrix of the codicil dated Aug. 14, 1897, she republished her will as of that date, and this being subsequent to the Act of July 12, 1897, P. L. 256, which provides that "no devise or legacy hereafter made in favor of . . . the children of a brother or sister of any testator whether such . . . children of brothers or sisters be designated by name as a class, such testator not leaving any lineal descendants, shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise," they are, therefore, entitled to take by substitution the same share their mother would have taken had she survived the testatrix, and thus being included within the terms of said Act. We are willing to concede much that is urged by exceptant's counsel with great learning and ability as to the legal effect of the execution of a codicil, and all that is written in the will must be taken as if actually

Harrison's Estate.

therein rewritten, yet we cannot go further than to say that while a testator thereby re-adopts and re-declares the contents of the will to be his testamentary intentions, yet we think it is to have no greater effect than to express his reaffirmance and re-adoption of what he had previously declared. It is not to make a new will, but simply to confirm the old, and to declare, in 1897, that the estate shall be disposed of as was directed in 1896. We cannot imagine that any greater effect can be given to a mere formal codicil bequeathing additional legacies, or, perhaps, appointing new executors. In fact, cases arise where the will and codicil, although in legal contemplation one instrument, instead of being treated as one instrument are considered and construed separately, as distinct testamentary papers, in order to give full effect to the intention of testator. In this instance, the will and codicils are to be treated as a single instrument, from which we gather the intention of testatrix to be that the excess of income is to be divided among the children of her sisters living at her death. And, as stated by the auditing judge, "A gift to a class—the members of which are not individuated—is simply and necessarily a gift to the persons then in existence who form the class. It cannot by any process of reasoning be made to include persons who had ceased to exist when the class was defined. The Act of 1897 is confined in its operation to cases of death of a member of the class to whom the gift is made after the date of the will in the lifetime of the testator." As we are of opinion with him that the question is not affected by the Acts of 1844 and 1897, nor by the execution of the codicil subsequent to the date of the will, but that the intention of testatrix is to be carried out according to the provisions of the will and the law as it then stood, we must dismiss the exceptions and confirm the adjudication.

Powell's Estate.

Legacies charged on land—Blending of real and personal estate.

Where a legacy is bequeathed payable out of the entire estate, real and personal, as a fund, there is such a blending of the realty and personalty as constitutes the legacy a charge upon the land.

Petition to charge legacies on land. O. C. Phila. Co., Oct. T., 1900, No. 263.

Harry S. Hopper and John Sparhawk, Jr., for petitioners.

F. S. Drake and R. H. McGrath, for respondents.

HANNA, P. J., Jan. 5, 1901.—There can be no doubt the legacies are a charge upon the land and, in the absence of sufficient personal estate, payable thereout. Testatrix says in her will "I give" them "out of my estate," thus making her entire estate, real and personal, a fund out of which they are to be paid. And as further indicating her intention that the legacies are entitled to priority of payment, even if absorbing her entire estate, except specific gifts to her daughter, she says "and the balance to be equally divided betwixt" her three children named. Thus making them residuary legatees. There is, consequently, such a blending of the real and personal estate in a common fund for payment of the legacies as will constitute the latter a charge upon the land: Bennett's Estate, 148 Pa. 139; Markley's Estate, 148 Pa. 538; Lloyd's Estate, 174 Pa. 184, and many other cases which might be cited to the same effect.

The petition is therefore granted. And counsel will prepare the proper decree charging such legacies upon the real estate described in the petition, and further ordering that if said legacies, with interest thereon from Oct. 2, 1896, be not paid by the residuary legatees and devisees within twenty days from service of said order, a writ of *levari facias* will issue for the enforcement of the decree: *Hart v. Homiller's Executor*, 23 Pa. 39.

10 DIST. R.

Shafer v. Marsh, Tax Collector.

Equity jurisdiction—Relief for irregularities of assessment, &c.

The commissioners of the county have jurisdiction to pass upon the question of residence and liability for taxation.

By Act of April 15, 1834, P. L. 511, ample provision is made for appeal for all persons who may apply for redress and relief from their assessment down to any time previous to the payment of the tax.

Bill in equity, answer and replication. C. P. Monroe Co., Dec. T., 1898, No. 11.

Plaintiff representing himself.

D. S. Lee, J. B. Williams and Harvey Huffman, for defendant.

CRAIG, P. J., Dec. 5, 1898.—This bill was filed to restrain the tax collector of the borough or Stroudsburg from collecting of the plaintiff certain State, county, borough, poor, and school taxes for the year 1898. The plaintiff claims he has not been a resident of this State since 1893; that since 1893 he has resided in New York City; that he never was a resident of the borough of Stroudsburg; and that, therefore, the taxes above mentioned have been wrongfully and unlawfully assessed and levied against him. The actual amount of taxes demanded of the plaintiff is \$19.80. On the filing of the bill, a preliminary injunction was granted on Oct. 5, 1898, returnable to Nov. 4, 1898. On Oct. 19, 1898, the defendant filed his answer, and on Oct. 20 following, the plaintiff filed his replication, joining issue on the matters alleged in the answer. The cause came on for hearing on Nov. 12, 1898, when the testimony was taken in open court and the argument had. The question now is on the making of the preliminary injunction permanent.

Findings of fact.

The plaintiff was born in Stroud township, Monroe county, Pennsylvania, in 1843. He resided there with his parents till 1867, when he went to the State of Kansas and resided there until 1887. In September, 1887, he returned to Stroud township aforesaid, and purchased the homestead of his parents and resided thereon until 1893, when he sold it. During this residence on the homestead he paid taxes in Stroud township. He claims to have gone then to New York City, and to have taken up his residence there, and to have resided there ever since. In October, 1895, he left New York City, and took a trip around the world, and returned to New York City in the spring of 1896. In the latter part of April, or May 1, 1896, he came to Stroudsburg, and has since been there the greater part of his time. During this time, the plaintiff has been in no business, but has been dealing in bonds and selling money in New York City and in Stroudsburg. In Stroudsburg, also, he has been looking after and transacting some business for his sister. The plaintiff never voted in New York City, nor did he ever pay any taxes there; nor has he voted in Stroudsburg nor paid any taxes there. The plaintiff owns some judgments and a mortgage in Monroe county, aggregating about \$3700. Since May, 1896, the plaintiff has been boarding by the week at the Indian Queen Hotel in Stroudsburg for the greater part of the time. During the year 1898, the plaintiff has been living almost continuously in the borough of Stroudsburg, and, during the same year, his name does not appear in the city directory of New York. Practically, the plaintiff has lived in the borough of Stroudsburg almost continuously from the spring of 1896 to the present time. Starting with the fact that the plaintiff gave up his residence in Stroud township, Monroe county, in 1893, we have nothing in the testimony to corroborate the plaintiff's contention that he resided in the city of New York from that time until October 1895, when he started on his trip around the world.

In the spring of 1896, he returned to this country, and came to Stroudsburg, where he has lived (excepting occasional trips) continuously to the present time. The testimony on the question of the residence of the plaintiff is not very satisfactory, nor very conclusive. We must consider it as we have it. But the affirmative was with the plaintiff to show clearly that his residence was not in the borough of Stroudsburg during the year 1898. In the bill, he avers that his residence is in the State of New York, and he so swears in his testimony, and gives his reasons therefor. This is all the proof we have on the subject on the part of the plaintiff. On the part of the defendant, it is denied in the answer that the plaintiff is a citizen and resident of the State of New York, and it is averred that he is and has been a resident of the borough of Stroudsburg, Monroe county, for the greater part, if not the whole, of the year 1898. This denial and averment of the defendant is corroborated by a number of circumstances brought out in the testimony, viz.: That the plaintiff has lived at the Indian Queen Hotel, in Stroudsburg, nearly all the time since 1896; that he has been, whilst there, attending to his own and his sister's business during all this time; that he has investments in Monroe county which he is looking after; that he was assessed for taxes in the borough of Stroudsburg for the year 1898, as appears from exhibits "A" and "B;" that he is rated with taxes for the year 1898 in the defendant's duplicate; and that his name does not appear to be inscribed in the city directory of New York City. Under this condition of the proof, we think the weight of the testimony is that the plaintiff's residence, in 1898, was in the borough of Stroudsburg, Monroe county; and we so find as a fact.

It further appears in evidence, and we so find as a fact, that the assessor of the borough of Stroudsburg, Jerome S. Williams, assessed the plaintiff as a taxpayer and resident of the borough for the year 1898, as appears by the notices marked exhibits "A" and "B." If there were any wrongs or illegalities, or irregularities, in the plaintiff's assessment on the day fixed for appeal, it was plaintiff's duty to seek correction in that tribunal. He knew that the commissioners of the county had the jurisdiction under the law to pass upon the question of his residence and his liability to taxation, and to that body he was bound to go for redress. The law gave him the right of appeal, and it was through that channel that his relief must be sought.

As to the amount of taxes claimed of the plaintiff, the defendant concedes that it is \$19.80, included in which there are no school taxes except a *per capita* tax of one dollar. We are not satisfied affirmatively and satisfactorily that these taxes were wrongfully and unlawfully assessed. We, therefore, find as a fact that the amount of \$19.80, taxes for 1898, is due and owing under the law from the plaintiff to the defendant.

Conclusions of law.

In *Beach on Injunctions*, § 1190, the law touching the collection of taxes is stated thus: "The general rule is, that the collection of taxes will not be arrested by injunction. It has its reason in public policy, which cannot lend its sanction to any remedial proceeding which might clog the machinery of civil administration. If the tax complained of will not amount to more than a trespass, the complainant will be remitted to his remedy at law."

Again, in the same book, § 1245, it is said: "One who seeks an injunction against the collection of taxes, on the ground that he is not a resident of the district wherein they are assessed, must clearly show the fact of non-residence."

So it is also laid down, in *Cooley on Taxation* (1st ed.), 540: "A tax will not be restrained on the ground merely that it is irregular or erroneous. Errors in the assessment do not render the tax void, nor, as a general rule, do they constitute any reason whatever against its being strictly enforced. But, however that may

10 DIST. R.

Shafer v. Marsh, Tax Collector.

any particular case, the law has provided remedies for all such mere irregularities and errors as do not go to the foundation of the tax, and parties complaining must be confined to these."

In Bispham's Equity (5th ed.), § 424, page 538, the author says: "Tax officers are frequently restrained from levying and collecting taxes, and the jurisdiction of chancery on this point is now undoubted. There are, however, limits to this jurisdiction, and it has been held by the Federal courts that an injunction bill to restrain the collection of a tax cannot be maintained on the sole ground of the illegality of the tax, but must present a case which falls within some recognized head of equity."

By the 2nd section of the Act of April 15, 1834, P. L. 511, the assessors are to make out and return to the commissioners a just and perfect list of the names of all the taxable persons residing within their wards, etc.; and by the 4th section of the same Act, after the receipt of their precepts, they are to take an account of the names and surnames of all the taxable inhabitants within their respective wards, &c.; and also, *inter alia*, all single freemen above the age of twenty-one years who shall not follow any occupation or callings; and, by the 11th section of the same Act, the assessor is to note all freemen who have arrived at the age of twenty-one years since the last triennial assessment, and all others who have since that time come to inhabit in such ward, &c. By the same Act, ample provision is made for appeal for all persons who may apply for redress and relief from their assessment, down to any time previous to the payment of the tax.

We have already found as a fact that the plaintiff was a resident of the borough of Stroudsburg during the year 1898. The place where a person lives is presumed to be the place of domicile until the facts establish the contrary: Bouvier, vol. 1, page 600; Am. & Eng. Ency. of Law, vol. 5, pages 875 and 870. Under the testimony, we are led to the conclusion that the facts preponderate to the finding, that the plaintiff was a taxable inhabitant of the borough of Stroudsburg during the year 1898: *Com. v. Smyth*, 1 Bro. 113; *Barnett's Case*, 1 Dallas, 153; *Lyle v. Forman*, 1 Dallas, 480; *Respublica v. Steele*, 2 Dallas, 92; *Com. v. Ravenel*, 21 Howard, 103; *Finley v. City*, 32 Pa. 381. We, therefore, hold that the plaintiff was a taxable inhabitant residing in the borough of Stroudsburg during the year 1898, and liable to the assessment and payment of taxes therein.

The plaintiff, however, contends that the taxes which the defendant demands of him were wrongfully and unlawfully assessed and levied. If so, this court can afford him no remedy by injunction. The remedy belongs to another tribunal, as already stated. The commissioners of Monroe county had, under the law, a general jurisdiction and power to assess and levy taxes on all the taxable inhabitants of the borough of Stroudsburg, and, inasmuch as we have found that the plaintiff was actually living in the borough of Stroudsburg when the assessment was made, and is now living there, the assessor was clothed with the jurisdiction to inquire and determine whether he was a taxable or not; hence, the plaintiff's remedy for wrongful or unlawful assessment was by appeal.

Where a general power to assess exists, the remedy for illegal taxation is by appeal, and, if none be given, this court cannot reverse the judgment of the taxing officers: *Moore v. Taylor*, 147 Pa. 481; *Black v. Boyd*, 155 Pa. 163; *Van Nort's Appeal*, 121 Pa. 118; *Hewitt's Appeal*, 88 Pa. 55; *Carlisle School District v. Hepburn*, 79 Pa. 159; *Stewart v. Maple*, 70 Pa. 221; *Clinton School District's Appeal*, 53 Pa. 315; *Hughes v. Kline*, 30 Pa. 227; *Wharton v. Birmingham*, 37 Pa. 371.

In addition to what has already been said, there is still another controlling reason against the granting of this injunction. The plaintiff resists taxation on

Shafer v. Marsh, Tax Collector.

the ground that he is a resident of the State of New York, and never has been a resident of the borough of Stroudsburg. This is the gravamen of his contention. The affirmative of the complaint lies with the plaintiff. The presumption of the law is against him. Before he can invoke the strong arm of the court by injunction, he must make out a clear case of right, and one where no doubt exists. Even where the proof as to the plaintiff's right is so equally balanced as to leave it in doubt, the injunction should be refused: *Minnig's Appeal*, 82 Pa. 373; *City of Philadelphia's Appeal*, 78 Pa. 33; *Reno v. Moss*, 120 Pa. 49; *Cooper v. Railroad Co.*, 3 Phila. 262; *Baxter v. Buchanan*, 7 Phila. 315; *Miller v. Preston*, 38 Pa. 309.

According to our finding, the plaintiff was a taxable inhabitant residing in the borough of Stroudsburg during the year 1898; but, even if we are in doubt as to this, under the proofs, an injunction will not lie. A doubt as to the plaintiff's right is fatal to an injunction.

Injunction dissolved, at the cost of the plaintiff.

From Cicero Gearhart, Stroudsburg, Pa.

Utter, to use of Franklin Fire Insurance Company, v. Lewis.

Subrogation of insurer of mortgagee—Right of action against mortgagor's vendee.

Where a mortgagor procured insurance for the benefit of the mortgagee and subsequently sold the property to a third party, without the assent of the insurance company, whereby the policy, as to the mortgagor, was forfeited, but by a special clause remained good as to the mortgagee, the company, having paid the policy to the mortgagee, is entitled to be subrogated to his rights and enforce the mortgage against the mortgagor.

Exceptions to report of referee. C. P. Lackawanna Co., March T., 1898, No. 646.

The action was *sci. fa. sur mortgage*. Plea, payment, and payment with leave, &c. Referred to Hon. John P. Kelley, from whose report the following facts appear: Defendant mortgaged her property to Utter to secure payment of \$700, and had the buildings insured in above-named company in the sum of \$900, with standard mortgage clause for benefit of Utter attached. Subsequently, defendant, without notice to the insurance company, sold and conveyed the premises to John and Johanna Parfitt. Afterwards a fire occurred. Utter made claim under the policy, and was paid \$228 by the company, and he delivered to the company an assignment of the mortgage to the amount of \$228, which was duly recorded. The *sci. fa. sur mortgage* issued to recover full amount of mortgage. Affidavit of defence by Mary E. Lewis admitted all but the \$228. Plaintiff took judgment for amount admitted and proceeded for balance. The referee found as conclusions of law that Mary E. Lewis was not entitled to credit for the \$228, and directed judgment for the plaintiff accordingly. Then these exceptions were taken.

Thos. F. Wells, for plaintiff; *F. W. Flietz* and *J. W. Carpenter*, for defendant.

ARCHBALD, P. J., March 26, 1900.—The policy which the defendant procured for the benefit of the mortgagee on the property mortgaged provided that any change in the title other than by the death of the insured should avoid the insurance, unless assented to by the company by agreement endorsed on the policy. As the result of this, when the defendant sold and conveyed the property, as she did in January, 1896, to John and Johanna Parfitt, the policy, as to her, was annulled, and she had no further claim upon the company by reason of it.

10 DIST. R.

Utter, to use of Franklin Fire Insurance Company, v. Lewis.

Not so, however, the mortgagee, Utter. By the mortgage clause attached to the policy any loss under it was made payable to him as his interest should appear, with the further provision—which, by the way, is not reported by the referee—that as to him the insurance should not be invalidated by any act or neglect of the mortgagor or owner. The effect of this was to make the company liable to him for the loss which subsequently occurred, while it was entirely absolved, as we have seen, from any obligation, so far as Mrs. Lewis was concerned, by reason of her previous conveyance to another party. When, then, the company paid the loss, as it was bound to, to the plaintiff, Utter, it was entitled to subrogation as provided by still another clause of the policy, if not on the general principles of equity, and with this payment the defendant has nothing whatever to do. While she took out the policy in the beginning and paid the premium, at the time of the fire she was the same as an utter stranger to the transaction, her interest by her own act having been forfeited. Had the mortgagee insured on his own account without the intervention of the defendant, there could be no question as to his right to recover every dollar of the mortgage without regard to anything received on the policy, and the case as it stands is the same as though he had; and his rights in a suit upon the mortgage, whatever they are, have passed to the insurance company, who paid him and took an assignment of it. These conclusions are abundantly sustained by the authorities: *Springfield Insurance Co. v. Allen*, 43 N. Y. 389; *Ulster County Savings Institution v. Leake*, 73 N. Y. 161; *Norwich Fire Insurance Co. v. Boomer*, 52 Ill. 442; *Allen v. Watertown Insurance Co.*, 132 Mass. 480; and the referee was right in following them.

The previous opinion expressed by us in this case was based upon the facts as stated in the affidavit of defence, which are materially different, and therefore has no bearing upon the present disposition of it.

The exceptions are overruled, and the report of the referee is confirmed.

From William A. Wilcox, Scranton, Pa.

Commonwealth v. Roenick.

Boroughs—Peddlers' and hawkers' licenses—Butcher not subject to.

A butcher whose principal business is selling beef, slaughtered by himself, at his shop and also from his wagon to his customers and others in a borough, and also in the summer months retailing with his other meats pork which he purchases from others, is neither a hawker nor a peddler, and therefore is not subject to the provisions of a borough ordinance prohibiting hawking and peddling within the borough, whether from house to house or from wagons without a license.

Appeal from summary conviction. Q. S. Allegheny Co., Sept. Sess., 1900, No. 5.

J. Frank Peffer, for appellant; *Nelson MacVicar*, for appellee.

SHAFER, J., Dec. 8, 1900.—The defendant was arrested on a warrant and tried and was convicted of hawking and peddling meats in the borough of Tarentum without a license. The defendant's petition for appeal sets out an ordinance prohibiting hawking or peddling within the borough, whether from house to house or from wagons without a license, and fixes the price of a butcher's license at 65 cents per day, \$5 per month and \$18 per year.

The parties have filed a statement of facts agreed on, from which it appears that the defendant is a butcher, having his slaughter-house outside the borough and a shop there, and selling meats from his wagon to his customers and others in the borough; that all the beef he sells is of his own killing, that being his principal business, but that in the summer months he sells with his other meats

pork which he purchases, and at the time complained of he sold pork purchased of Armour & Co. with his other meats and that he had no license. We are not informed as to the incorporation of the borough of Tarentum, and for that reason and from the argument of its counsel may assume that it is under the general borough law of 1851. The provision of that law under which the ordinance is made is the 11th paragraph of the 2nd section, which empowers the borough to regulate the hawking and peddling of market produce and other articles.

The only question to be decided is whether or not the business of the defendant as described can be properly classed as hawking or peddling. A hawker is one who sells goods by outcry through the streets. This defendant did not do. What is meant by peddling is more difficult to state with precision. In common acceptance, a peddler is one who carries about on his person or in a vehicle small articles which he endeavors to sell by solicitation of persons in the street or from house to house. His business is subjected to police regulation, because of the inconvenience and annoyance inflicted by it, because he is often or usually a transient with no fixed place of business, who seeks customers by invading their homes, and by the time he is wanted to answer for his representation and engagements is out of sight and out of reach of process: *Com. v. Gardner*, 133 Pa. 289.

If the hawking and peddling which the borough is empowered to regulate is of the kind just described, there can be no doubt that the facts presented do not bring the business of the defendant within the terms of the Act.

There are a number of cases in which farmers and others selling their own produce have been held exempt from the operation of the Act, apparently for the reason that the articles sold by them were of their own raising—and it is argued, therefore, here, that as defendant purchased cattle for slaughter and sells them only in changed form, and especially as he sold sometimes with it pork purchased of Armour & Co., which counsel apparently expects the court to take judicial notice of as being already slaughtered and ready for sale, he must be a peddler.

We do not apprehend that farmers are exempt merely because they raise what they sell, but because, being farmers and raising products, they may sell them even from house to house and that this is not peddling, but is incidental to their business as farmers: *Com. v. Gardner, supra*.

The business of a butcher is a well-known, distinct and ancient trade, and a well-known part of it is the purchasing and delivering from house to house of meats, just as the milkman and the baker furnish their products, and this, instead of being an inconvenience or annoyance, is a great convenience, and in many places a necessity.

We think it cannot be fairly said that one whose principal business is killing cattle, as a butcher, and selling at a shop and also delivering meats from a wagon, and incidentally selling from the wagon to those who come to it to purchase, is in any sense a peddler.

The ordinance itself appears to make the distinction, for it prescribes license fees for a "single-foot peddler," and for a wagon with one horse, and a wagon with two horses, and then proceeds to fix very much lower fees for milkmen, butchers, etc., indicating that a butcher is not looked upon as a wagon peddler. Nothing was said upon the argument as to the summary mode adopted for the recovery of the penalty, and we say nothing about that, as the parties seem to desire to raise only the question above discussed.

The judgment of the magistrate is reversed, and restitution of the fine and costs paid is avoided, the prosecutor and the defendant each to pay one-half of the costs, including costs of appeal.

From Edwin L. Mattern, Pittsburgh, Pa.

Goldman v. Teitlebaum.

Magistrates' courts—Service of summons—Return.

A return by a constable that he has served defendant by leaving a copy of the summons at his dwelling-house with an adult member of the family, is sufficient; the name of the person with whom the summons was left need not be stated in the return.

Magistrates' courts—Service of summons—Computation of time—When summons should be returnable.

In computing the five days between the date of the summons and the return-day, the first day is to be excluded from the count.

Act of March 20, 1810—Void judgment—Certiorari after twenty days.

The 21st section of the Act of March 20, 1810, 5 Sm. Laws, 161, which directs that no judgment of a justice or magistrate shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment was rendered, and served within five days thereafter, does not apply to cases where the justice or magistrate has no jurisdiction either of the parties or of the subject-matter, and he has no jurisdiction of the former when they are not legally summoned.

Hence, where the summons was issued March 10, 1900, returnable March 15, and plaintiff appeared but defendant did not, although served, and judgment was entered for plaintiff, it was held that the magistrate had no jurisdiction over defendant, because not legally summoned, and the judgment was set aside, although twenty days had elapsed between the entry of the judgment and the issuing of the *certiorari*.

Certiorari to proceedings of magistrate. C. P. No. 4, Phila. Co., June T., 1900, No. 14.

G. J. Dengler, for plaintiff; *W. R. Murphy*, for defendant.

WILLSON, J., Jan. 5, 1901.—The summons in this case was issued by the magistrate on March 10, 1900, and made returnable on March 15, between the hours of 9 and 10 o'clock in the morning. The constable made return on March 10 that he had served the defendant by leaving a copy of the summons at the dwelling-house of the defendant, with an adult member of the family. On March 15, the date at which the summons was made returnable, the plaintiff appeared. The defendant did not appear. The magistrate heard the case and entered judgment against the defendant upon the same day. On April 11 execution was issued, which was stayed by the writ of *certiorari*.

Two objections are made to the proceedings which have thus been briefly reviewed. One of them is that the name of the member of the family with whom the summons was left should have been stated in the return. We know of no authority or provision in the statute which requires any such information to be given in the return, and we dismiss this objection from further consideration. The other objection is more serious. It is claimed that the summons was made returnable at least a day earlier than the law allowed, and that therefore the hearing which was had by the magistrate was without authority, and that the judgment entered by him is void.

The Act of March 20, 1810, 5 Sm. Laws, 161, provides, in the second section, that the summons may command the defendant to appear before the justice "on a certain day therein to be expressed, not more than eight nor less than five days after the date of the summons." It was decided in the case of *Barber v. Chandler*, 17 Pa. 48, that, in counting the five days referred to, the day on which the summons issued should be included. This decision, however, was in effect overruled by the Supreme Court in the case of *Cromelien v. Brink*, 29 Pa. 522. It is true that the latter case did not relate to the computation of time within which a magistrate's summons might be made returnable, but it fully covered the principle which must be applied in all such cases. The former case introduced a revolutionary and irregular feature into the application of the principle of the computation of time, and the ruling in the other case was intended to re-establish the regularity and uniformity of the practice. The rule that, in

Goldman v. Teitlebaum.

computing time within which something may be done which is allowed to be done within a certain number of days from the doing of another act, the day on which the act was done from which the computation is to be made shall be excluded in the count, is one which is now so well established and so uniform in its application that we consider it as necessarily the rule to be applied in this case, and we must therefore hold that the summons issued by the magistrate was made returnable at least one day too soon. It would therefore follow that the proceedings before the magistrate must be declared to be null and void, unless the *certiorari* was taken too late, under the provisions of the 21st section of the Act of March 20, 1810, which directs that no judgment of a justice or magistrate shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment was rendered and served within five days thereafter.

We think, however, that this case falls within the spirit of the doctrine laid down in *Lacock v. White*, 19 Pa. 495, wherein it was stated as follows: "The twenty days limitation does not apply to cases in which the justice has no jurisdiction either of the parties or the subject-matter, and he has no jurisdiction of the former where they are not legally summoned."

In the case before us the magistrate had no jurisdiction over the defendant because he was not legally summoned. The defendant did not appear before the magistrate, and therefore cannot in any sense be regarded as having waived the insufficiency of the time between the issuing and the return of the summons.

The judgment of the magistrate must therefore be reversed and set aside.

Zablocki v. Delaware, Lackawanna and Western Railroad Co.

Corporations—Railroad—Freight agent—Serving summons on—Setting same aside—Practice, C. P.

Service upon a domestic corporation cannot be had by serving the traveling freight agent at his office, which is outside of the county where the trespass occurred or the corporate property situated.

Rule to set aside service of summons in trespass. C. P. No. 3, Phila. Co., Sept. T., 1900, No. 158.

This was a rule to set aside the service of a summons in trespass, issued in Philadelphia county, against the Delaware, Lackawanna and Western Railroad Company. The defendant's petition averred that it was a domestic corporation, having no portion of its road in the county of Philadelphia, and that its executive officers resided in the State of New York, and its principal office in the State of Pennsylvania was at Scranton, Pennsylvania; that the cause of action arose in Monroe county, Pennsylvania.

Plaintiff's answer averred that service was made on one Snively, who had charge of the office of the corporation at Seventh and Chestnut streets, Philadelphia; that the sign upon the said office is that of the Delaware, Lackawanna and Western Railroad Company, and that it is the headquarters of the corporation in the State of Pennsylvania.

The sheriff's return was: "Served the Delaware, Lackawanna and Western Railroad Company by giving, Sept. 28, 1900, a true and attested copy of the within writ to F. E. Snively, the clerk of Lawrence E. Snively, who is the traveling freight agent of the said Delaware, Lackawanna and Western Railroad Company, defendant, and making known to him the contents thereof."

Francis S. Laws, for rule.—The defendant being a domestic corporation, service must be made in accordance with the Act of June 13, 1836, § 42, P. L. 568, upon either the president or other principal officer, or on the chief cashier,
10 DIST. R.

Zablocki v. Delaware, Lackawanna and Western Railroad Co.

treasurer, secretary or chief clerk of such corporation, and upon a writ issued in a county in which the corporation either has property, or in the county where the trespass occurred. A traveling freight agent is not within the designated officers upon whom service can be made: *Dale v. Blue Mountain Manuf. Co.*, 167 Pa. 402; *Johnson v. Carbon County Electric Ry. Co.*, 18 Pa. C. C. Reps. 479; *Walsh v. Lehigh Valley R. R. Co.*, 1 Lack. Jurist, 173.

Julius C. Levi, contra, relied upon *Crawford v. The Cunard Steamship Co.*, 8 W. N. C. 567; *Nat. Bank of Republic v. N. Y.*, etc., R. R. Co., 8 W. N. C. 252; *Blakeslee Manuf. Co. v. Hilton*, 5 Pa. Superior Ct. 184; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. 12.

PER CURIAM, Jan. 7, 1901.—Rule absolute.

Brock's Estate.

Statute of limitations—Waiver—Acknowledgment—Sufficiency of, to relieve claim from bar.

To relieve a claim from the bar of the statute of limitations "there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained and an unequivocal promise to pay."

The acknowledgment or admission must be a clear and unambiguous recognition of an existing debt, and so distinct an expression as to preclude hesitation as to the debtor's meaning as to the particular debt to which it applied.

Hence, a claim on a promissory note, drawn by testatrix to her son (claimant), is not relieved from the bar of the statute by a paper executed by her within six years, wherein she recited that she had assigned to her said son a certain mortgage for \$1000, to be used by him as collateral for a loan, which was to be returned to her at his convenience "in the future, less any claims he may have against me in form of promissory notes or open book accounts," since such recital contains no specific acknowledgment of an existing debt.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 173.

Carroll R. Williams, for exceptant; *H. S. P. Nichols*, contra.

FERGUSON, J., Jan. 5, 1901.—In this case a claim was presented by the accountant, a son of the testatrix, upon a note dated March 10, 1890. The note was undoubtedly barred by the statute of limitations, but it was alleged that new life had been infused into it by a certain paper executed by the testatrix on Oct. 5, 1896, wherein she recited that she had assigned to her said son a certain mortgage for \$1000, to be used by him as collateral for a loan, which it or its equivalent was to be returned to her at his convenience "in the future, less any claims he may have against me in form of promissory notes or open book accounts."

This was not an acknowledgment that he then had any claim against her. It referred to a time in the future when they were to have a settlement, when the mortgage or its equivalent was to be returned, less any claim upon notes or book account that he might then have. "It is settled that the acknowledgment or admission must be a clear and unambiguous recognition of an existing debt, and so distinct an expression as to preclude hesitation as to the debtor's meaning as to the particular debt to which it applied." *Wesner v. Stein*, 97 Pa. 328. In this case the paper relied upon does not refer to any existing debt, whether upon note, book account or otherwise. To relieve a claim from the bar of the statute of limitations "there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained and an unequivocal promise to pay." *Miller v. Bachore*, 83 Pa. 356. We think the auditing judge was correct in rejecting this claim. The exceptions are dismissed.

Sheasley v. Condryn.

Bailment—Opening judgment confessed under lease of chattel.

A judgment entered under a warrant of attorney contained in a lease of a chattel, which, on its face, is a bailment and not a conditional sale, will not be opened when neither fraud, accident nor mistake is shown as a basis for relief.

Bailment—Repossessing leased chattel and recovery of rent—Concurrent remedies.

A provision for collection of rent in arrear at the time of repossessing the leased chattel will be enforced. *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. 222, *Wheeling v. Phillips*, 10 Pa. Superior Ct. 634, followed.

Rule to open judgment and let defendant into a defence. *C. P. Venango Co.*, April T., 1899, No. 123.

It appears from the record that judgment was confessed under a warrant of attorney contained in a lease for a piano for \$296.32, being the amount of rental in arrears, with ten per cent. attorney's commission. The agreement, which was in writing, was as follows:

MEMORANDUM OF AGREEMENT, made this 17th day of April, 1896, between Jacob Sheasley, of Franklin, Pa., party of the first part, and Mrs. Mollie and Jerry Condryn, 5½ Pearl Avenue, Oil City, Pa., party of the second part, witnesseth: That the said first party does hereby deliver to the second party, on lease or hire, on the terms and conditions hereinafter mentioned, one style 18, Schubert piano, numbered 15,083, valued at \$375, to have and to hold the same for and during the term of thirty months from date. For the use and hire of which the said second party hereby agrees to pay to the said Jacob Sheasley, at Franklin, Pa., the sum of one square piano, \$100, on the execution of this agreement, and \$5 per month for three months and \$10 on the 17th day of every month thereafter; and the second party also covenants that he will deliver the said piano to first party at any time he makes default in any of the above payments, or at the end of the said term, in as good condition as the same now is, excepting only reasonable wear and tear; that he will not remove the said piano from the above-described residence, where he now lives, nor in any way part with the possession or custody of the same, without the written consent of first party.

In case default be made by the second party in the payment of any one of the above-stated rentals or monthly sums, on the days and places above set apart for the payment of the same, then first party or assigns shall be at liberty at any time afterwards, to repossess himself of the same piano without any notice or proceedings at law, second party hereby waiving any action for trespass or damage for so doing; and first party may also, either before or after repossessing himself of the said piano, recover from second party, by execution or otherwise, such rental or monthly payments as above stated for the use and hire of the said piano as may be in arrear, due and payable at the time of such repossessing of the same.

In case of default of any of the above payments, I hereby authorize and empower any attorney of record in this State or elsewhere to appear for me and confess judgment against me in favor of the said Jacob Sheasley, or his assigns, for the amount of any hire or rental due, either before or after first party retakes possession of said piano as above set forth, with interest and costs and ten per cent. attorney's commission, and I hereby waive all appraisalment and exemption laws, and the right of inquisition upon real estate.

And the said Jacob Sheasley agrees, upon the payment of the rentals as above, and the faithful performance of all and singular the covenants and conditions of this agreement by the said second party, if at any time during the term of this lease second party wishes to make purchase of the said piano, if the second party shall pay first party or assigns all the rentals which shall fall due during the whole term of this lease, and shall pay in addition, to first party, the sum of \$1, then first party will make, execute and deliver to second party a bill of sale for said piano.

And it is hereby declared and understood that no agreement, written or verbal, exists, or has been made, modifying or altering the above in any particular.

In witness whereof, the said parties have hereunto set their hands and seals the day and year aforesaid.

Attest: W. J. LEASURE.

JACOB SHEASLEY. [SEAL.]
Mrs. MOLLIE CONDryn. [SEAL.]
J. W. CONDryn. [SEAL.]

Read the terms of this lease before signing it, as no statement, agreement or understanding, verbal or written, not contained therein will be recognized by me.

JACOB SHEASLEY.

McCalmont & McGill, for rule; *Dunn & Carmichael*, for plaintiff.
10 DIST. R.

Sheasley v. Condrin.

CRISWELL, P. J., Oct. 23, 1899.—On its face, the contract between the parties in this case is a bailment and not a conditional sale, and the plaintiff, in repossessing himself of the piano and causing judgment to be entered against the defendant for the rent or hire of the piano, did nothing but what the contract in expressed terms authorized him to do. The defendants admit the execution of the contract of bailment on their part, and allege neither fraud, accident or mistake as a basis for relief. Mrs. Condrin says that she did not read the paper she signed, but she does not say that she was not informed as to its contents; while her husband makes no claim that he did not fully comprehend its terms and effect.

Upon these facts, the defendants are in no position to ask relief at the hands of the court. They not only signed the contract, but they kept the instrument thereunder for about three years without protest or objection. They complain only after they have failed to keep the terms of the agreement, and, in pursuance of its terms, the instrument has been taken from them. They slept upon their rights, if they had any, until other duties and responsibilities have grown up, and the law will not now help them: *Susquehanna Mutual Fire Insur. Co. v. Swank*, 102 Pa. 17. If they did not read the instrument, they should have done so, and are bound by it: *Weller's Appeal*, 103 Pa. 594.

It should be observed that the lease upon which judgment was entered expressly provides for the collection of any rent in arrear at the time of repossessing the instrument, in which respect it differs from many similar instruments which have been the subjects of adjudication. A similar provision in an oil lease was enforced in *Wills v. Susquehanna Natural Gas Co.*, 130 Pa. 222, and the effect of its presence is emphasized in *Wheeling v. Phillips*, 10 Pa. Superior Ct. 634.

And now, Oct. 23, 1899, the rule to show cause heretofore granted in above-entitled case is discharged.

From H. W. Fisher, Oil City, Pa.

Diener v. Wopsononock Hotel Company.

Foreign attachment—Foreign corporation having agent in the State—Practice, C. P.

A foreign corporation is subject to foreign attachment, although it has an agent in the State, or even in the very county in which suit is brought.

Rule to dissolve writ of foreign attachment. *C. P. Blair Co.*, Oct. T., 1899, No. 148.

N. P. Mervine, for plaintiff; *Greevy and Walters*, for defendant and for rule.

BELL, P. J., Oct. 2, 1899.—The Wopsononock Hotel Company is a corporation chartered under the laws of New Jersey. The principal reason urged for dissolving the foreign attachment is that said defendant corporation has complied with the provisions of the Act of April 22, 1874, P. L. 108, and has filed in the office of the secretary of State a certificate designating an agent on whom service of process may be made. But the authorities in this State seem to uniformly hold that a foreign corporation is subject to foreign attachment, even though it has an agent in the State, or even in the very county where suit is commenced.

In *Beal v. Toby Valley Supply Co.*, 2 District Reps. 671, Judge Mayer held that "a private corporation is in contemplation of law resident at the place of its incorporation," and "that a corporation chartered by the laws of another State, has an office in a town in this State where its business is transacted, and its treasurer resides and has his office, does not give it a residence within this State, nor exempt it from the process of foreign attachment." To the same effect is *Pain's Pyro-Spectacle Co. v. Lincoln Park Co.*, 5 District Reps. 474.

Diener v. Wopsononock Hotel Company.

The identical question now raised was passed upon in *Pierce v. Electric Co.*, 28 W. N. C. 311. In that case, as in the present, it was argued that, as the defendant corporation had designated, by certificate filed in the office of the secretary of State, an agent on whom process could be served, foreign attachment would not lie. The court, however, refused to dissolve the attachment.

The legislation making the filing of a certificate designating an agent a prerequisite to the doing of any business in this State, was enacted not for the benefit of foreign corporations, but of the citizens of this State. The legislative purpose was to enable a citizen of this State to litigate in this State; to obviate the disadvantage of a foreign tribunal. But if such foreign corporations had property in this State, the remedy by foreign attachment still remained.

The authority cited by counsel for defendant, 8 Am. & Eng. Ency. of Law, 298, does not sustain his contention. It is there said: "A corporation is foreign in every other State or country except that of its location or domicile. There is an exception to this general rule. If another State bestows upon foreign corporations the right of doing business within its bounds, and provides by statute that they *shall have the same standing as domestic corporations*, they are no longer liable to the remedy." [The italics are mine.]

The statute requiring a certificate to be filed designating an agent nowhere provides that the foreign corporation filling same "shall have the same standing as domestic corporations." As has before been stated, said statute was intended to benefit the citizen, not the foreign corporation. The legislative intent was to prohibit all business on the part of a foreign corporation until such foreign corporation could be sued in this State, for business here transacted, even though it had no property here, and its agent, who had transacted the business, had left the State. This matter was deemed of sufficient importance to warrant a constitutional provision: Art. XVI, § 5.

The defendant corporation could have placed itself on "the same standing" with "domestic corporations" by complying with the provisions of the Act of June 9, 1881, P. L. 89, but there is no averment or proof that it has so done.

The further contention, on part of defendant, that this attachment should be dissolved because plaintiff saw fit to serve a copy of his statement on the duly-designated agent of defendant, has some elements of plausibility, but, I think, is not sound. Assume that such copy was so served, and assume, further, that plaintiff took out a rule to arbitrate, why should the defendant be benefited, or why should the plaintiff be prejudiced? Grant that such course was mistaken practice on part of plaintiff, that no rule to arbitrate is allowable in foreign attachment, and that judgment could not be obtained for failure to answer such statement so served, but that plaintiff was bound to wait until the "third term" (Purd. 933), how was the defendant prejudiced? An examination of the record fails to show any return of service of the rule to arbitrate, but, on the contrary, shows that the plaintiff struck off said rule. A similar examination fails to disclose any return of service of any statement, and the plaintiff has in no wise attempted to take judgment. The plaintiff, not the defendant, will have to pay the costs of such nugatory proceedings. How, then, is the defendant prejudiced? Or on what legal principle shall it be held that a mistake in practice, which did the defendant no harm, shall enure to the benefit of the defendant and overthrow the foundation of plaintiff's rights?

Had the defendant corporation alleged and shown that they were prejudiced by such mistaken practice on part of plaintiff, some elements of estoppel might be urged. Had the course pursued by plaintiff caused the defendant to go to the trouble and expense of filing an affidavit of defence to prevent judgment, a different question might arise. But there is no allegation, much less proof, that the defendant corporation has caused any trouble or expense by reason of such

Diener v. Wopsononock Hotel Company.

mistaken practice. On the contrary, it seems evident that the thought at once occurred to the defendant corporation, "Plaintiff has made a mistake which may enure to our advantage."

Now, Oct. 2, 1899, rule discharged. From Robert W. Smith, Hollidaysburg, Pa.

Corbett's Estate.

Equitable relief—Demurrer—Gross laches as a defence.

Gross laches is a defence which must be made to appear affirmatively. Where it does not appear on the face of the bill or petition, it must be made by way of plea or answer. It is only in cases where a bill or petition on its face shows gross laches that this defence can be set up by way of demurrer.

Jurisdiction, O. C.—Vacation of decree after term of entry.

In exception to the general rule, which confines the revision of judgments to the term of entry, the Orphans' Court may vacate or amend a decree entered for want of jurisdiction, or by reason of fraud, mistake or misapprehension.

Married woman dying intestate—Mortgage to pay debts.

Where a married woman dies intestate, seized of real estate, but without personal property, if the surviving husband pays her funeral expenses, and the administrator makes no charges or is paid by the husband, and the wife's creditor or creditors are willing, it is within the powers of the Orphans' Court to decree that the deceased wife's real estate be mortgaged to pay her debts, and to confirm a return of the administrator, in which he states that he has executed a mortgage to the creditor for the amount of his debt, *payable at the death of the husband*. Such a decree is not prejudicial to the interest of the heirs-at-law, who take subject to the life-estate of the husband, but, on the contrary, is in their interest, in that it postpones the time of payment without interest.

Practice, O. C.—As to mortgage of decedent's real estate.

Before such a decree is made, it would be the better practice for the court to appoint an auditor, as provided by section 34 of the Act of March 29, 1832, who, after giving all parties in interest notice, would inquire into the validity of the claim of the creditor, and make report to the court. But where this is not done, and the court acts upon the petition of the administrator, supported by his affidavit alone, the heirs-at-law have a right to be heard in the Court of Common Pleas as defendants in the *scire facias* to foreclose the mortgage, or in an action of ejectment after sale on a judgment of foreclosure, if they have not been made parties in the *scire facias* on the mortgage.

Mortgage of real estate of decedent—Right of heirs to invoke relief.

Where the mortgagee fails to bring his action to foreclose the mortgage for nearly four years after it is over-due, the heirs-at-law, if the facts warrant it, have a right to become the actors and invoke the equitable powers of the Orphans' Court, to the end that their real estate may be relieved of the lien placed upon it.

Revocation of mortgage—Fraud—Laches.

Where a decree, such as was made in this case, authorizing the mortgaging of the real estate of a decedent, is made upon the *ex parte* affidavit of the administrator, and it afterwards is made to appear that the decree was obtained through collusion between the administrator and the alleged creditor and mortgagee, and that the decedent was not indebted in any sum to him, the Orphans' Court making the decree can vacate it and cancel the mortgage. Such a decree is not, by the lapse of time, made conclusive against the heirs-at-law who had no notice of the proceeding and were not parties thereto.

Demurrer to petition to set aside proceedings to mortgage real estate. O. C. Washington Co., Aug. T., 1894, No. 49.

The following facts are abstracted from the statement of facts of the court: Decedent died intestate in 1892, seized of certain real estate, leaving to survive her a husband and collateral heirs. The husband took possession of the real estate and held same until his death in 1896. In 1894, Hawkins, as administrator, executed a mortgage of the estate to pay an alleged claim of one Daugherty, amounting to \$1107. The mortgage was made to Daugherty himself, and was approved and recorded. The heirs, after the death of the husband, filed a petition, alleging that the estate was not indebted to Daugherty; that

the mortgage was procured by collusion and fraud between the administrator and alleged creditor, without notice to the heirs, alleging irregularities in the proceeding, and praying that the confirmation of the mortgage be lifted, revoked and set aside, and the mortgage canceled, proceedings to stay. To this petition Daugherty demurred, for the following reasons: 1. "The facts averred in the petition are insufficient to warrant the court in granting the relief prayed for. 2. The decree of the Orphans' Court, authorizing the execution of the mortgage, is conclusive upon the parties in this proceeding. 3. The petitioners have been guilty of gross laches, and are not entitled to the relief prayed for."

T. F. Birch and J. W. Donnan, for petition; *R. W. Irwin*, for demurrer.

McILVAINE, P. J., Sept. 29, 1900.—In considering the questions raised by the demurrer filed in this proceeding, we will do so under three heads suggested by the three reasons assigned in support of the demurrer.

1. "Should the relief prayed for by the petitioners be denied because they have been guilty of gross laches?"

Gross laches is a defence, and must be made to appear affirmatively. Where it does not appear on the face of the bill or petition, it must be made by way of a plea or answer. It is only in cases where a bill or petition on its face shows gross laches that this defence can be set up by way of demurrer. Taking, then, every fact alleged in the petition of Rebecca Combs and Daniel McIntyre to be true, is the defence of gross laches made to appear? We think not. If W. N. Hawkins, the administrator, and Joseph B. Daugherty, by collusion, obtained, on an *ex parte* affidavit, without notice to the heirs-at-law, an order of this court to mortgage the real estate of Agnes Corbett to secure the payment of \$1107 to Joseph B. Daugherty, when she did not at her death owe him anything, then a fraud was perpetrated on the court and it had no jurisdiction to make the order it did, and this fact would remain and be a good defence against Joseph B. Daugherty so long as his mortgage remained unpaid. The petitioners were not bound to take affirmative action to have this mortgage declared null and void; they could have waited until the mortgagee attempted to foreclose it and sell their land. He stands, so far as they are concerned, in the position of one claiming under an executory contract, and until he attempts to enforce the specific performance of it, the defence that the other parties to the contract have remains unaffected by the lapse of time.

2. "Has the court the power and are the facts averred in the petition sufficient to justify the granting of the relief prayed for?"

It may be said that all courts of record having power to enter judgments have power to vacate them. But this power to vacate is necessarily limited; otherwise there would be no end to litigation.

It may be stated as a *general rule* that the Orphans' Court has power to alter, revise, revoke or amend its judgments upon cause being shown at any time during the term at which the original judgment was entered, and that after the term has passed it has no such power. But to this general rule there are exceptions. On the one hand, the rights of innocent third parties may intervene in such a way that no relief can be given even if the term has not passed; while, on the other hand, the judgment entered may, for want of jurisdiction, or by reason of fraud, mistake or misapprehension, be vacated or amended, although the term has passed.

In *George's Appeal*, 12 Pa. 260, Mr. Justice Bell says: "We have recently had occasion to observe, more than once, that the Orphans' Court has, from the beginning, exercised the power of reviewing and modifying its proceedings and decrees as an authority necessarily inherent and essential to the right discharge of its duties."

10 Dist. R.

Corbett's Estate.

In *Johnson's Appeal*, 114 Pa. 132, it was held that the Orphans' Court in all matters within its jurisdiction is a court of equity powers, and has full power in the right discharge of its duties to grant relief as a chancellor has, and can vacate a decree confirming the private sale made by a guardian of his ward's real estate, although two years had passed since the order of confirmation of the sale was made, and although the purchase-money had been paid and a deed delivered.

In *Milne's Appeal*, 99 Pa. 483, Mr. Justice Gordon says: "We have no doubt about the power of the Orphans' Court to review and correct its former adjudications, if, in this adjudication, it discovered a palpable mistake, produced either by its own inadvertence or by the blunder of the parties. A sense of fair dealing and justice would be authority enough, in the absence of any other, for so holding."

If we, then, have the power, as we believe we have, to vacate the decree authorizing W. N. Hawkins, administrator, to mortgage the real estate of which Agnes Corbett died seized, are the facts alleged in the petition sufficient, if true, to move a chancellor to grant the relief prayed for?

A number of reasons are assigned in the petition why the decree in question should be held illegal and void. Some of these are not well founded. It was not necessary for the administrator, in his petition for an order to mortgage the real estate of his decedent to pay debts, to "name the surviving heirs of Agnes Corbett, deceased;" it was not necessary that the petition "set forth the value of the real estate proposed to be mortgaged;" it was not necessary that the petition should be "accompanied by a schedule of the personal property of the decedent," when the petitioner swears that she "left no personal estate," and "that he has no money out of which to pay said claim;" it was not necessary for the petitioner to state in his petition "the approximate expense of the settlement of the estate," as he was only asking authority to mortgage the real estate for "an amount sufficient to pay the above-mentioned claim;" it was not necessary for the petitioner to state that "there were no other debts owing the estate," nor was it necessary, in making his return, that he should state, under oath, that "he was not directly nor indirectly interested as mortgagee in the property mortgaged." Nor do we think that "the period of twenty years provided therein for the payment of the said mortgage is unconscionable and in derogation of the interests of the heirs of Agnes Corbett in said real estate, and not in accordance with the Act of Assembly in such cases made and provided."

The action of the court in this proceeding was unusual, in that the mortgage returned as having been given was given direct to the creditor for the amount of his claim; but if all the facts stated in the petition were true, and the situation was as represented to the court when the return was made, then, in our opinion, the mortgage of Joseph B. Daugherty is a valid mortgage.

John Corbett, the husband of Agnes Corbett, deceased, had a life-estate in this land, and was in possession. Agnes Corbett had no personal estate, and, so far as this petition on its face showed, owed no one but Joseph B. Daugherty. He, out of friendship for John Corbett, or for some reason not apparent, in place of insisting on his money, agreed to take the mortgage for *the face of his claim, payable at the death of John Corbett*. It is true that twenty years were inserted in the mortgage, but it was stated at the time that John Corbett was a very old man, and would not probably live but a short time, and the mortgage is payable at his death if he dies within the twenty years. Taking the claim to be a just one, as the administrator swore it was, and that its payment was postponed until the death of John Corbett, without any provision requiring the payment of interest, we thought the arrangement a proper one to make, and especially as not prejudicial to the heirs-at-law, who could not come into the

possession of the land until the death of John Corbett. The only mistake the court made, if any was made, was in not making further inquiry into the validity of the claim of Joseph B. Daugherty. If all the facts set forth in the petition of Rebecca Combs and Daniel McIntyre are true (and in passing upon this demurrer we must take them as true), then the court was imposed upon, and it made a mistake in not investigating the facts of the case, as provided by the 34th section of the Act of March 29, 1832; for it now appears that Agnes Corbett was not indebted to Joseph B. Daugherty in the sum of \$1107, or in any other sum, and that there was collusion between W. N. Hawkins, the administrator, and Joseph B. Daugherty, their purpose being to saddle an unjust claim upon this real estate without notice to the heirs-at-law. This fraud being admitted, it surely follows that the court is justified in exercising the power it has of vacating the former decree, that decree having been obtained by the fraud of those at whose instance, and in whose interest, it was made, and there being no intervening interest that will be affected thereby.

3. "Is the decree of Oct. 20, 1894, confirming the return of the administrator and approving of the execution of the mortgage, and authorizing its being placed upon record as a lien against the real estate of which Agnes Corbett died seized, conclusive upon the heirs-at-law of Agnes Corbett, the petitioners in this proceeding?"

There is no doubt that the decree is a final decree, made more than five years ago, and that, therefore, the time for appeal to a higher court is passed, and if we follow the rule fixed by the legislature as to reviews of final decrees confirming original or supplementary accounts of executors, administrators or guardians, by the Act of Oct. 13, 1840, it is now, also, too late to file a bill of review in this court. It will be admitted that the petition now before us is not a "bill of review" filed under the Act of 1840, and the limitation fixed in that Act does not apply directly to this proceeding. Nor do we think it should be followed "by analogy," for two reasons: 1. Because the jurisdiction of the court to make the decree authorizing the execution of the mortgage in question depended on the truth of the allegation that Agnes Corbett at the time of her death was indebted to Joseph B. Daugherty. If she was not indebted to him in any sum, and there was collusion between the administrator and the alleged creditor to fasten a fraudulent claim on the estate, then this court had no jurisdiction to make the decree it did, and there is no limit of time within which a decree made without jurisdiction, or fraudulently obtained, can be set aside; it can be attacked and disregarded even in a collateral proceeding. "It is never too late to attack a judgment for want of jurisdiction:" *Fowler v. Eddy*, 110 Pa. 120. "An unauthorized decree of an Orphans' Court for the sale of lands will not stand until reversed in a regular course of appeal, but may be questioned in a collateral suit by or against a person claiming under the decree, whether the want of jurisdiction appears affirmatively on the record or not:" *Smith v. Wildman*, 178 Pa. 245; *Jackson v. Summerville*, 13 Pa. 368; *Biddle v. Tomlinson*, 115 Pa. 299. 2. Because the petitioners, who are the heirs-at-law of Agnes Corbett, were not made parties in the proceeding to mortgage, and have not yet had their day in court on the question here involved, to wit: "Was Agnes Corbett indebted to Joseph B. Daugherty at the time of her death," and "judgments conclude only the parties and their privies:" *Rettispaugh v. Lewis et al.*, 103 Pa. 1.

Agnes Corbett died intestate, and at her death the title to the land mortgaged vested in the petitioners, subject, however, to the lien of Joseph B. Daugherty's claim against Agnes Corbett, if he has one. That these heirs-at-law have a right to be heard on the question of the validity of that claim *before their land* can be sold for its payment, we have no doubt; and that they never had a hear-

10 DIST. R.

Corbett's Estate.

ing is undisputed. The only ways now left for a hearing are in this proceeding, or upon a *scire facias* upon the mortgage—they intervening—or in an action of ejectment, if they are not made parties in the *sci. fa. sur* mortgage. Although John Corbett has been dead and this mortgage over-due for nearly four years, the mortgagee has not issued a *sci. fa.*, or taken any legal steps to enforce the payment of his claim. Under these circumstances, we are of the opinion that the petitioners have the right to become the actors and have the decree authorizing the mortgage set aside, if it was fraudulently obtained. If this mortgage had been given to an innocent third party, who had paid to the administrator the amount it was given to secure, and whose rights would be prejudiced, this remedy might not be open to the petitioners; but in that case the administrator would have had to file an account, and the claim of Joseph B. Daugherty could not have been paid without the heirs-at-law having an opportunity to be heard on the question of its validity. If the administrator had paid it and took credit for it in his account, they could have filed exceptions to his account. If he had not done this, but asked that an auditor be appointed to make distribution, then they could have been heard before him. The fact that the administrator saw fit to ask the court for authority to borrow *only* enough to pay Daugherty's claim, and saw fit to give him the mortgage rather than the money secured from some other persons on a mortgage given to them, and the fact that Daugherty saw fit to accept the mortgage, so as to avoid the settlement of an account, cannot affect the petitioners' right to be heard. A judgment honestly obtained in the Court of Common Pleas against the administrator of a decedent's estate is conclusive in the distribution of the personal estate, but the decedent's real estate cannot be sold thereon until the heirs-at-law have been heard on a *scire facias* to show cause why an execution should not be had against them. And in that *scire facias* "the heirs may contest the judgment on original grounds:" *Atherton v. Atherton*, 2 Pa. 112; *Murphy's Appeal*, 8 W. & S. 165.

After a careful consideration of the questions raised by this demurrer, our conclusions on the whole matter may be stated as follows:

1. Where a married woman dies intestate, seized of real estate, but without personal property, if the surviving husband pays her funeral expenses, and the administrator makes no charges or is paid by the husband, and the wife's creditor or creditors are willing, it is within the powers of the Orphans' Court to decree that the deceased wife's real estate be mortgaged to pay her debts, and to confirm a return of the administrator in which he states that he has executed a mortgage to the creditor for the amount of his debt, *payable at the death of the husband*. Such a decree is not prejudicial to the interest of the heirs-at-law, who take subject to the life-estate of the husband, but, on the contrary, is in their interest, in that it postpones the time of payment without interest.

2. Before such a decree is made it would be the better practice for the court to appoint an auditor, as provided by section 34 of the Act of March 29, 1832, who, after giving all parties in interest notice, would inquire into the validity of the claim of the creditor and make report to the court. But where this is not done, and the court acts upon the petition of the administrator, supported by his affidavit alone, the heirs-at-law have a right to be heard in the Court of Common Pleas as defendants in the *scire facias* to foreclose the mortgage, or in an action of ejectment after sale on a judgment of foreclosure, if they have not been made parties in the *scire facias* on the mortgage.

3. That where the mortgagee fails to bring his action to foreclose the mortgage for nearly four years after it is over-due, the heirs-at-law, if the facts warrant it, have a right to become the actors and invoke the equitable powers of the Orphans' Court, to the end that their real estate may be relieved of the lien placed upon it.

Corbett's Estate.

4. Where a decree, such as was made in this case, authorizing the mortgaging of the real estate of a decedent, is made upon the *ex parte* affidavit of the administrator, and it afterwards is made to appear that the decree was obtained through collusion between the administrator and the alleged creditor and mortgagee, and that the decedent was not indebted in any sum to him, the Orphans' Court making the decree can vacate it and cancel the mortgage. Such a decree is not, by the lapse of time, made conclusive against the heirs-at-law who had no notice of the proceeding and were not parties thereto.

And now, Sept. 29, 1900, the demurrer herein filed is overruled, with leave to Joseph B. Daugherty to file an answer within ten days from this date. In default of an answer filed within the time specified, a decree will be made, granting the relief prayed for by the petitioners.

From James I. Brownson, Washington, Pa.

Brennan & Ward v. Miner's Mills Borough.

Justice of the peace—Certiorari—Jurisdiction—Service of summons where borough is defendant.

Where the return of a constable to a summons from a justice of the peace is defective in not showing service upon an officer of the defendant borough, the defendant is not in court, the justice is without jurisdiction, and the proceedings will be reversed on *certiorari*.

A *certiorari* in such a case, issued after the lapse of twenty days from the date of judgment, is good.

Certiorari. C. P. Luzerne Co., Oct. T., 1900, No. 772.

The return of the constable on the back of the summons in this case was as follows :

"Served this writ on within-named defendant the 20th day of July, 1900, by leaving at Thos. Evens's dwelling-house, in presence of an adult member of his family, viz., his wife, a true and attested copy thereof.

M. J. MULVEY, Constable."

The transcript of the justice contained, *inter alia*, the following: "Now, July 25, 1900, Thomas Evens asked for a continuance until July 27, 1900, at 7 to 8 o'clock P. M. It was granted. Now, July 27, 1900, Brennan and Ward asked for a continuance until Aug. 1, 1900, at 7 and 8 o'clock P. M. It was granted. Now, Aug. 1, 1900, at the hour above mentioned, Thomas Evens appeared for plaintiff."

R. Laura Cannon, for defendant in error and plaintiff below, cited, *inter alia*, *Cooke v. Shoemaker*, 17 Pa. C. C. Reps. 641; *Young v. Trunkley*, 22 Pa. C. C. Reps. 127; *Missemer v. Trout*, 17 Pa. C. C. Reps. 317, and *Weisman v. Weisman*, 133 Pa. 89.

S. R. Miner, for plaintiff in error and defendant below, cited, *inter alia*, *Swartwood v. Exeter Township* (10 Luz. Leg. Reg. 49), 1 Kulp, 304; *McCale v. Kulp*, 8 Phila. 636; *Mulligan v. Riley* (9 Luz. Leg. Reg. 102), 1 Kulp, 79; *Dale v. Blue Mountain Manuf. Co.*, 167 Pa. 403; *Albert Lewis Lumber and Manuf. Co. v. Lewis*, 2 District Reps. 34.

McCLURE, P. J., 17th judicial district, specially presiding, Dec. 3, 1900.—The summons in this case was served upon Thomas Evens, but there is nothing on the record to show that Evens was in any way connected with or held any office in Miner's Mills borough. The defendant, by the record, was never in court, and the justice was without jurisdiction of the parties. As this objection is fatal, and can be made on *certiorari* issued after the lapse of twenty days, it is not necessary to discuss the questions raised by the other exceptions.

Dec. 3, 1900, the judgment is reversed.

10 Dist. R.

Citizens' Trust and Surety Co., to use, v. Howell et al.

Principal and surety—Surety company—Assignability of bond.

Where a **bond** of suretyship, given by the defendant company to the obligee for the completion, by the principal, of his contract to perform certain work, is not simply an obligation to **pay** money upon the failure of performance by the principal, but the payment of the penal sum is conditioned also upon the performance by the obligee of certain conditions, the bond is **not assignable** by the obligee without the assent of the surety, before breach of the conditions by the principal, because the surety company may have relied upon its confidence in and knowledge of the obligee.

Demurrer to statement. C. P. No. 3, Phila. Co., Dec. T., 1899, No. 847.

Howard W. Page and *S. Davis Page*, for demurrer, cited *Bensinger v. Wren*, 100 Pa. 500; *Bank v. Barrington*, 2 P. & W. 27; *Gargan v. School District*, 4 Colo. 53; *Barnes v. Barrow*, 61 N. Y. 39.

David J. Myers, contra, cited *Blanchard v. Com.*, 6 Watts, 309; *Reed v. Garvin*, 12 S. & R. 100.

MCMICHAEL, J., Feb. 1, 1901.—The suit is upon a bond given by **Lewis O. Howell, Jr.**, of Philadelphia, as principal, and the **National Surety Company**, a corporation under the laws of the State of New York, as surety, to the **Citizens' Trust and Surety Company**. The conditions of the obligation are:

"Whereas, the above-bounden principal, **Lewis O. Howell, Jr.**, has entered, or is about to enter, into a certain contract with the above-named obligee, a copy of which contract is hereto attached and hereby referred to and made a part hereof, as fully and to the same extent as if copied at length herein.

"Now, if the above-bounden principal shall well and truly keep, do and perform each and every, all and singular, the matters and things in said contract set forth and specified to be by the said principal kept, done and performed, at the times and in the manner in said contract specified, and shall pay over and make good and reimburse to the above-named obligee all loss and damage which said obligee may sustain by reason of failure or default on the part of said principal, then this obligation shall be null and void; otherwise, to be and remain in full force and effect: Provided, however, and this bond is executed by the **National Surety Company** (hereinafter called the company), as surety, upon the following express conditions, which shall be conditions precedent to the right of the above-named obligee to recover hereunder:

"1. The obligee shall keep, do and perform each and every, all and singular, the matters and things set forth and specified in said contract, to be by the obligee kept, done and performed at the times and in the manner in said contract specified.

"2. If, at any time, the above-named principal shall, in any manner, fail, neglect or refuse to keep, do or perform any matter or thing, at the time and in the manner in said contract set forth and specified to be by said principal kept, done or performed, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company at its principal offices in the city of New York.

"3. All moneys specified in said contract to be withheld by the obligee until completion of the work shall be paid to the company.

"4. If, at any time, it appear that the above-named principal has abandoned the work or will not be able, or does not intend, to carry out or perform the contract, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company at its principal offices in the city of New York, and the company shall have the right, at its option, to assume such contract and to sub-let or complete the same, and all moneys due, or to become due thereafter, under said contract, including percentages agreed

Citizens' Trust and Surety Co., to use, v. Howell et al.

to be withheld until completion, shall, as the same shall become due and payable under the terms of said contract, be paid to the company, and the company, if it so elect, shall be subrogated to all the rights of said principal.

"5. The obligee shall, before paying to the principal any instalments coming due under said contract, require the principal to produce receipted bills for all labor done and materials furnished in, for and about the work in said contract specified; and should the principal fail, neglect or refuse to produce such receipted bills, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company at its principal offices in the city of New York, and shall, upon demand, pay to the company all moneys which would have been due and payable to the principal had the principal produced such receipted bills.

"6. The failure, neglect or refusal of the obligee to keep strictly observed and fully performed each and every, all and singular, the matters and things herein-before stipulated and agreed to be done, kept or performed by the obligee, at the times and in the manner specified, shall relieve the company from all liability under this bond.

"7. No action, suit or proceeding shall be had or maintained against the company upon this bond, unless the same be brought and commenced within six months after the date fixed in said contract for the completion of the work: Provided, however, that if, during such six months, any matter necessary to be considered in determining the liability of the company hereunder be involved in litigation in the courts, and the obligee so notify the company in writing, by registered letter, prepaid, addressed to the company at its principal offices in the city of New York, the time in which such action, suit or proceeding may be brought shall be extended to sixty days after the termination of such litigation."

The statement alleges, *inter alia*, as follows: "For lawful consideration, the bond in suit was assigned, to wit, on the 11th day of April, 1899, to the use-plaintiff, The Union Surety and Guaranty Company." And in an amendment to the statement it is averred: "4. The said Howell, for more than ten days prior to and on the 14th day of August, 1899, quit work and failed to go forward and finish the said contract, and the work which plaintiff caused to be done was necessary and proper to determine the damages suffered by plaintiff by reason of the said default of said defendants in not finishing said work by the 1st day of January, 1900."

Various causes for demurrer are assigned, but the principal cause is that the bond of suretyship is not assignable as against the said National Surety Company without its assent, and such assent has not been averred. It will be noticed by an inspection of the bond that the National Surety Company is held and bound unto the Citizens' Trust and Surety Company, and that the words "assigns" or "successors" is not used; and, further, the conditions of the bond are not only that the principal, Lewis O. Howell, Jr., shall keep and perform the matters and things set forth in a contract said to have been entered into between the Citizens' Trust and Surety Company and Howell, but also the obligee, that is, the Citizens' Trust and Surety Company, is bound to perform certain matters and things:

"If the principal fails, etc., in performance, the obligee shall immediately so notify the company, in writing, by registered letter, prepaid, addressed to the company at its principal offices in the city of New York."

"All moneys specified in said contract to be withheld by the obligee until the completion of the work shall be paid to the company."

"If, at any time, it appear that the above-named principal has abandoned the work, or will not be able, or does not intend, to carry out or perform the contract, the obligee shall immediately so notify the company, in writing, by

Citizens' Trust and Surety Co., to use, v. Howell et al.

registered letter, prepaid, addressed to the company at its principal offices in the city of New York, and the company shall have the right, at its option, to assume such contract, and to sub-let or complete the same, and all moneys due, or to become due thereafter, under said contract, including percentages agreed to be withheld until completion, shall, as the same shall become due and payable under the terms of said contract, be paid to the company, and the company, if it so elect, shall be subrogated to all the rights of said principal."

"The obligee shall, before paying to the principal any instalments coming due under said contract, require the principal to produce receipted bills, . . . and should the principal fail, neglect or refuse to produce such receipted bills, the obligee shall immediately so notify the company in writing," etc.

And then follows a condition, that "the failure, neglect or refusal of the obligee to keep, strictly observe, and fully perform, each and every, all and singular, the matters and things hereinbefore stipulated and agreed to be done, kept or performed by the obligee, at the times and in the manner specified, shall relieve the company from all liability under this bond."

It will be seen by an inspection of the bond as here pointed out, that the obligation of the defendant, the National Surety Company of New York, was not simply an obligation to pay money upon the failure of performance by Howell, but the payment of the penal sum of the bond, or any part of it, was also conditioned upon the performance by the obligee, the Citizens' Trust and Surety Company, of certain conditions on its part. Such an obligation was not, we think, assignable without the consent of the surety company, because the National Surety Company may have relied, and probably did rely, upon their confidence in, and knowledge of, the Citizens' Trust and Surety Company in giving this bond.

If the breach by Howell had occurred before the assignment, the averment in the statement by the plaintiff that it in every respect complied with the conditions mentioned in said bond, etc., might have been sufficient in law; but by the amended statement the plaintiff avers, under oath, that the failure of performance by Howell occurred subsequent to the date of the assignment of the bond to the use-plaintiff, because it is averred in the statement that the bond was assigned on April 11, 1899, and it is averred in the fourth paragraph of the amended statement as follows: "The said Howell for more than ten days prior to and on the 14th day of August, 1899, quit work and failed to go forward and finish the said contract, and the work which plaintiff caused to be done was necessary and proper to determine the damages suffered by plaintiff by reason of the said default of said defendants in not finishing said work by the 1st day of January, 1900." It seems to us that the bond upon which suit has been brought, and which, being a solemn contract and agreement by the parties, is the law of the case, does not give to the plaintiff, the Citizens' Trust and Surety Company, the right to bring a suit to the use of The Union Surety and Guaranty Company against the National Surety Company for the non-performance by the obligor, Howell, of work, said non-performance being alleged to be subsequent in date to the assignment of the bond by the Citizens' Trust Company to The Union Surety Company, because, by such assignment, the Citizens' Trust Company put it out of its power to comply with, and keep faithfully, the conditions set forth at length above, for the failure to keep which the bond became null and void.

Very many cases have been cited to us upon general principles. The nearest case among those cited is that of *Janes v. Benson*, 155 Pa. 489; but none of the cases are exactly in point. The determination of the plaintiff's right as set forth in its statement and amended statement depends upon the careful consideration of the bond given by Howell and the National Surety Company to the Citizens' Trust and Surety Company, and we think that the right to recover

Citizens' Trust and Surety Co., to use, v. Howell et al.

on that bond depends upon the compliance by the Citizens' Trust and Surety Company with certain conditions, which they have put it out of their power to comply with by the assignment of the bond. We think there is no power in the instrument itself to substitute another obligee without the consent of the surety, the National Surety Company, and that the assignment by the Citizens' Trust and Surety Company to The Union Surety Company was an attempt to substitute another company in their place and stead, and that this could not be done without the assent of the National Surety Company.

The demurrer is sustained, and judgment is entered for the defendant.

NOTE.—*It seems* also that such a bond cannot be assigned after breach unless the obligee has complied with all the conditions imposed upon it by the bond and has sustained damage before the assignment, so as to vest in it a complete right of action.

Opdyke v. Murphy Iron Works, defendant, and The Babcock & Wilcox Company, garnishees.

Foreign attachment—Situs of debt.

A debt due by one foreign corporation to another, which is not payable within the jurisdiction, cannot be attached, even though the debtor corporation (garnishee) is engaged in doing business within the jurisdiction, under the Pennsylvania statute.

The mere fact that the garnishee's local agent conducted the initial negotiations leading up to the final contract out of which the debt arose, gives him no such status with reference to it as to make the debt attach to his person, where the bargain itself was finally consummated by direct correspondence between the home offices of the respective corporations.

Rule to dissolve foreign attachment. C. P. No. 4, Phila. Co., Sept. T., 1900, No. 15.

W. C. Ferguson, for plaintiff; *S. Heckscher*, for defendant.

WILLSON, J., Jan. 5, 1901.—The attachment which was issued in this case was intended to reach a debt due by the garnishees to the defendant. Both the defendant and the garnishees are foreign corporations—the former having its locality and place of business in Michigan, and the latter in New Jersey. The garnishees also had an established agency doing business in Philadelphia, which was duly registered in the Commonwealth's office at Harrisburg, under the statute providing for such registration. The debt arose in the following manner:

The agent of the defendant doing business in Philadelphia made an offer to the Philadelphia representative of the garnishees to furnish his company with certain furnaces. This offer was accepted, not by the garnishees' representative in Philadelphia, but directly by a communication sent from the company's office in New Jersey to the defendant in Michigan. No provision was made in the offer or in the acceptance as to the place where payment should be made. A portion of the amount which fell due under the contract so made was paid by check sent by the garnishees directly to the defendant in Michigan. The balance of the amount, namely, \$2325, is that which the plaintiff endeavors to reach by this attachment. The only question which arises in the case, is whether or not such a debt due by the garnishees to the defendant can be held under a writ of foreign attachment issued in this State.

There is no controversy whatever about the regularity of the proceedings, and the question is wholly a legal one. It is not disputed that in a proper state of circumstances the garnishees might be held under such a writ, notwithstanding the fact that they are a foreign corporation, engaged in doing business in Penn-
10 DIST. R.

DISTRICT REPORTS.

Opdyke v. Murphy Iron Works et al.

sylvania under the statute. The basis of the contention is, that the debt sought to be reached was not situated within the jurisdiction of this State, and, therefore, was beyond the grasp of the attachment.

The case is not without authority which seems to rule the point. When the question somewhat similar to that now under consideration first came before the Supreme Court of this State in *Childs v. Digby*, 24 Pa. 23, the view which was taken of the matter was favorable to the plaintiff's side of this controversy. In that case, an effort was made to attach goods situated, in point of fact, in the State of Ohio, and belonging to a defendant living in the same State, though the goods themselves were in the possession and control of the garnishee, who lived in Pennsylvania. The court below held that the attachment would not lie, because the goods had not actually been brought within the jurisdiction of the court, but the judgment was reversed by the Supreme Court, in the opinion which is found in 24 Pa. It was there held, "in personam property the *lex loci rei sitæ* is not to be recognized. All that is requisite to sustain the proceedings against the garnishee is that he be within the jurisdiction of the court when the writ is served, and that the property attached be in his hands or possession" That case, however, can no longer be regarded as authority in Pennsylvania, in view of the treatment it received at the hands of the same court in *Pennock v. R. R. Co.*, 51 Pa. 244, in which an effort was made to attach in Allegheny county the defendant's property which was on cars of the garnishee in Philadelphia, by serving a writ on the garnishee in Allegheny county. The court said: "The party being beyond the reach of process, and his property within, is the foundation of the attachment process. But if neither be within the reach of process, it is evident no appearance can be attained. There is nothing on which process can operate, and there is an end of the attachment writ, if one be issued, as there would be to suit commenced by summons when the party is not to be found." In principle, the same doctrine was laid down in *Noble v. Thompson Oil Co.*, 79 Pa. 354.

We find no later cases in our State which seem to conflict with this view of the law as enunciated in *Railroad Co. v. Pennock*. It must, therefore, be regarded as a sound basis for the disposition of this case, that the attachment can be held to reach the fund in question if, and only if, it appears that the fund may properly be regarded as within the jurisdiction of this court. Being a debt, a mere chose in action, it, of course, was not capable of manual possession, but if its *situs*, so far as it legally could have one, was not in Pennsylvania, it seems to us that in principle the debt must be regarded as being beyond the reach of the attachment.

The facts in this case show no obligation on the part of the garnishees to pay any money within the limits of this State to the defendant, or that any money is due to the defendant by the garnishees as residents, so to speak, of the State or as being situated within this State. While it is true the initial part of the negotiations leading up to the final contract took place in Philadelphia, it is also true, as has been stated, that the bargain was finally consummated by correspondence directly between the principals, the garnishees, in New Jersey, and the defendant in Michigan. The debt cannot be said in any sense, whether the *situs* of such a right shall be regarded as that of the debtor or the creditor, to have a place or a home within the limits of this jurisdiction. It is entirely a foreign entity, which, by its nature, attaches to the principal, and which cannot be said, as it seems to us, to be within the control of the agent of the garnishee living in this jurisdiction. The mere fact that that agent was connected with the origin of the transaction can give him no such status with reference to us as to make the debt attach to his person. On this point the case of *Noble v. Thompson*, *supra*, is in principle applicable.

Opdyke v. Murphy Iron Works et al.

The case of the garnishees, however, seems to be made even stronger than if it stood only on the considerations which have been already presented, for the reason that the strong current of authority seems to be in the direction that the *situs* of the debt is not that of the debtor but of the creditor. If that be so, the *situs* of the debt in question was in Michigan and not in either New Jersey or Pennsylvania. On this point it is sufficient to refer to Central Trust Co. v. Chattanooga, etc., R. R. Co., 68 Fed. Repr. 685; Reimers v. Seatco Manufacturing Co., 70 Fed. Repr. 573; National Bank v. Furtick, 2 Marvel, 35.

We are of the opinion that the attachment in this case must fail, and we therefore direct that the writ shall be quashed.

Neafie's Estate.

Testamentary trustees—Removal—Act of April 9, 1868.

While the Act of April 9, 1868, P. L. 755, in regard to the removal of testamentary trustees, is so far directory as to permit the court to judge of the existence of some cause of removal, and the court is not bound to appoint a new trustee whenever the caprice of the *cestui que trust* demands it, yet, where a want of confidence existing between the trustee and the *cestui que trust*, which is averred to have arisen because of a breach of good faith on the part of the trustee and a disregard of the wishes of the *cestui que trust*, proceeds to such an extent as to lead to a severance of the friendly relations existing between them, so that personal intercourse is suspended and communications respecting the management of the trust and the payment of its income have to be conducted through counsel, a case arises which falls within the mischief contemplated by the Act, and the court will remove the trustee and appoint another, upon petition of the *cestui que trust*.

Petition for removal of trustee. O. C. Phila. Co., Jan. T., 1899, No. 136.

A. H. Wintersteen and Geo. Tucker Bispham, for petitioner.

Price & Martin and John G. Johnson, for respondent.

HANNA, P. J., Jan. 10, 1901.—This petition is by a *cestui que trust* for life for the removal of a testamentary trustee and appointment of another trustee selected by her in pursuance of the authority conferred by the Act of April 9, 1868, P. L. 755. It was held early after the passage of the Act that it was to be construed "so far directory as to permit (the court) to judge of the existence of some cause of removal:" Stevenson's Appeal, 68 Pa. 101,

The trustee in that case had been selected by a woman in contemplation of marriage, to whom she conveyed all her estate in trust for her separate use. After her marriage, she and her husband sought to remove the trustee and appoint another. But the court dismissed the petition for the reason that no cause was shown to justify the removal of the trustee: See, also, Keen's Estate, 6 Pa. C. C. Repr. 645. And the court is not bound to appoint a new trustee whenever the caprice of the parties interested demands it: Mifflin's Estate, 19 Phila. 200.

The purpose of the Act is to protect the interests of the *cestui que trust*, rather than of the trustee. And the relation between trustee and *cestui que trust* should be not merely one of trust, confidence and reliance upon the integrity, truthfulness, candor and fair dealing of the trustee, but also marked by a free, unrestrained, cordial and amicable intercourse. In other words, a friendly relation must exist. The trustee must not simply be honest, but courteous in behavior, willing to afford information to his *cestui que trust* of the condition of the trust-estate, and accept from him or her reasonable and proper suggestions as to its management. Such a course of conduct evokes friendship, good-will and confidence, often allays suspicion, and overcomes the ill-advice of mistaken friends. The opposite naturally produces the contrary effect. And, when this

10 DIST. R.

Neale's Estate.

is made to appear, it becomes the duty of the court to furnish the remedy intended by the Act of Assembly.

In Hilles's Estate, 9 W. N. C. 421, a trustee was removed, not because his continuance in office might imperil or jeopard the trust, but "would probably work positive disadvantage or inconvenience to the *cestui que trustent*." In that case, hostile relations were shown to exist between the trustee and *cestui que trust*, and directly affected the comfort of the latter: See, also, Marsden's Estate, 3 District Reps. 281.

In Theis's Estate, 26 W. N. C. 302, it was said: "The power of the court to remove a trustee, . . . where the interests of the *cestui que trust* may suffer from incompatible disposition between him and the trustee, cannot be doubted." And in Martin's Estate, 4 District Reps. 219, it is also said: "The court may sever the legal relation between the trustee and the *cestui que trust* where the former has pursued a line of conduct which, although it does not work actual peril to the estate, tends to sever the social relations between the parties."

Thus it appears, while the mere whim, desire to make a change of trustee, or caprice of the *cestui que trust*, will not be regarded by the court as sufficient to justify removal of a trustee; yet where it is shown the relations of the parties have become inharmonious, and friendly and amicable intercourse has ceased and can no longer be continued, arising either from the withdrawal of belief of the fairness and disinterestedness of the trustee in the management of the trust, or discourtesy of manner, unintentional perhaps, and disregard of the wishes and request of the *cestui que trust*, the interests of the latter, who, in equity, is the owner of the trust-estate, were intended to be recognized by the law, and it is the duty of the court to carry out the evident intention of the legislature by the passage of the Act of 1868. In the recent case of Nathans's Estate, 191 Pa. 404, the conclusion was reached that "the feelings with which the life-tenant regards the trustee, whether it is a prejudice or not, and whether or not it is based upon a reason which proves to be exaggerated, is deep-seated and destructive of mutual confidence between the parties." She was thought not entitled to the remedy administered by the Act, for the reason she was not compelled to have any dealings with the trustee, there being a co-trustee approved by her, and with whom she had dealt exclusively for several years prior to the presentation of her petition. But the Supreme Court reversed this court, Sterrett, C. J., saying: "In view of the evidence and of the expressions contained in the appellant's petition, there cannot be any doubt as to the substantial correctness of this conclusion of fact, that her feeling of hostility towards the respondent 'is deep-seated and destructive of mutual confidence between the parties.' That fact being thus clearly established, it would seem that the remedy contemplated by the Act above quoted should be applied, unless the personal interests, convenience and comfort of the *cestui que trust* should be subordinated to those of the trustee. We do not understand the Act contemplates any such result as that."

After a careful consideration of the present case, we are unable to distinguish it from any of the preceding cases in which the Act of 1868 is held applicable. Here we have a *cestui que trust* who emphatically asserts her want of confidence in the trustee, and alleges it was occasioned by what she considered a breach of good faith with her and disregard of her oft-expressed wishes, in which he had led her to believe he concurred. From this lack of confidence naturally proceeds a severance of the friendly relations previously existing, so that personal intercourse is suspended, and communications respecting the management of the trust and payment of its income are now and hereafter to be made through the counsel of the respective parties. Thus loss of confidence and hostile relations between the trustee and the *cestui que trust* are made to appear. In addition,

Neafie's Estate.

an expense is thus imposed upon the latter by the necessary employment of counsel if the trustee be not removed. And a much stronger case is shown than in *Nathans's Estate, supra*, for in that case there was a co-trustee with whom the *cestui que trust* could transact the business of the trust and from whom receive her income, while here the respondent is the sole trustee and having under his control the management of the trust, the collection and disbursement of its income, and with whom the *cestui que trust* must either in person or by attorney consult and communicate.

For the reasons mentioned, we are compelled to the conclusion that a case is presented contemplated by the Act of 1868, and petitioner is entitled to the relief sought. The petition is therefore granted, and counsel will prepare the proper decree; the costs to be paid by respondent.

Notes of Treasury Department Decisions.

From December 31, 1900, to January 26, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Bowling Alley.

Special tax. No. 261, January 2, 1901. 4 Treasury Decisions, No. 2, page 15.

Capital and Surplus of Banks.

Opinion of the Attorney-General on capital and surplus of banks. Previous opinion of February 4, 1899, reaffirmed. Congress, in taxing capital, meant to tax only the capital of the bank in its strict technical sense under the banking laws, and that, in taxing surplus, it meant the fund formally set apart by the board of directors as surplus in its restricted and technical sense in banking. No. 262, January 5, 1901. 4 Treasury Decisions, No. 2, page 16.

Legacy Tax.

A State inheritance tax a proper deduction from a legacy as an expense. No. 266, January 17, 1901. 4 Treasury Decisions, No. 4, page 18.

A legacy to a partnership is considered a legacy to each partner that comprises the firm. The firm is not to be treated as an entity. No. 267, January 17, 1901. 4 Treasury Decisions, No. 4, page 18.

Oleomargarine.

Regulations in returns of manufacturers of and wholesale dealers in. No. 264, January 11, 1901. 4 Treasury Decisions, No. 3, page 64.

Opera House.

Special tax. No. 260, December 31, 1900. 4 Treasury Decisions, No. 1, page 11.

Stamp Tax on Plasters.

No. 268, January 21, 1901. 4 Treasury Decisions, No. 4, page 19.

Stamp Tax on Proxies or Powers of Attorney, Schedule A.

Proxies or powers of attorney used to vote at meetings of building and loan associations taxable. Former rulings inconsistent revoked. No. 270, January 26, 1901. 4 Treasury Decisions, No. 5, page 39.

Tobacco.

Publication of receipts from. No. 263, January 9, 1901. 4 Treasury Decisions, No. 3, page 63.

Use of the Penalty Envelope.

No. 265, January 16, 1901. 4 Treasury Decisions, No. 4, page 17.

Vouchers of Deputy Collectors.

No. 269, January 21, 1901. 4 Treasury Decisions, No. 4, page 21.

Sullivan & Co. v. Johnston & Co.*Justices of the peace—Foreign attachment—Jurisdiction of justices in.*

The Act of July 7, 1879, P. L. 194, extending the jurisdiction of justices of the peace to \$300, is applicable to the Act of May 8, 1874, P. L. 123, regulating attachments against non-resident debtors for amounts not exceeding \$100.

Rule to quash appeal from justice. C. P. No. 2, Allegheny Co., July T., 1899, No. 160.

T. C. Gabler, for plaintiff; *Geo. Elphinstone* and *John M. Petty*, for defendant.

SHAFER, J., May 4, 1900.—This case comes into court as an appeal from a justice of the peace in proceedings begun before him by attachment under the Act providing for the collection of debts against non-resident debtors, the amount of the debt claimed being \$160, and the defendant has procured a rule to show cause why the proceedings should not be quashed for want of jurisdiction in the justice. It is claimed by the defendant that the Act of July 7, 1879, P. L. 194, does not extend the jurisdiction given to justices by the Act of May 8, 1874, P. L. 123, above referred to.

The Act of 1874 gives justices jurisdiction to issue foreign attachments for amounts not exceeding \$100 in a manner substantially the same as that in which such a writ may issue from the Common Pleas, except that there is no provision that the writ shall not issue if the defendant be in the county at the time. The Act of 1879 provides that justices shall have concurrent jurisdiction with the Common Pleas in all actions arising from contracts for amounts not exceeding \$300.

It has been held by the Supreme Court that attachments under the fraudulent debtors' Act are within the purview of the Act of 1879, and that a proceeding by attachment for the collection of a debt is an action within the meaning of this Act: *Jacoby v. Shafer*, 105 Pa. 610.

The present question, however, has never been passed upon by that court. Two Courts of Common Pleas have held that the jurisdiction is not extended by the Act of 1879: *Ross v. Miller*, 14 W. N. C. 253; *Pagett v. Truby*, 1 Pa. C. C. Reps. 596; and one has held that it was so extended: *Ormsby v. Grinolds*, 18 Phila. 658; the opinion in the latter case being rendered by Mr. Justice Williams when he was president of the Common Pleas of Tioga county.

The whole question turns on the meaning of the expression "concurrent jurisdiction." The defendant contends that because the justice has jurisdiction in a foreign attachment, even where the defendant is at the time within the county of Allegheny, the jurisdiction is not concurrent. It does not seem to make any difference what may be the case under some other circumstances than those before us. The only question really is, could the present action have been brought in the Common Pleas with the same effect as before the justice? The record here shows affirmatively that the defendant was not in the county

when the writ issued. No reason appears why the Common Pleas would not have had jurisdiction of this action if the suit had been brought there instead of before the justice; nor would there have been any difference in the proceedings from those in this case, except those differences of time of return, etc., which occur in all actions before justices, and which do not in any way affect the jurisdiction.

This is, therefore, an action arising from contract, of which, at the time of the passage of the Act of 1879, the Common Pleas had jurisdiction, and of which justices also had jurisdiction if the claim was not over \$100. The object of the Act of 1879 plainly was to raise the limit of the jurisdiction already possessed by justices from \$100 to \$300. It is not necessary to discuss the effect to be given to the words of the Act of 1879, in case jurisdiction should be claimed for a justice in some form of action on contract, of which he would have had no jurisdiction at all before the Act of 1879, if any such exists. In this case the justice had, before the Act, precisely the same jurisdiction as this gives him, except as to amount.

We are of opinion, therefore, that the justice had jurisdiction in this case, and the rule is discharged.

From Edwin L. Mattern, Pittsburgh, Pa.

Bank of Saginaw v. Title and Trust Co. of Western Penna.

Bills and notes—Certificates of deposit—Negotiability of—Federal courts not bound by decisions of State courts on matters of the general commercial law.

Under the decisions of the Supreme Court of the United States, a certificate of deposit issued by a banking institution is a negotiable instrument, possessing all the qualities of a negotiable promissory note: and in a suit in a Federal court in Pennsylvania upon such an instrument issued by an institution of that State, brought by a *bona fide* holder for value, it is no defence that the Supreme Court of Pennsylvania has held that such a certificate, although containing negotiable words, has none of the incidents of a negotiable promissory note, because, there being no statute in Pennsylvania regulating the matter, the question is one of the general commercial law, and the courts of the United States are not controlled by decisions of the State courts on questions of general commercial law.

Motion for judgment for want of sufficient affidavit of defence. Circuit Court of the United States, Western District of Pennsylvania, May T., 1900, No. 23.

Robinson & McKean (R. B. Ivory with them), for plaintiff.

Edward Wilson Boyd and W. H. Core (Murphy & Hosack with them), for defendant.

ACHESON, Circ. J., Dec. 26, 1900.—The plaintiff is a corporation of the State of Michigan, engaged in the banking business at Saginaw, in that State. The defendant is a corporation of the State of Pennsylvania, doing business at Connellsville, Pennsylvania. The suit is upon six certificates of deposit issued by the defendant, and of which the plaintiff is endorsee and holder. The certificates are alike in form, and the following copy of one represents the general character of all of them:

"\$500.00.

\$500.00 No. 2.

TITLE & TRUST COMPANY OF WESTERN PENNA.

Connellsville, Penna., February 5, 1900.

J. F. Barrows has deposited with this company Five hundred dollars, payable to the order of J. F. Barrows, on return of this certificate, properly endorsed.

Endorsed by J. F. Barrows.

W. M. RUTH, Treasurer."

[Certificate of deposit not subject to check.]

10 DIST. R.

Bank of Saginaw v. Title and Trust Co. of Western Pennsylvania.

The sworn statement of claim sets forth that on or about Feb. 12, 1900, J. F. Barrows, having endorsed each of these certificates in blank in the usual manner, presented them, so endorsed, at the plaintiff's banking house at Saginaw, asking that they be cashed, and that thereupon the plaintiff, in the usual course of its business as a bank, received and cashed them, paying therefor full value. These allegations are not denied in the affidavit of defence, and there is no suggestion therein that the plaintiff is not a *bona fide* holder for value of the certificates. Upon the pleadings, the plaintiff must be so regarded.

That the defendant company is authorized to receive deposits of money is conceded, but it is denied that it had lawful authority to issue such certificates as those in suit. There is, however, no statutory or other inhibition of such certificates. These certificates are in the form commonly used everywhere in the commercial world by bankers and companies receiving money deposits, and the defendant's right to issue them in the course of its business and as an incident thereto is not to be doubted. At any rate, I do not see that it is open to the defendant to raise the question. The case, I think, turns upon the question of the negotiability of the certificates sued on. Now, that such a certificate of deposit is a negotiable instrument, possessing the qualities of a negotiable promissory note, was determined by the Supreme Court of the United States in *Miller v. Austen*, 13 How. 218. To the same effect are the decisions of all the State courts except those of Pennsylvania: 5 Am. & Eng. Ency. of Law (2nd ed.), 805. The Supreme Court of Pennsylvania has held that a certificate of deposit, although containing negotiable words, has none of the incidents of a negotiable promissory note: *Patterson v. Poindexter*, 6 W. & S. 227; *Lebanon Bank v. Mangan*, 28 Pa. 452; *London Savings Fund Society v. Hagerstown Savings Bank*, 36 Pa. 498. There is, however, no statute in Pennsylvania regulating this matter, and the question here is one of general jurisprudence.

That courts of the United States are not controlled by decisions of the State courts on questions of general commercial law is authoritatively settled: *Swift v. Tyson*, 16 Pet. 1; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14. Mr. Justice Bradley, in *Railroad Co. v. Lockwood*, 17 Wall. 357, said: "But on a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that State." In *Railroad Co. v. National Bank*, *supra*, the question related to the legal effect of the transfer by the endorsement of negotiable paper before maturity as mere security for an antecedent debt. The transaction occurred in New York, and the question had been there determined by decisions of the highest court of the State. It was contended that, as the bank was located in New York and the other parties were citizens of that State and the contract had been made there, the Federal courts were bound to follow the decisions of the State court, whether they met their approval or not. The Supreme Court of the United States rejected the argument, refused to follow the said decisions, and, speaking by Mr. Justice Harlan, said: "The decisions of the New York court, which we are asked to follow in determining the rights of the parties under a contract there made, are not in exposition of any legislative enactments of that State. They express the opinion of that court, not as to the right of parties under any law local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State or depending upon local authority, but one arising out of the usages of the commercial law." This is very pertinent to the case in hand, and furnishes a complete answer to the contention that the question at issue is governed by the decisions of the Supreme Court of Pennsylvania,

Bank of Saginaw v. Title and Trust Co. of Western Pennsylvania.

because this State is the place where the contracts were made and where they are to be performed.

The parties to the commercial instruments in suit did not contract with reference to the State decisions any more than they did with reference to the decisions of the Supreme Court of the United States. They contracted with reference to the general commercial law. In view of the authorities cited, it is clear that, upon the controlling question of the negotiability of the instrument in suit, the decision in *Miller v. Austen* is conclusive of this controversy.

Judgment, therefore, must be entered in favor of the plaintiff for want of a sufficient affidavit of defence. And it is so ordered.

From Edwin L. Mattern, Pittsburgh, Pa.

West Wheatfield Township's Sanitary Agent.

Appointment of sanitary agent—Act of 1899.

Where, under the Act of April 11, 1899, P. L. 88, a sanitary agent is applied for by the school board, the court, having no reason to doubt the accuracy of the statements and request, will regard them as *prima facie* correct, and the suggestions of the school board as to the person and the compensation will ordinarily be accepted and approved.

Application of the school directors of West Wheatfield township for the appointment of a sanitary agent in said school district. C. P. Indiana Co., Dec. T. 1900, No. 117.

WHITE, P. J., Oct. 1, 1900.—The school board of West Wheatfield township have presented their petition for the approval of their appointment of a sanitary agent to aid in enforcing the rules and regulations of the board. This application is made under the Act of April 11, 1899. This is the first application of the kind that has been made to this court. We find the recital, "being notified and are aware of the typhoid fever in Garfield and vicinity in said township, and in our judgment deem it necessary that immediate steps be taken to have said town and vicinity put in proper sanitary condition," and thereupon appoint John W. Huston as sanitary agent, to act in said township during the school term at a compensation of \$1.50 per day for the time actually employed. The Act requires the court to consider the matter as follows: "And if the said court, or judge thereof, shall approve the reasons given by the said board for the appointment of such sanitary agent, and shall also approve the compensation deemed proper therefor, said board shall have the authority to appoint such sanitary agent for such term as may be designated by the said court or judge thereof, the said compensation to be paid out of the school fund of the respective townships." We have nothing before us but the petition of the school board. We have no reason to doubt the accuracy of the statements and request of the school board. In all such applications we should regard the statements of the school board as *prima facie* correct, and, of course, their suggestions of the person and the compensation will be ordinarily accepted and approved by the court.

And now, to wit, Oct. 1, 1900, the appointment of John W. Huston as sanitary agent by the school board of West Wheatfield township, because of the existence of typhoid fever in the school of said district in the said township, is hereby approved, he to act as such sanitary agent for the schools of said township at a compensation of \$1.50 per day for the time actually employed. Such appointment to continue during the present school term, but his accounts to be presented to and settled by the school board, allowing compensation for the days actually and necessarily employed.

From J. Wood Clark, Indiana, Pa.

Hoffman's Estate.

Wills—Construction—Estates for life—Spendthrift trusts.

A bequest to executors in trust to pay interest to testator's son for life, without anticipation, neither principal nor income to be liable for debts, with a limitation to children or their issue on his decease, and, in default of children or issue him surviving, over, creates an active trust and the son takes but a life-estate.

The testator's will contained the following paragraph: "I give to my executors in trust two sums of \$12,000 each, the interest and income from one of said sums is to be paid by them monthly to my son, Horace M. Hoffman, for life. Such payments are never to be anticipated, and principal and interest and income are not to be liable for his debts, contracts or engagements, past, present or future; upon his decease, to transfer and assign said principal sum to his lawful child or children or their issue. In default of children or issue him surviving, to transfer and assign \$6000 of said principal sum to the Penn Asylum for Indigent and Single Women of the District of Kensington, now or late of No. 817 Belgrade Street, Phila., to whom I give and bequeath the same. The interest and income from other of said sums of \$12,000 to be paid by my executors monthly to my grandchild, Clara Haeuptner, for life, for her sole and separate use and benefit, and free from the control of contracts, debts or engagements of her present or any future husband. Said monthly payments of interest and income shall never be anticipated; upon her decease, to transfer and assign said principal sum to her lawful child or children or their issue her surviving. In default thereof, to transfer and assign said principal sum to the Philadelphia Homes for Incurables aforesaid, to whom I give and bequeath the same." *Held*, that the son took a life-estate only.

Exceptions to adjudication. O. C. Phila. Co., July T., 1899, No. 259.

Charles F. Van Horn, for accountant, exceptant.

Joseph W. Hunsicker, *Jos. A. Gorman* and *Wm. Gorman*, for exceptants.

Isaac Etwell, for Penn Asylum for Widows, legatee.

HANNA, P. J., Jan. 5, 1901.—The able and earnest argument of counsel for the exceptants failed to convince us of any error in the conclusion of the auditing judge. And little need be added to what has been said by him in support of his findings. The legal effect of the language employed by testator must be presumed to have been contemplated by him. It clearly creates a valid active trust of the sum of \$12,000 for the benefit of his son for life. This was sustained by the court under its award to the trustee upon the settlement of the executor's account and acquiesced in by the *cestui que trust* for life. And it was only after his death and when the final disposition of the trust fund is to be made, that it is suggested the trust was invalid in its inception, and the *cestui que trust* entitled not merely to the income for life but to the absolute ownership of the fund itself. This is a mistaken view of the language of the will and intention of testator. His primary purpose was to preserve the income for the maintenance of his son during life, and his ultimate object, should his son leave a child or children or their issue surviving him, that then the trustees should pay over to the last-mentioned beneficiaries the principal of the trust fund. It barely admits of argument that such a trust must be sustained for the protection of those entitled in remainder at the death of the son. Not only did testator provide for the child or children of his son and their issue, but he also contemplated the possible death of his son without child or children or their issue, for, in this event, he specifically bequeathed \$6000 of the trust fund to a charity. It would thus appear, if the will was silent as to the remainder of the fund, testator died intestate as to it, and his heirs and next of kin would be entitled thereto. But the will is not silent, nor did testator neglect nor fail to direct the final disposition of the fund after the payment of the legacy to the charity. He had also a daughter living at the date of the will, and he provided for her by the gift of all the residue of his estate to his executors in trust to pay her the income therefrom for life; and in case he should not make any disposition of his estate to take effect after his daughter's death, then he directed his residuary estate shall go and be-

Hoffman's Estate.

distributed according to the intestate laws. The testator's daughter died in his lifetime, but his son survived him. Had the former survived her father and brother, it must be conceded the remainder of the fund, held in trust for her brother after the payment of the bequest to the charity, would have formed part of the residuary estate of testator, the income from which was payable to her. This cannot be disputed, as it would have been a portion of testator's estate not otherwise disposed of, and consequently form part of the residue. In this manner, as before stated, testator did have in mind this balance and intended it should fall into the residue of his estate for the benefit of his daughter. Furthermore, his daughter pre-deceased him, and he permitted his will to stand as originally prepared, and the consequence is the residue of his estate must now go as he in that event directed, viz., to those persons entitled "according to the intestate laws." These were his son, now deceased, and a granddaughter, still living. Consequently, the award of the balance to them is proper.

The subject of the remaining exceptions urged was fully considered by the auditing judge and further discussion is unnecessary.

All the exceptions are dismissed and the adjudication confirmed.

McIlroy's Estate.

Testamentary law—Insane delusions—Issue devisavit vel non.

Although it may be conceded that mere belief in the possibility of being placed in communication with the spirits of the deceased is not, *per se*, enough to show the kind of mental unsoundness which is inconsistent with testamentary capacity, yet, where upon an application for an issue *devisavit vel non* the evidence shows that a will disinheriting testator's daughter and her sons was induced by insane delusions regarding them due to alleged spiritual communications, an issue will be awarded.

Appeal from register. O. C. Phila. Co., Oct. T., 1898, No. 537.

John G. Johnson, for appellant; W. H. R. Lukens, for appellees.

PENROSE, J., Feb. 2, 1901.—Whether the manifestations which have given rise to what is known as spiritualism are to be attributed to supernatural agencies, to some natural force or power not yet patent or understood, or to the deceptive arts of so-called mediums, it is not within our province to determine; and it must be conceded that mere belief in the possibility of being thus placed in communication with the spirits of those who have died, is not, *per se*, enough to show the kind of mental unsoundness which is inconsistent with testamentary capacity.

But if we admit that such communications may be received, if it should appear that the spirits have been untruthful, and that by reason of their falsity the mind of a testator has been so prejudiced and embittered against those in whose favor he would otherwise have disposed of his estate,—as, in the present case, his only child and her family, that his will, practically, disinherits them and gives the bulk of his possessions to strangers—even if totally disconnected with the malevolent slanderer, the instrument, if the exclusion is thus induced, will no more be permitted to stand on account of the supernatural source of the misrepresentations than it would if they had been made by a spirit still incarnate. The falsehood indeed is all the more dangerous, since it is uttered by one who is beyond the reach of human punishment and has not even the restraining influence of a fear of the hereafter.

This testator, as the evidence shows, gave implicit credence to all that, as he declared, was said to him by the spirits, including the assertion that his daughter would poison him, and that her sons wanted him to die "so that they might have fast horses." Led to such a belief, which it would appear nothing could

McIlroy's Estate.

change, a will giving to the daughter a mere life-estate in a very small part of the estate, and cutting off the grandchildren altogether, is only what might be expected.

Under these circumstances, the verdict of a jury against the validity of the will, on the ground that it was the direct offspring of the spiritual misrepresentation, would not be set aside as unwarranted by the evidence; and as this is the test by which it is to be determined, the demand of issues should be granted.

The exceptions are sustained, and issues awarded in accordance with the prayer of the petition.

Stambaugh v. Baker.

Justice's record—Amendment of—Certiorari.

A justice of the peace has no right to amend his record after it is removed to the Court of Common Pleas by *certiorari*. Therefore, a proposed amendment will be refused, which, if allowed, would show the cause of action to have been within his jurisdiction, and where the amendment would defeat an appeal and trial by jury.

Certiorari and rule to show cause why the justice's record should not be amended. C. P. York Co., Oct. T., 1900, No. 31.

John A. Hooper, for *certiorari*; *Niles & Neff*, for rule to amend.

STEWART, J., Dec. 21, 1900.—The summons in this case was issued Sept. 10, 1900, returnable the 15th of the same month. It was served on Sept. 10, "by leaving a copy at defendant's dwelling-house in the presence of his wife, an adult member of his family," and so returned on oath by the constable. The defendant did not appear on the return-day. The plaintiff with his counsel appeared, and the plaintiff and two witnesses were sworn and judgment entered on the proofs and allegations the same day in favor of the plaintiff for \$87.30 and costs of suit.

The cause of action is stated as follows: "Summons in trespass not exceeding \$300. Plaintiff's claim is founded upon for ninety bushels of wheat at sixty-eight cents per bushel, and fifty-eight bushels of rye at forty-five cents per bushel. Total demand, \$87.30."

On Oct. 1, 1900, the defendant sued out a writ of *certiorari* to remove the proceedings before the justice, and on Oct. 9 the return to the writ, accompanied by the record, was filed in the prothonotary's office, and on Oct. 12, 1900, the exceptions to the record were filed.

On Nov. 26, after the argument list on which the exceptions were set down for hearing was made up, the justice filed a petition in the Court of Common Pleas, averring that one of the defendant's exceptions to the record of the proceedings before him is as follows: "The record fails to disclose or designate the wrongful act alleged so as to show that it is within the jurisdiction of the justice." That he is advised and believes that the cause of action was within his jurisdiction as a justice of the peace, and he desires to amend his record so as to show the true facts and true character of the plaintiff's claim. He, therefore, prayed to be allowed to strike out the cause of action as stated by him and to insert: "Plaintiff's claim is for damages for the wrongful seizure and sale by the defendant of ninety bushels of wheat and fifty-eight bushels of rye belonging to the plaintiff." A rule was granted to show cause why this amendment should not be allowed, and now both the exceptions to the proceedings and this rule to amend come up together for argument.

In civil cases, the jurisdiction of a justice of the peace is altogether statutory, and his court is one of limited jurisdiction; he must act within this limited scope, and his jurisdiction must appear upon the face of his record: *McCale v. Kulp*, 8 Phila. 636.

Stambaugh v. Baker.

It is virtually conceded by this application to amend that the record is deficient, and it is so in point of fact, there being two classes of actions of trespass, trespass *vi et armis* and trespass on the case, and a justice having no jurisdiction of the latter: *Masteller v. Trimby*, 6 Binn. 33; his record must affirmatively show in trespass that it was trespass of the former kind with reference to which he undertook to adjudicate: *Lovell Manufacturing Co. v. Dougherty*, 5 Pa. C. C. Reps. 399; *Fitzgerald v. Campbell*, 10 Pa. C. C. Reps. 396; *Wood v. Bronson*, 2 District Reps. 746. The record in this case does not show with certainty what the nature of the action is. It is as consistent with an action of *assumpsit* as of trespass, and yet the record declares that it is trespass.

The proposed amendment, if allowed, would show the cause of action to have been within the jurisdiction of the justice. This raises the question of whether or not such amendment is allowable under the circumstances.

There is no question but what a justice may amend his record so as to make it conform to the truth while it remains within his own control: *Kearney v. Pennock*, 12 Pa. C. C. Reps. 37. And in all cases of error the parties must apply to the justice for relief or correction of his record: *Clark v. McComman*, 7 W. & S. 469. But where is the authority of a Court of Common Pleas to direct or allow the record of a justice to be amended while it remains before him, and where is the authority of a justice to amend it after it has been removed by a *certiorari*? None has been cited. Manifestly, none can exist. While a justice's court is not strictly a court of record, yet the justice is a judge of a court which, deriving its jurisdiction from statutory grants, proceeds in most things according to the substance contained in the forms of the common law, and his docket as to things adjudicated by him has the conclusiveness of a record: *Coffman v. Hampton*, 2 W. & S. 377. Parol evidence is inadmissible to contradict it: *Clark v. McComman*, 7 W. & S. 469. It is true that when his record comes into court on appeal, the proceedings are *de novo*, and may generally be amended or changed, but not under all circumstances. When a justice's docket should have showed, but did not, that the action was brought under a special Act of Assembly, which would have entitled the plaintiff to a recognizance on appeal in a particular form, the court below quashed the appeals upon the affidavit of the plaintiff, showing what the justice's docket should have contained, and the Supreme Court reversed this decision and reinstated the appeals, saying: "It was not thus that the justice's transcript could be supplemented, when the effect would be to deprive the defendant of trial by jury:" *D. & H. Canal Co. v. Loftus*, 71 Pa. 418. Besides, what is the justice's petition to amend more than an offer to prove by parol that the record which he made and is now no longer before him is incorrect? This identical proposition was denied in the opinion of the Supreme Court in *Coffman v. Hampton*, *supra*.

The Court of Common Pleas has no right to intermeddle with the record of a justice while it remains before him, by amendment or otherwise, except to remove it by *certiorari*, or where a diminution is alleged to require him to complete it, and a justice has no right to amend it after it is removed by *certiorari*. And notwithstanding some cases have been decided which seem to indicate a contrary doctrine, they are not well considered and not binding upon this court.

The suit here is against a constable for selling grain on an execution. Evidently, the title is in dispute, and to allow the amendment would be to deprive the defendant of his right to trial by jury, as was said in *Canal Co. v. Loftus*, *supra*. But independently of this, I deny the right to amend after the case is removed into this court on *certiorari*. The justice has already certified to the verity of the record, and he cannot now be allowed to contradict it.

The first exception is, therefore, sustained; the amendment refused, and the proceedings are set aside and reversed.

From Richard E. Cochran, York, Pa.

Weir Furnace Company v. Aushutz-Bradberry Company.

Corporations—Rights of directors of—Secretary has no authority to bring suit.

Upon the directors of a corporation rests the duty of instituting legal proceedings in its name and behalf, and, consequently, a bill in equity in its behalf by the secretary, without their knowledge or consent, will be dismissed at his costs.

Bill in equity. C. P. No. 2, Allegheny Co., April T., 1900, No. 210.

Levi Bird Duff and L. B. D. Reese, for plaintiff.

Samuel B. Griffith and Ed. G. Hartje, for defendant.

FRAZER, P. J., Dec. 13, 1900.—The bill in this case was filed for the purpose of compelling the defendant company to account for the number of furnaces made and sold under an agreement with plaintiff company, dated Nov. 5, 1894. From the bill, answer and proofs we find the following facts:

Findings of fact.

1. The Weir Furnace Company is a corporation of the State of Iowa, its principal place of business being at the city of Des Moines, in that State. The defendant is a corporation of the State of Pennsylvania, having its principal office and place of business in the city of Allegheny, State of Pennsylvania.

2. That the plaintiff company, claiming to have the control of certain patents of the United States for furnace improvements, issued to R. M. Weir, which patents bear date Aug. 1, 1882, April 14, 1885, and Sept. 21, 1891, and numbered respectively 261,884, 315,687 and 459,882, on Nov. 5, 1894, entered into a contract in writing with the defendant company, whereby the exclusive right to make and sell furnaces, under the patents above referred to, in the States of Pennsylvania, Ohio and West Virginia, was granted to the defendant company; that the defendant company was to pay to plaintiff the sum of \$5 on each Weir furnace made and sold by it, and a like sum on each and every other furnace made and sold by it to which the soot and gas-burning features of the Weir furnace might be applied; and a like sum of \$5 on each and every furnace made and sold by it, in the construction of which any device might be used for distributing heated air diffusively on the surface of the fuel; that the defendant agreed to either issue a special catalogue devoted principally to the advertising of the Weir furnace as their leading furnace, or to give that furnace prominence in any other catalogue issued by it, and in other ways to use its best endeavors to promote its sale, and to refrain from using, advertising or offering for sale any other furnace having, or claiming to have, any advantages as a soot and gas-burning furnace, or claiming any special device for the improving of fuel combustion; that the defendant was to have the benefit and advantage of any and all improvements to the patented features of the Weir furnaces.

3. That the defendant began to manufacture and sell the Weir furnaces shortly after the execution of the contract above referred to, and continued to manufacture those, or similar furnaces, until Sept. 1, 1899, when it sold and transferred its entire property and business to the Pittsburgh Stove and Range Company; that reports or statements were furnished by the defendant to the plaintiff company of all Weir furnaces manufactured and sold by it up to January, 1897, and all royalties due thereon were paid to that date; that no statements have been made of the number of Weir furnaces made and sold by defendant since 1897, and no royalties have been paid since that time; that about Jan. 1, 1897, the defendant was notified by Myer, Harms & Co., of Peoria, Illinois, that the Weir furnaces infringed upon patents held by them, and that all royalties due on such furnaces manufactured and sold by the defendant company must be

Weir Furnace Company v. Aushutz-Bradberry Company.

paid to them; that defendant company offered to pay either the Weir Furnace Company, or Myer, Harms & Co., upon being satisfied of their right to receive the royalties due; that the royalties remaining unpaid are still claimed by Myer, Harms & Co.

4. That the defendant never received from the Weir Furnace Company, or any other person, any license authorizing it to manufacture and sell the Weir furnace within the States covered by the agreement of Nov. 5, 1894; that J. E. Clarey testified that such license was obtained from Mr. Weir, the patentee, and mailed to the defendant company.

5. That on June 8, 1897, the defendant, through its president, W. T. Bradberry, filed in the United States patent office an application for a patent for a furnace similar in principle to the Weir furnace, and comprising the essential features of the Weir patents, 315,387 and 459,892, and, on Jan. 4, 1898, obtained on such application letters-patent 639,828, for fire-pot on stoves, and that such patent was secured for the purpose of avoiding litigation and the payment of royalties under the agreement of Nov. 5, 1894.

6. That the defendant manufactured and sold furnaces constructed in accordance with its own patent, 639,828, which contained some of the patented features of the Weir furnace; that such furnaces were sold by defendant from shortly after its letters-patent were obtained until the transfer of its business to the Pittsburgh Stove and Range Company.

7. That the defendant advertised the Weir furnace prominently in catalogues issued by it, and used its best endeavors to promote its sale by advertisements inserted in trade and building journals.

8. That the plaintiff company was incorporated on Dec. 16, 1891, for the purpose of manufacturing heating apparatus, with authority to purchase, own or use patents necessary to carry on its business; that its capital stock is \$15,000; that its affairs "shall be managed by a president, vice-president and a secretary and treasurer, which last two offices may be united in one person, who shall constitute an executive board, and hold their offices for one year, or until their successors are elected;" that the annual meeting of the stockholders shall be held in Des Moines on the first Monday of January of each year.

9. That at the last annual meeting of the stockholders of the defendant company, held in January of either 1893 or 1894, H. S. New was elected president, J. W. Howell vice-president, and J. E. Clarey secretary and treasurer, all of whom were at that time and are still residents of Des Moines, except that J. E. Clarey has resided at Great Barrington, Mass., since August, 1898.

10. That the plaintiff company has not done any business since 1894, except make a few collections and pay a few outstanding accounts, and there has been no meeting of either its stockholders or executive board since 1894.

11. That these proceedings were instituted by John E. Clarey on his initiative without consultation with any of the stockholders or other officers of the corporation; that they were not authorized by the stockholders, executive board or other officers, and that no notice of the same has been given by Clarey to any other officer or member of the company, and that the executive board has never been requested by Clarey or any other member of the company to institute proceedings against defendant for an accounting under the agreement of Nov. 5, 1894.

Conclusions of law.

The right of Mr. Clarey to institute and carry on these proceedings of his own motion is denied by the defendant. Whether he has such right is the first question to be determined. The general rule is that the management of all corporations belongs to the directors; they may do any regular and ordinary act within the corporate powers in carrying on and directing the corporate

Weir Furnace Company v. Aushutz-Bradberry Company.

business, and, so long as they act honestly and in good faith, they cannot be interfered with. Among their many duties and powers is that of determining whether or not the corporation shall engage in litigation; upon them, unless the charter provides otherwise, rests the duty of instituting legal proceedings in the name and on behalf of the corporation, and for that purpose they alone have authority to employ counsel. This seems to be the rule laid down in all text-books, and it has been followed in many of the States. In this State, in *South West Gas Co. v. Fuel Gas Co.*, 145 Pa. 16, it is said that the directors of a corporation are "clothed with the power to control its action, and to decide whether it should engage in litigation." In *Pollok v. Shultze*, 1 Hun, 320, it is held that the directors should determine whether the corporation ought to begin legal proceedings, and in *Ashuelot Manufacturing Co. v. Marsh*, 1 Cush. 507, it is said that the president of a corporation has no implied authority to begin a suit in the name of the corporation. And in *Catron v. First Universalist Society of Manchester*, 46 Iowa, 107, it is held that where the articles of association provide that the business of the corporation is to be managed and conducted by the officers as a board of trustees they must act together; that no two of them have power to transact the business of the corporation without showing authority conferred upon them, either by a resolution or a by-law. This last case, it seems to us, determines the question of the right of Mr. Clarey to carry on this case in the name of the corporation. Here, as in that case, the affairs of the company are to be managed by three officers as an executive board; in transacting the business of the company those officers must act as a board; they must determine, not individually, but together, whether or not the corporation shall engage in litigation. This they have not done, nor have they even been advised of these proceedings, and given an opportunity to either approve or disapprove of them. These proceedings having been begun by Mr. Clarey of his own motion, and without authority from the executive board, we conclude and so find, that the same were improperly instituted, and that the bill should be dismissed, at the costs of John E. Clarey.

From Edwin L. Mattern, Pittsburgh, Pa.

Pavona v. Di Jorio.

Practice, C. P.—Actions—Act of 1842—Discharge on common bail.

The enforcement of a *capias ad respondendum* as a remedy is barred by the Act of July 12, 1842, P. L. 339, where the cause of action arose from a contractual relation. In the case at bar, defendant, as manager or salesman of plaintiff, was the bailee of property which he converted to his own use; a motion to discharge on common bail was sustained.

Rule to quash *capias*, or discharge defendant on common bail. *C. P. Blair Co.*, Oct. T., 1899, No. 71, *capias ad respondendum*.

A. V. Dively, for plaintiff; *Stevens, Owens & Pascoe*, for defendant.

BELL, P. J., Oct. 2, 1899.—Pavona, the plaintiff, had a fruit store in Tyrone. He put Di Jorio, the defendant, in charge of same as manager or salesman. Di Jorio absconded with part of the store and part of the money, the proceeds of sales. He was brought back to Blair county, tried under Act of March 31, 1860, § 107, P. L. 409, "larceny as clerk," convicted and sentenced, Pavona being the prosecutor. About the time his sentence expired this *capias* was sued out for substantially the same tort for which he had been prosecuted and punished. This court is now asked to discharge him on common bail, on the ground that his offence, while in one sense it may be a tort, in another sense had its origin *ex contractu*.

As has before been stated, Di Jorio was the manager or salesman of Pavona. He was a bailee of the property he stole or embezzled. It came into his possession by virtue of a contract. It was a contract in the first instance which placed Di Jorio in the position to do the wrong to Pavona. This being so, I think the present action arose from a contractual relation, and the enforcement of a *capias ad respondendum* as a remedy is barred by the Act of July 12, 1842, § 1, P. L. 339, abolishing imprisonment for debt.

In *Hammer v. Ladner*, 17 Phila. 315, it is held that whenever it appears that the debt or obligation has arisen out of a contractual relation between the parties, there the *capias ad respondendum* is prohibited by said Act of July 12, 1842. It is needless to here cite, or attempt to repeat, the very satisfactory reasoning of Judge Thayer in that case. It seems to have been suggested to that eminent jurist by counsel for plaintiff, as it was likewise suggested in this case, that the action was trover and therefore a *capias* could issue; but Judge Thayer disposed of this contention by citing *Bowen v. Burdick*, 3 Clark, 227, wherein Sharswood, J., says: "The Act of July 12, 1842, 'To abolish imprisonment for debt, and to punish fraudulent debtors, provides that no person shall be arrested on any civil process for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract.' It is clear from these words that the form of action was not meant to be the guide in the determination of cases arising under this Act. . . . Fraud vitiates everything it touches; and no case can well be imagined of a fraudulent contract in which the party injured has not his election to repudiate the contract and pursue his remedy in an action in form *ex delictu*. If it be a sale of goods he may bring trover, or in that or any other contract an action on the case for deceit. . . . It is the settled law of Pennsylvania that the election of the plaintiff in cases of this character to proceed in an action in form *ex delictu* shall not deprive the defendant of any substantial privilege or defence."

In the present case, Pavona could have brought an action in *assumpsit* on Di Jorio's contract, implied at least, and doubtless expressed, to duly return any unsold merchandise, and honestly account for the proceeds of such goods as were sold. This being so, Pavona's election to sue in trover ought not to be allowed to deprive Di Jorio of the freedom from arrest on civil process guaranteed by said Act of July 12, 1842.

But the 2nd section of said Act, as has been well stated by Judge Thayer in *Hammer v. Ladner*, *supra*, provides a remedy against the fraudulent debt by warrant of arrest and hearing before a judge. If such debtor is concealing property, he can thus be compelled to disgorge. If he has done acts which are punishable criminally, the judge can direct that he be criminally indicted and punished. In the present instance, however, Di Jorio has undergone criminal punishment by imprisonment; the Act of July 12, 1842, prohibits further imprisonment for the same debt or claim which had its origin in the contractual relation of the parties. It might be that a different rule would apply in the case of a criminal who had been punished for common law larceny pure and simple; for instance, the burglar who breaks into a house and steals. In such case, it would be a tort pure and simple, without any features of contract and with no possible origin in a contractual relation; but even in such a case it would seem a little hard to first punish a man for his criminal wrong, and then keep him further imprisoned until a civil action against him could be put at issue and, after possibly long delay, be tried.

To allow the present defendant to be imprisoned on a *capias ad respondendum* would, moreover, I think, be in contravention of the spirit of extradition practice. Defendant was arrested in Illinois and brought to Pennsylvania for a
10 DIST. R.

Pavona v. Di Jorio.

criminal trial. Before the district-attorney of Blair county could have procured extradition papers he would have been compelled to certify in substance that the process would not be used as a means of collecting a civil debt. To bring a man into the State on a criminal charge, and then, as he emerged from jail at the expiration of his sentence for the crime, to permit him to be again imprisoned on a *capias* for the debt, growing out of the crime, would closely resemble using the criminal process as a means of collecting a debt. True, in this case, defendant waived the procuring of requisition papers. But still ought he not be afforded all the protection given by the spirit of extradition practice? Ought the criminal who voluntarily saves the district-attorney the trouble and expense of procuring requisition papers be in a worse condition than the other criminal, who fights extradition to the last ditch and compels every formality to be observed?

Now, Oct. 2, 1899, it is ordered that defendant be discharged on common bail.

From Robert W. Smith, Hollidaysburg, Pa.

Commonwealth v. Hollop.

Criminal law—Costs—Cases of acquittal—Placing same on plaintiff though not named—Act of 1860.

The 62nd section of the Act of March 31, 1860, P. L. 427, permits the jury, in all cases of acquittal on indictments, except in cases of felony, to place part of the costs on the prosecutor, whether he be named in the indictment or not. If the party on whom the costs were placed had a full and fair opportunity to explain his conduct and relieve himself of the charge of having been instrumental in bringing the prosecution, it cannot be said that the placing of the costs upon him deprives him of his property without the judgment of his peers or the law of the land.

Rule to show cause why the verdict of the jury imposing one-third of the costs on Joseph Oselas should not be set aside. Q. S. Schuylkill Co., March Sess., 1900, No. 205.

A. D. Knittle, for rule; *M. P. McLaughlin*, district-attorney, for Com'wealth.
John F. Dolphin, for defendant.

WADLINGER, J., April 2, 1900.—The indictment in this case charged the defendant with assault and battery on Frank Matuaitas, whose name was endorsed on the bill as prosecutor. The testimony disclosed that these two parties and Joseph Oselas met in a saloon on Jan. 1, on which occasion the defendant "smacked" Matuaitas on the cheek twice with the open hand; Matuaitas seemed to take no special offence or umbrage at this conduct, and the defendant explained his action by saying it was "Happy New Year." At the trial, when Matuaitas was asked why he brought this suit, he said he did not want to sue, but that Oselas had told him to do so. Oselas, when called as a witness, admitted that he advised the prosecution, but denied that he had any feeling against the defendant, or that he did it to become a witness to secure the fees and mileage payable; he was examined at some length on this subject by counsel and court, and given full opportunity to explain his conduct in the matter. The jury returned a verdict of "not guilty, costs equally divided between Frank Matuaitas and Joseph Oselas, whom we find to be joint prosecutors in the case, and Peter Hollop." The power of the jury to make the finding it did, and to place a portion of the costs on Oselas, is challenged on his behalf, and the constitutional provision that no man can "be deprived of his life, limb or property unless by judgment of his peers or the law of the land," is invoked in support thereof.

The power of the jury to go behind the name of the prosecutor endorsed on the bill, and inquire who the actual prosecutor or prosecutors were, is provided by the 62nd section of the Act of March 31, 1860, P. L. 427, which says that, "in all prosecutions, cases of felony excepted, if the bill of indictment shall be returned *ignoramus*, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittal by the petit jury on indictments for the offences aforesaid, the jury trying the same shall determine by their verdict whether the county or the prosecutor or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, *shall name him in their return or verdict*." This section of the Act of 1860 is a substantial re-enactment of the Act of Dec. 7, 1804, 4 Sm. Laws, 204, and these Acts are intended to provide a means of punishment for the malice of parties who, without cause, put a defendant to the shame and expense of a public trial on a charge of crime. What was intended by the Act of 1804 is clearly defined by the preamble, wherein it is declared that the "laws obliging the respective counties to pay the costs of prosecution in all criminal cases where the accused is or are acquitted, have a tendency to promote litigation by enabling restless and turbulent people to harass the peaceable part of the community with trifling, unfounded or malicious prosecutions at the expense of the public," and it was no doubt to remedy this evil that the Act of 1804 and, subsequently, the Act of 1860 were enacted.

Although a provision similar to that invoked in this case, and contained in the constitution of 1874, existed in the constitution of 1790, and its amendment of 1838, yet, for nearly one hundred years, the legislation in question has stood unchallenged for constitutional reasons, and the power of the jury to impose costs on another than he whose name is endorsed on the bill as prosecutor, has been recognized by various courts of the Commonwealth: *Com. v. Anderson*, 17 Pa. C. C. Reps. 89; *Com. v. Hoopman*, 1 York Legal Record, 20; *Com. v. Ream*, 1 Pa. C. C. Reps. 33; *Com. v. Bennett*, 1 Pitts. 261; *Com. v. Weber*, 7 Lanc. Law Rev. 172; *Com. v. Jackson*, 1 Pa. C. C. Reps. 38; *Com. v. Madden*, 11 Pa. C. C. Reps. 459; *Clemens v. Com.*, 7 Watts, 485; and by our own court in unreported cases.

The cases of *Com. v. Hayward*, 4 Del. Co. Reps. 569, and *Com. v. Baltzby*, 3 Pa. C. C. Reps. 73, were cited in support of this rule. An examination of these cases, however, discloses that they clearly recognize the power of the jury to determine another as prosecutor and impose upon him all or a portion of the costs. In the first of the cases cited the verdict was set aside because the action of the jury was not justified in finding Charles S. Phipps to have been a prosecutor. Likewise, in the second case, "there was no evidence upon which the jury could find that David Eshelman was the prosecutor. From anything that appeared in the evidence, they might as well have found any one else as prosecutor, and by our law no man is to be condemned unheard."

In the present case, Joseph Osceles did have a hearing and a full, fair opportunity to explain his conduct in the premises and relieve himself of the charge of having been instrumental in the bringing of the present prosecution, and we are constrained to say that the jury did not err in finding that he was, at least, a joint prosecutor. He was not condemned unheard, and it therefore cannot be said that he will be deprived of his property without the judgment of his peers or the law of the land. For the reasons stated, we must decline to interfere with the verdict of the jury.

And now, April 2, 1900, rule discharged.
10 Dist. R.

From J. O. Ulrich, Tamaqua, Pa.

Boyd's Estate.

Married woman—Separate estate—Active trusts.

A trust which imposes active duties on a trustee for the separate use for life of testator's daughter, remainder to her heirs, is an active trust and not merely a trust for her separate use, and continues after the death of her husband.

Contingent interests.

Where interests are limited, not simply in default of the execution of a power, but in the event also of a failure of a prior estate, they are contingent.

Perpetuities—Remoteness.

An appointment under a power created by the testator to persons who, by possibility, may not come into being within twenty-one years after the death of the donee, infringes the rule against perpetuities and is void.

Hence, where a testator devised and bequeathed one moiety of his residuary estate, whether real or personal, "in trust, to pay the rents, interest and income thereof to my daughter, M. B. (an unmarried woman), during her natural life, for her sole and separate use, support and maintenance and without any control of any husband she may take, and her receipt to be the only discharge therefor, and after her decease for the use and benefit of such person or persons as my said daughter, M., shall give and devise the same by will, in writing, duly executed, and for want of such will, then the same to go to her heirs;" and the daughter afterwards married and exercised the power of appointment in favor of her son, providing that, at the age of twenty-five, her trustees should pay him, out of the principal moneys of her residuary estate, the sum of \$25,000 for his own use absolutely, and further providing that, after paying him the income from the remainder of the residuary estate during his life, they should, on his death, dispose of the fund as follows: "And as to said residue of my estate upon the further trust, upon the death of my son, leaving surviving him a child or children, or issue of a deceased child or children, or these or any of them, and a widow also, then to hold said residue to and for the use of such of his said children, issue of a deceased child or children and widow, as the case may be, in such proportions and in such way and manner as my son, by his last will and testament, or any writing in the nature thereof, shall direct, limit or appoint, and in default of such appointment, then to hold said residue to the use of such person or persons as would be entitled to the same, and in such shares and proportions and for such estate and interest as they would respectively be so entitled under the laws of Pennsylvania aforesaid, in case my son died intestate, possessed and the lawful owner of said residue of my estate, and having the absolute dominion thereof. But should my son die, leaving surviving him no child or children, but a widow only, then in trust to pay, first, one-third of said residue of my estate to such widow, unless my son should, by his last will and testament, in writing, in the nature thereof, direct otherwise, viz., that said one-third shall not be paid to her, and then to hold said one-third of said residue as though no provision had been made herein for such widow and as if this clause had not been written."

Held, (1) that the trust was active and M. B. had but a life-estate; (2) therefore she could dispose of the fund only under the power of appointment in her father's will; (3) the appointment to the son of \$25,000 upon attaining the age of twenty-five was good and did not infringe the rule against perpetuities; (4) the limitations to the widow and unborn children of the son were contingent and not vested subject to a divesting contingency; (5) therefore the appointment to the widow and unborn children of the son was bad, as infringing the rule against perpetuities, as the appointees, by possibility, might not come into being within twenty-one years of the death of the donee; (6) as the appointment to the widow and unborn sons was bad, the fund passed, under the will of the original testator, to his daughter's "heirs;" (7) as the fund was personal and her husband and son survived her, distribution should be made, one-half to the personal representatives of her husband, less collateral inheritance tax, and one-half to the personal representatives of the son.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1885; No. 37.

Samuel E. Cavin and David W. Sellers, for exceptants.

Richard C. Dale, contra.

PENROSE, J., Feb. 2, 1901.—The equitable life-estate given to the testatrix by the will of her father did not cease to be equitable merely because the separate use annexed to it failed by reason of the fact that she was not, at the time of its execution or of his death, married or contemplating marriage. The legal estate was given to trustees upon whom the performance of active duties was

carefully and minutely enjoined—duties which required the legal estate to remain in them. A separate use requires no activity of duty on the part of the trustee, and is created, if the beneficiary is married at the time, by any words showing the intention to exclude marital authority or interference (*Scott v. Bryan*, 194 Pa. 41); but the trust, while unnecessary to accomplish this part of the testator's intention (and he is presumed to know the law on the subject), had a manifest purpose for which it was necessary, viz., the prevention of the coalescence of the life-estate with the remainder to heirs. And here again it must be presumed that he knew that the separate use would not be efficacious unless his daughter should be married when the will became operative—(*Neale's Appeal*, 8 Outerb. 214, deciding that the execution of the will was the determining time, could not have been anticipated by him), and protection in that case could only be afforded by preserving the remainder as a distinct estate, not subject to the control of the beneficiary for life. In construing wills courts are bound to give effect to every word and provision (*ut res magis valeat quam pereat*), where no rule or policy of the law is violated, and there is no more right in this case to say that the sole purpose of the father in giving to his daughter an equitable life-estate was to create a separate use than there was in the case of the son, for whom, of course, a separate use was impossible—the language employed in each case being practically identical. Indeed, the necessity for supporting the trust is stronger in case of the daughter than in case of the son, irrespective of the separate use, since in the former it is expressly provided that “her receipt,” for the moneys paid by the trustees, shall “be the only discharge therefor”—words which, it would seem, create a spendthrift trust for her protection (*Stambaugh's Estate*, 20 Crumr. 585; *Winthrop Co. v. Clinton*, 196 Pa. 472; see also *Vaux v. Parke*, 7 W. & S. 19), and this, in itself, furnishes an unanswerable reason for the separation of the life-estate from the remainder (*Rife v. Geyer*, 9 P. F. Smith, 393). In this view of the case it becomes identical with *Wolfinger v. Fell*, 195 Pa. 12, 14, where the subject is elaborately considered by the present chief justice. See also *Hemphill's Estate*, 5 District Reps. 690; 180 Pa. 95; *Livezey's Appeal*, 10 Outerb. 201. The precise point was decided in *Bacon's Appeal*, 7 P. F. Smith, 504, in an opinion by Judge Strong, where a trust, with active duties on the part of the trustee, for separate use for life of a daughter with remainder to her heirs, was held to continue after the death of the daughter's husband (as it would not have done but for such duties: *Stacy v. Rice*, 3 Casey, 75; *Koenig's Appeal*, 7 P. F. Smith, 352—also an opinion by Judge Strong) and the life-estate not unite with the remainder to her heirs—the distinction being between a mere dry trust requiring no duties on the part of the trustee after the purpose of the trust has ceased (*Yarnall's Appeal*, 20 P. F. Smith, 337) and a trust for a purpose which continues (*Earp's Appeal*, 25 P. F. Smith, 119; *Ashhurst's Appeal*, 27 P. F. Smith, 464). *Utile per inutile non vitiatur*.

But the plain words of the will are all that is required to show that the creation of a trust for separate use was not the only, or even the main purpose of the testator. The trustees are directed to pay to the daughter “during her natural life for her sole and separate use, support, and maintenance, and without any control of any husband she may take, and her receipt to be the only discharge therefor.” Thus, it will be observed, the taking of a husband is spoken of hypothetically and contingently, as an event which may or may not happen: any husband she “may” take, *i. e.*, “in case” she should take; but the payment is to be during the whole of her natural life, and is to be for her “support and maintenance”—the only discharge therefor, during her whole natural life, being “her receipt,” whether she take a husband or not. This brings the case directly within the ruling in *Dunn's Appeal*, 4 Norris, 94, 98.

Boyd's Estate.

Assuming then that the daughter had but a life-estate, her right of disposition was only such as she had under the power of appointment conferred by the father's will, and to the extent that its exercise transgressed the rule against perpetuities the principal passed at her death to her "heirs" as purchasers. Her will (which showed her own understanding of the interest given by the father) gave, in execution of the power, the estate to a trustee to pay the income to her son, in part during his minority and the whole when he became of age, for life—\$25,000 of the principal being given to him absolutely at the age of twenty-five years: at his death the residue to his children or issue and widow, in such shares as he should appoint by will, and in default of appointment to the persons entitled to his estate under the intestate laws. But if he should leave a widow and no issue, then one-third to such widow, \$1000 to the Children's Hospital, \$1000 to the Southern Home for Friendless Children, one-half of the residue to her husband, and one-half to children of her brother, designated in the will, in equal shares.

The original testator died ———, 18—; the daughter, in January, 1874; her husband, May, 4, 1898, and her son, February, 22, 1900, leaving a widow to whom he bequeathed his entire estate, but no children or issue.

The life-estate appointed to the son and also the gift to him of \$25,000 upon attaining the age of twenty-five years—if that event occurred within twenty-one years of the death of his mother, the donee of the power (but not otherwise) do not infringe the rule against perpetuities (Gray on Perp., §§ 232, 523; Lawrence's Estate, 21 Crumr. 364); but the appointment to the widow and unborn children of the son was clearly bad, as the appointee, by possibility, might not come into being within twenty-one years after the death of the donee. But are the limitations to persons in being in her lifetime, of ascertained portions of the estate, to be regarded as vested and thus saved from the operation of the rule against remoteness? If they were given simply in default of the execution of a power conferred upon the prior taker, they would be regarded as vested subject to being divested, and the gift would be valid (4 Kent, 324, 204; Perry on Trusts, § 250). But where interests are limited not simply in default of the execution of a power, but in the event also of a failure of a prior estate, they are contingent. Thus, in a devise to B, who is unmarried, for life, remainder to his children, but if he dies without children to C (which is precisely this case), both remainders are contingent, though that to B's children may become vested when a child is born, subject to open and let in after-born children (*Doe v. Perryn*, 3 Term Rep. 484; 4 Kent, 205; *Woelpper's Appeal*, 11 Crumr. 562). In the present case, children of the son, had there been any, could not have taken under the primary appointment to them, because of the rule again perpetuities, and yet, if the limitation to persons in being were good, the latter would take to the exclusion of the son's children, which would be a perversion of the will of the donee and certainly not in accordance with her intentions.

It follows that there was a failure to make a valid appointment except to the extent of the life-estate to the son and the gift to him of \$25,000 (if he reached the age of twenty-five years within twenty-one years of his mother's death), and that as to anything beyond, the estate of the original testator, so far as it is included in the account, passes, under his will, to the daughter's "heirs." Who are her "heirs?" Her husband and son survived her, and the former, where the subject of the gift is personalty, is included in a limitation to the heirs of the wife (*Gibbons v. Fairlamb*, 2 Casey, 217; *Eby's Appeal*, 3 Norris, 241). The distribution should, therefore—subject to the gift of \$25,000, if valid and not already paid—be, one-half to the personal representatives of the husband, less collateral inheritance tax, and one-half to the personal representatives of the son.

Jennings's Estate.*Decedent's estate—Executors and administrators—Supplemental accounts.*

Where there has been an unexplained shrinkage of assets between any two accounts, the accountant will be ordered to file a further account, explaining the apparent disappearance of assets, upon petition of parties in interest.

Petition for account. O. C. Phila. Co., July T., 1885, No. 20.

Harry E. Kohn, for petitioner; *W. Henry Sutton*, for respondent.

HANNA, P. J., Jan. 19, 1901.—The purpose of this petition is to ascertain what has been done by the executrix with the assets found to be in her hands upon the adjudication of her fourth account, filed Nov. 12, 1897. This, we think, the parties are entitled to know. Upon examination, it appears the adjudication was prepared by counsel, and assumed by the auditing judge to be correct, as the former appeared for all the parties interested. From this fact, certain errors were not observed and inadvertently approved. For instance, the balance in the hands of the accountant, as shown by the adjudication of her third account, filed Dec. 13, 1892, was \$17,301.50, and improperly included therein were two ground rents and a house, No. 1722 South Ninth street. These being real estate, should not have been included, as an account, stated in proper form, contains and comprises only money or other personal assets which can be distributed and paid out. Real estate cannot be distributed, but is the subject of formal conveyance.

Again, this apparent balance of \$17,301.50, composed of mortgages and real estate, is, by the adjudication of the fourth account, reduced to \$16,600, but how and by what means this was done does not appear, and, if stated arbitrarily by the accountant, was certainly without authority. The balance, transferred as above stated, could properly be reduced only by a conversion of the assets and an allowance for any loss by the sales. And in the account the accountant states an estimated value of the assets of the estate to be \$15,400, which was irregular and meaningless. Then, although the assets of the estate remained intact, and there was no cash for distribution, allowances are made, to be deducted from moneys thereafter realized by the executrix, and reducing the nominal value of the estate to \$15,000. Thus the auditing judge, through press of business, no doubt, was inadvertently led into a departure from the usual practice of awarding the personal estate to the accountant, to be converted and thereafter accounted for, striking out the real estate items, and then, when a supplemental account is filed, making the allowance out of the cash then for distribution. It is also a further departure to direct a sale of the real estate, at public or private sale, without a petition to the court and a proper decree thereon. If this order has been carried out, the question of title may hereafter vex the purchaser. It was also erroneous to allow commissions to the executrix before any sale had been made, for the proper amount could not until then be determined. So the allowance of costs of filing account seems to be in excess of the rate fixed by the rule of court. There was, therefore, no fund out of which to allow these expenses and counsel fee charged until a sale made and supplemental account filed. However, these errors cannot, in this proceeding, be corrected. The adjudication has long been confirmed and cannot be disturbed except by a petition for review. In the present application sufficient has been shown to entitle the petitioner to be informed as to the disposition made by the executrix of the assets of the estate since the adjudication of Nov. 12, 1897, and the amount of interest and income received therefrom since the filing of the account.

10 DIST. R.

Jennings's Estate.

The petition is therefore granted, and the executrix directed to file in the office of the register, within two weeks from this date, a further account of both principal and income collected from the securities and property of the estate, both real and personal, since the close of the original account.

Claghorn's Estate.

Orphans' Court—Adjudication—Petition for review.

A petition for review which sets up as a ground for review an error of law on the face of the adjudication, and shows affirmatively that the petitioners were not guilty of laches, will be sustained on demurrer, although more than four years have elapsed since the adjudication was confirmed.

Petition for review. O. C. Phila. Co., Oct. T., 1894, No. 261.

Isaac D. Yocum, for petitioner; *John G. Johnson*, for respondent.

ASHMAN, J., Feb. 2, 1901.—The petition sets up as ground for review an error of law on the face of the adjudication arising out of these facts: In the lifetime of the decedent, his son, who is now the executor of the father's will, made certain promissory notes which the decedent endorsed, and which were discounted by the bank for the use of the son. The notes matured after the testator's death and were protested for non-payment, but no notice of protest was given to the endorser. In lieu of them, other notes were afterwards given by the son, which were so far paid that the original indebtedness to the bank was reduced to \$4300. The payments were made out of moneys of the estate, and the credits taken therefor were allowed by the adjudication, and are alleged to have been erroneous primarily for the reason that no notice of protest of the notes was given to the executor. The position is untenable, however, because the maker of the notes was the executor of the will of the endorser. The sole purpose of notice is to save the endorser from loss which his ignorance of the non-payment of a note might occasion. But it would be a vain performance to notify an endorser, who is also the maker, that he has not paid his own note. The liability of the estate, therefore, not being affected by the failure of notice, there was no apparent error in allowing the credits for subsequent payments on account of the indebtedness.

The petition, however, further denied the legitimacy of these credits, because the notes whose payment they represented were the personal obligations of the executors, and entailed no liability to the estate; and the funds of the estate were therefore improperly used in their payment. The adjudication allowing the credits was filed in 1895, and confirmed in May, 1896. On appeal to the Supreme Court by Emma F. Keller, a creditor, so much of the adjudication as awarded the sum of \$4300 *pro rata* to the bank and to Mrs. Keller was reversed, and payment of the entire sum of \$4300 was decreed in favor of Mrs. Keller, the court holding that the notes given by the executor, together with his bond as executor, constituted a promise that he would not plead the statute as against the bank, which, however, did not preclude the other creditors from pleading it. The credits allowed by the adjudication were not disturbed, and the adjudication, except as to the distribution of the sum named, was confirmed; Mrs. Keller's exception having been taken solely to the right of the bank to share in the distributive fund, and having no relation to the credits claimed for the various payments which had been made on account of the notes.

Do the facts set out in this statement warrant a review and opening of an adjudication made in 1895 and confirmed in May, 1896? The petitioner shows that he was appointed administrator *c. t. a.* in April, 1899, and that no laches can be imputed to him. On behalf of Mrs. Keller, for whom he formerly

Claghorn's Estate.

acted as counsel, he alleges that she was not informed until the decree of the Supreme Court on July 15, 1897, that she had any standing as a creditor to object to the payments made to the bank. She was the victim of atrocious fraud at the hands of the executor, if not of the testator. The former gave her minute details of investments of her capital, but omitted to tell her that almost all of the securities had been hypothecated for loans to himself, and that others were in the name of his father; and his story was believed, because there was no reason to doubt it up to the moment at which he ceased his remittances. In *Ritter's Appeal*, 23 Pa. 95, which was quoted approvingly by the Supreme Court when the present estate was before it (see *Claghorn's Estate*, 181 Pa. 600), it was said that while the personal representative of a decedent could not bar distributees from pleading the statute by his own refusal to plead it, still, if he had in perfect good faith actually paid a barred debt in which he had no interest, without protest by legatees or creditors, equity would not refuse him credit therefor in his account. The executor here does not come within those terms, for he had a direct interest in the claim of the bank, and he failed to plead the statute simply because he thereby compelled the estate to pay what was actually his own debt.

In view of the fraud which underlay these transactions, we think that a review should be granted. The petitioner, by virtue of his office, is a trustee for creditors; he had no official existence at the time of the audit, and at once, on his appointment, he instituted suit in another tribunal to compel an accounting and a refunding from the bank of the sums paid to it by the estate. The proceeding was dismissed, because the Orphans' Court alone had jurisdiction, and because the account filed in that court by the executors showed, or ought to have showed, the amounts so paid, and was not objected to as to those payments by legatees or creditors. That decision, however, does not say, and was not meant to say, that the time of grace within which creditors may still except has ended. The demurrer is overruled, with leave to file an answer.

 Smith's Estate.

Decedent's estate—Intestate—Children and grandchildren of deceased uncles and aunts—Acts of April 27, 1855, and June 30, 1885.

Under the Acts of April 27, 1855, § 2, P. L. 368, and June 30, 1885, § 1, P. L. 251, children of deceased uncles and aunts participate in the distribution of the estate of a deceased intestate to the exclusion of grandchildren of deceased uncles and aunts.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 182.

Charles A. Chase, for exceptant; *George R. Van Dusen*, contra.

ASHMAN, J., Feb. 2, 1901,—The Act of April 27, 1855, § 2, P. L. 368, constituted first cousins a distinct class of collateral heirs as distinguished from mere next of kin, and directed that they should take by representation. This altered the rule established by the Act of 1833, under which such collaterals took *per capita*. The Act of June 30, 1885, § 1, P. L. 251, followed, enacting that "whenever, by the intestate laws, it is directed that the real and personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole of such estate, and if there be more than one they shall take in equal shares." This provision restored the symmetry of legislation under the head of decedent's estates by reinstating section 14 of the Act of 1833, whereby distributees of whom all stand on the same plane of relationship shall share *per capita*: *Cremer's Estate*, 156 Pa. 40; *Whitaker's Estate*, 175 Pa. 189. Under these Acts, the children of deceased

Smith's Estate.

uncles and aunts participate in the distribution of the estate of a deceased intestate to the exclusion of grandchildren of deceased uncles and aunts: Rogers's Estate, 131 Pa. 382; Cremer's Estate and Whitaker's Estate, *supra*. It follows that the award in this instance of one-half of the fund to the first cousins of the decedent, exclusively, was correct. Exceptions dismissed.

Waters v. Carr.

Appeal from justice—Payment of costs precedent to appeal.

Under the general Act of June 24, 1885, P. L. 159, a person desiring to take an appeal is not required, as a condition precedent thereto, to pay more costs than are demanded by the justice furnishing the transcript; nor is it a duty imposed by statute upon the justice to demand and require all costs before furnishing the transcript.

An appeal will not be stricken off where it appears that the justice only demanded and appellant only paid the costs due the constable and justice.

The special Act of March 22, 1899, P. L. 478, relative to costs of justices of the peace in the counties of Westmoreland and Beaver, was extended by the Act of May 25, 1871, P. L. 1142, to the county of Crawford, and by those Acts the fees of the justice and constable are alone demandable as a condition precedent to right of appeal.

Rule to show cause why appeal should not be stricken off. C. P. Crawford Co., Nov. T., 1899, No. 129.

Samuel Grumbine, for rule; Byles & Mackey, contra.

THOMAS, P. J., March 21, 1900.—The reason assigned for striking off this appeal is that the appellant has not paid the costs accrued before the justice of the peace, excepting those of the justice and constable. This question has frequently been before our courts with somewhat divergent and unsatisfactory results.

The proponent of this rule relies chiefly upon the cases of Carbaugh v. Sanders, 9 District Reps. 13, and Greer v. Pool, 21 Pa. C. C. Reps. 521, which hold that the payment not only of the justice's and constable's costs, but also of appellant's witnesses, is a prerequisite to the appeal, which the justice may not waive.

It is true that Judge Swope, in the case of Carbaugh v. Sanders, so decided relative to the Act of June 24, 1885, and based said decision on the cases of Enyeart v. Lehrsch, 6 District Reps. 404; Wells v. Weaver, 6 District Reps. 661; Acor v. Acor, 7 District Reps. 360, and Greer v. Pool, 21 Pa. C. C. Reps. 521.

In the case of Enyeart v. Lehrsch, in reference to the special Act applicable to Blair county, which is also very similar to the general Act of June 24, 1885, Judge Bell says: "Said language is equivalent to saying that appellant must pay the costs in order to render his appeal effectual, or, to put it in another form, the payment of the costs is a prerequisite to securing the appeal."

The question in that case was as to whether appellant might pay the costs more than twenty days after the entry of the judgment, and Judge Bell was there speaking, not as to whether payment of part of the costs might be made, or the justice was entitled to demand but a portion thereof, but of the costs that actually were required to be paid. And what is really decided in that case is that the costs required to be paid by appellant must be paid within twenty days from the rendition of the judgment.

The case of Wells v. Weaver was, under a special Act, applicable to Erie county, which required that the party appealing "shall pay to the justice before whom the case was tried all of his fees and all the constable's fees in the case."

In that case, Judge Walling expressed the opinion that the justice had no power to waive the payment of the costs, which would seem clear under the Act applicable to said county, but the real ruling in the case was that the costs required to be paid must be paid within twenty days from the entry of judgment.

The case of Acor v. Acor, while holding that the Act of June 24, 1885, makes

the payment of the costs a prerequisite to securing an appeal or making it effectual, and basing the said decision on the case of *Enyeart v. Lehrsch*, *supra*, was certainly properly decided under the local Act of March 22, 1869, P. L. 478, extended to Montour county by the Act of June 2, 1871, P. L. 1352, which provides that the justice's and constable's costs *shall* be paid to the justice.

The case of *Greer v. Pool*, relying on the cases of *Enyeart v. Lehrsch* and *Wells v. Weaver*, *supra*, held that payment of the costs was a prerequisite, and that the justice whose duty it is to grant the appeal cannot waive the provisions of the statute. With this we certainly would agree, providing we conclude that the Act of June 24, 1885, imposes upon the justice of the peace the duty of collecting all costs before granting an appeal.

In opposition to the above cases, we have the case of *Clark v. Stephens*, 3 Pa. C. C. Reps. 592, where, under the special Act of March 25, 1873, P. L. 406, providing that the party or parties appealing shall pay to the justice all his fees and all the constable's fees in the case, said justice's and constable's costs were paid, and the justice demanded nothing more, it was held by Judge Sittser, that while under said special Act the justice is not empowered to dispense with his and the constable's costs, yet that the Act of June 24, 1885, only conferred upon the justice power to demand and receive the costs, and if the justice fails to exercise said power, and delivers a transcript without making such demand, the appellant would not be in fault, and his appeal should not be stricken off for his failure to make further payment not demanded of him.

The case of *Eastman v. O'Neil*, 3 Pa. C. C. Reps. 595, is one decided under the Act of March 2, 1868, P. L. 257, which is very similar in its provisions to the general law of June 24, 1885. In that case, Judge Archbald held, that where a transcript be furnished to appellant without requiring the payment of the costs, there is nothing in said Act which invalidates the appeal, or which makes the payment of the costs one of its absolute conditions, and that the same was not invalidated by the fact that appellant did not pay the costs to the alderman.

In the case of *Ledeber & Bowman v. Prather*, Feb. Term, 1894, No. 204, in this court, a motion was made to strike off the appeal for the same reason and under circumstances almost identical with the one at bar, and Judge Henderson refused so to do, on the ground that the provisions of the general Act of June 24, 1885, as to payment of costs, was one which the justice might or might not enforce at his pleasure.

It is somewhat interesting, at least, to study the various Acts of Assembly upon this subject. By the Act of April 9, 1833, the costs on appeals from the judgments of justices of the peace and aldermen were to abide the event of the suit and to be paid by the unsuccessful party. Later, we find a number of special or local Acts regulating the payment of costs on such appeals.

These special Acts were generally of three different classes, like the Act of March 2, 1868, P. L. 256, applicable to Lancaster county, which provided that no appeal should be allowed unless the appellant should pay *all the costs* accrued before the alderman or justice of the peace unless the customary oath as to inability was made; the Act of March 2, 1868, P. L. 257, made applicable to a number of counties, which provided that the justices of the peace should be entitled to demand and receive from the appellant all costs that may have accrued in the said action, &c.; or the Act of March 22, 1869, P. L. 478, applicable to Westmoreland county, which provided that the parties appealing should pay to the justice before whom the case was tried all his fees and all the constable's fees in the case, and no appeal need be allowed by the justice until said fees were paid.

We see, therefore, that these special Acts, which were extended to a number of different counties of the Commonwealth, provided in their respective cases, 10 DIST. R.

Waters v. Carr.

that *all fees should be paid* before appeal; that the justices *should be entitled to demand and receive* the costs and fees, and that the *fees of the justice and constable should be paid*.

The general Act of June 24, 1885, seems to have been modeled after, and in no essential different from, the second class of special Acts above referred to.

It does not seem, therefore, to us, that under that Act a person desiring to take an appeal is required, as a condition precedent thereto, to pay more costs than is demanded and required by the justice furnishing the transcript; or that it is a duty imposed by statute upon the justice to demand and require the payment of *all* costs before furnishing the transcript.

Furthermore, it appears by the Act of May 25, 1871, P. L. 1142, "that the provisions of the first (section) of the Act relative to fees of justices of the peace, constables and attorneys-at-law, in the counties of Westmoreland and Beaver, approved March 22, 1869, be and the same are hereby extended to the county of Crawford." The first section of the Act above referred to (P. L. 478) provides as follows: "That hereafter, in all cases of appeals from the judgments of justices of the peace in the county of Westmoreland, the party or parties appealing shall pay to the justice before whom the case was tried all his fees and all the constable's fees in the case; and the said justice shall receipt on his record for said fees, so that it shall appear on the transcript, the same to abide the final determination of the case as all other costs thereon, and no appeal need be allowed by the justice until said fees are paid."

It seems very clear to us that the appellant in this case complied with all the necessary conditions precedent to the right of his appeal, and the rule is, therefore, discharged.

From Otto Kohler, Meadville, Pa.

Commonwealth v. Lukan.

Criminal law—Liquor license—Act of May 13, 1887—Indictment—Sentence.

A bottler who has sold liquors by the drink in violation of his license, having been indicted and convicted of selling without a license, is to be sentenced for that offence under the first clause of section 15 of Act of May 13, 1887, P. L. 108, imposing a minimum penalty of \$500 fine and three months in jail, and not under the second clause of that Act for a violation of the license.

Seemle, that the defendant, notwithstanding his license, was rightly indicted and convicted for selling without one.

Motion for sentence. Q. S. Lackawanna Co., Oct. T., 1900, No. 256.

Defendant, John Lukan, was indicted for selling intoxicating liquors without having a license. At the trial, two witnesses testified that they were present together at the defendant's place, No. 845 Capouse avenue, Scranton, on May 1, 1900, and one of them bought a glass of whiskey of the defendant and drank it at the bar; that the place was fitted up with a regular bar and fixtures, and that three other men were there drinking beer from glasses. They also saw a little girl come with a pail and buy ten cents' worth of beer from the defendant.

A third witness swore that he was at the defendant's place on Aug. 25, 1900, and called for a glass of beer and drank it there. He also bought a half pint of whiskey, and was waited on by the defendant. Seven others stood at the bar drinking out of glasses, and three women came and got beer in pails. The sign over the door was "John Lukan's Bottling Works."

It appeared from the other evidence that a bottler's license for this place was issued to one Charles Rice on April 1, 1900; that on May 15 application was made to have the license transferred to the defendant; and that on May 29 it was duly transferred to him by order of court.

Counsel for the defendant, having offered no evidence, requested the court to

charge that as to what occurred on Aug. 25 there could be no conviction, the defendant having at the time a bottler's license, and his acts being merely a breach of that license and not a selling without a license as charged. This the court refused to do. Verdict, guilty in manner and form as indicted.

The district-attorney having moved for sentence, it was contended on the part of the defendant that sentence should be imposed, not for selling without a license, but for a violation of the license which the defendant held, that being the offence of which he was really guilty.

Joseph O'Brien, for defendant.—No penalty is imposed by the Wholesale Liquor Act of 1891 except a revocation of the license, and recourse must be had to the Act of 1887 to find one. That Act, in the second clause of section 15, directs that "any person having [a] license, who shall hereafter be convicted of violating any of the provisions of the license laws, shall be subjected to a fine of not less than \$100 nor more than \$500, &c." That provision is in direct contrast with the first clause, imposing a fine of not less than \$500 nor more than \$5000, and imprisonment of not less than three nor more than twelve months on any one convicted of selling without a license. The case is ruled by *Com. v. Watson*, 2 District Reps. 526.

F. E. Beers (John R. Jones, district-attorney, with him), for plaintiff.—The defendant is indicted and convicted of selling without a license, and he must be sentenced accordingly. A breach of his bottler's license amounted to a sale without a license, the sales being outside of, and so not under the protection of it, and he was, therefore, well convicted. Otherwise, how could a conviction for the violation of a wholesale license be obtained? There is nothing in the wholesale Act of 1891 which makes a disregard of its provisions a misdemeanor, but there is a general prohibition against selling without a license, which will justify it, in the retail Act of 1887, and in that Act we find the penalty for so doing; and when a bottler becomes a retailer and sells beer and whiskey by the half pint and glass, he violates the retail law and must suffer the consequences.

ARCHBALD, P. J., Jan. 5, 1901.—The defendant was indicted and convicted of selling liquor without a license. It was shown at the trial that he had a bottler's license, and it is contended in his behalf, that as the only infraction of the law which he committed consisted in selling liquor to be drunk upon the premises, the sentence to be now imposed should be that prescribed by the second clause of the 15th section of the Act of May 13, 1887, P. L. 108, for the breach of the license, and not the more severe penalty found in the first clause of the same section for selling without a license generally. To this, however, we cannot agree. The indictment—whether rightly or wrongly we do not now undertake to say—charges the defendant with the offence of selling liquor without a license, and not of violating the license which he held, and sentence must follow accordingly. The two charges are as distinct as the different penalties prescribed by the statute, and upon a conviction on either, the sentence appropriate to it must be imposed. We cannot vary or transpose our sentence upon what may have appeared or been contended for at the trial. If the defendant, having a license, has been improperly convicted, he has his remedy by an appeal to the courts above us, where our errors, if any, will be reviewed and corrected. But so far as the case now stands, the sentence must follow the record as it has been made, and as the defendant has been convicted of selling without a license, the penalty for that offence must be imposed.

NOTE.—On the general question whether persons who hold a license, wholesale or retail, can be lawfully indicted and tried for selling without a license, as to sales not protected by the kind of license which they hold, see *Com. v. Holstine*, 123 Pa. 357; *Com. v. Zelt*, 128 Pa. 615; *Com. v. Watson*, 2 District Reps. 526; *Com. v. Francis*, 9 District Reps. 744.

From William A. Wilcox, Scranton, Pa.

Salin's Estate.

Decedent's estate—Partition—Costs.

Upon proceedings in partition of a decedent's real estate, conducted by his administrator, who was also one of the owners, in good faith and with reasonable diligence, although no sale is effected because the property is held by the owners at a price above the bid, the auctioneer's bill, counsel fees and a commission of two per cent. to the administrator upon the bid will be allowed as taxable costs.

Appeal from taxation of costs. O. C. Phila. Co., Jan. T., 1899, No. 8.

Lewis L. Smith, for exceptant; *A. D. Wiler*, contra.

ASHMAN, J., Feb. 2, 1901.—After fruitless attempts, under successive orders of sale, to dispose of the real estate, the administrator, who was the owner of one-third, commenced proceedings in partition. He afterwards, by a sale to his sisters, divested his share, and, by agreement of all parties, discontinued the suit. The sale of his interest was effected under a judgment obtained against him by his sisters, which they satisfied of record upon the assignment to them of his share in the decedent's estate. The parties are now before us on the question of costs. All were equally anxious to sell, but the sum at which they valued the property exceeded the sum which was offered by bidders. There was some contrariety of testimony on this point, the sisters alleging that they had advised the acceptance of an offer, which the brother, however, declined to consider, but the fact seems to be that the brother made an honest endeavor to secure the largest attainable figure—a matter as vitally important to himself as to his co-owners. The objection that he had no standing as a party in partition, because he was indebted to his co-tenants in a larger sum than the amount of his interest, begs the question, inasmuch as the value of his interest was dependent upon the result of the sale. The proofs submitted of the services which were actually rendered warrant us in holding that the items to which exception is taken, comprising the auctioneer's bill, the fees of counsel and a commission of two per cent. to the administrator, represented reasonable expenses, and were properly allowed by the clerk.

The appeal from his taxation of costs is dismissed.

Baxter's Estate.

Decedent's estate—Creditor's petition for account—Laches.

Where the widow of a decedent came into possession as administratrix of the entire personal estate of her husband, valued at \$200, which she retained in satisfaction of her widow's exemption, and an equity which he had in a piece of real estate disappeared after his death, under a sale in foreclosure, which realized less than the amount of the mortgage, a creditor cannot, after five years' delay, compel her to file an account, without alleging in his petition that the personalty was undervalued, or that money was received by the respondent from the sale of the mortgaged premises.

Petition for account. O. C. Phila. Co., Oct. T., 1900, No. 276.

H. M. Du Bois, for petitioner; *Peter Boyd*, for respondent.

ASHMAN, J., Feb. 2, 1901.—The widow of the decedent came into possession as administratrix of certain household effects which were valued at \$200, and which she retained in satisfaction of her widow's exemption. The articles comprised the entire personal estate of her husband, but he had also an equity in a piece of real estate, which disappeared after his death, under a sale in foreclosure, which realized less than the amount of the mortgage. The petition does not allege that the personalty was undervalued, nor that any money was received

Baxter's Estate.

by the respondent from the sale of the mortgaged premises; but it sets up that the widow has neglected to file an inventory and appraisal of the estate and an account, although more than five years have elapsed since the decedent's death. From this statement, it would seem that the petitioning creditor is open in some measure to the charge of laches, which he has preferred against the respondent. It would be an idle formality on the part of the widow, when the personal estate is less than \$300, to present a claim against herself as administratrix, and to file an appraisal in order to secure her exemption (see Cocker's Estate, 11 Pa. C. C. Reps. 243; Bourguignon's Estate, 28 W. N. C. 315, &c.), and it would be an equally idle ceremony to file an account where no other property existed to be accounted for. At the end of a year from decedent's death the creditor might, with some grace, have asked that the administratrix should exhibit an account, and proceed to sell the real estate for the payment of debts, but he cannot, with effect, after years of delay, during which the property has been sold in adverse proceedings for less than its encumbrances, ask for an account which will be useless to him and expensive to the widow.

The petition is dismissed.

Bonwill's Estate.

Testamentary law—Construction—Inconsistent clauses,

The inconsistency which will justify a disregard of the former of two testamentary provisions relating to the same subject, must be clear and irreconcilable. Testator's will read as follows: "To my daughters, A., of Philadelphia, Pa., or to her heirs, and to B., now of Philadelphia, Pa., is to be divided the balance of the estate, whatever it may be, after all other of my wishes herein named shall have been fixed. To my son, C., now of Rangoon, India, where he is practicing dentistry, I leave (\$100.00) one hundred dollars, he having been of more expense to me than my daughters, which is to be paid by my daughters heretofore named in this will, if that amount is in hand after the debts are all paid, and, further, if the sisters heretofore named of C. wish, they may divide the residue of the estate with him as they may agree upon. . . . I wish no trouble to be made by any of my heirs over my estate, but a fair distribution to each, and have me rest in peace; and let all be the happier that justice is done to my immediate heirs, and that their minds were not set upon the dollars I may have left for distribution." *Held*, that the son took only \$100, and the daughters the residue.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 146.

Samuel E. Cavin, for exceptant; *John Weaver*, contra.

ASHMAN, J., Feb. 2, 1901.—We do not find any inconsistency between the clause in his will by which the testator gives a pecuniary legacy to his son, assigning the reason why it is no larger, and the clauses in which he gives the residue of his estate equally to his two daughters, with the suggestion that they may share it with the son as they may agree upon, and in which, finally, he wishes a fair distribution to be made to each. The testator has made what he deems a fair distribution, and, in view of what he had done for one of his beneficiaries, he has made it unequal in amounts in order that it may be fair. The precatory words in which he permits his daughters to share their portions with his son, do not, on any construction, amount to a gift to the son. They were manifestly not so intended by the testator, whose last thought was that only his daughters would take the residue. This is shown in the closing paragraph, where he directs that the interests which he had given to his heirs should be free from the control of their husbands. It is unnecessary to refer to the rule, as stated in *Jones v. Strong*, 142 Pa. 496, that "the inconsistency which will justify a disregard of the former of two testamentary provisions relating to the same subject, must be clear and irreconcilable," in a case like the present, where the several testamentary clauses are in entire harmony with each other.

The exceptions are dismissed.

10 DIST. R.

Phillips's Estate.

Decedent's estate—Holding real estate for rise in value—When real estate should be sold.

* The policy of the law is not in favor of the retention by a trustee of real estate yielding a proportionately inadequate income, irregularly paid and dependent to a large extent upon the vicissitudes of the business of the tenant, simply in the hope that at some unknown time in the future it may rise in value. Hence, where a large and expensive hotel is centrally located, can only be used for hotel purposes, yields but about \$16,000 income, with the rent in arrear, and the alteration or erection of a new building in keeping with the value and location of the lot is practically impossible on the part of the trustee, and the price offered is \$500,000 greater than the assessment, and will yield an assured income of \$45,000 as against \$16,000, and when but few of the *cestui que trusts* oppose the sale, a petition for leave to sell will be granted on the expiration of thirty days given the objecting *cestui que trusts* to find a purchaser on terms more advantageous.

Rent service—Rent charge—Covenant to pay proportionate part of principal at death of each life-tenant.

The rent reserved as part of the consideration of the sale is not changed from a rent service to a rent charge by the covenant of the purchaser to pay a proportionate part of the principal at the death of each of the *cestui que trusts* for life.

Exceptions to master's report. O. C. Phila. Co., Oct. T., 1886, No. 158.

Geo. Wharton Pepper, for exceptions; A. H. Wintersteen, contra.

PENROSE, J., Feb. 2, 1901.—The policy of the law is not in favor of the retention by a trustee of real estate yielding a proportionately inadequate income, irregularly paid and dependent to a large extent upon the vicissitudes of the business of the tenant, simply in the hope that at some unknown time in the future it may rise in value: and this, irrespective of the presumption in favor of the persons entitled to the income, as first takers and primary objects of the bounty of the creator of the trust, as against those whose interests are deferred and perhaps contingent. A statute forbids, in express terms, the withholding of income for the purpose of accumulation, or adding to principal, except for an existing minority and the benefit of the minor, and all the mischiefs which it was the purpose of this statute to suppress may result if income is sacrificed to benefit, or perhaps, to preserve such a property.

In the present case, the application is for leave to sell a large and very expensive hotel, in the central part of the city, which can only be used or rented for the purpose for which it is thus occupied. The class of renters capable of successfully carrying it on is, necessarily, a limited one; so that if the place should become vacant there would, in all probability, be a considerable time during which it would remain unoccupied, if indeed, in view of the growing competition by reason of the increased number of hotels, more modern in their construction and plan, a tenant could be procured at all, except at a considerable reduction in the rent. In that case, however, the annual expenses would still have to be met, with the cost resulting from deterioration of vacant property. The taxes alone are said to be \$13,875.00 per annum, with an apprehension, based upon what has taken place frequently in the past few years, of an increased and constantly increasing rate of assessment. Under the existing lease to a most competent tenant, the rent, if paid with regularity, as it is not, would yield a maximum net rent of \$31,000, but in point of fact the actual yield has been about \$16,000. The rent is largely in arrear, but proceedings for its recovery, by distraint or eviction, could not fail to injure the property very seriously, by indicating in the most unmistakable manner that the hotel cannot be carried on successfully or without ruin to the tenant. The building, as already stated, cannot be used or occupied except as a hotel, and the cost of alteration or of the erection of a new building in keeping with the value and location of the lot

would be so enormous as, practically, to make either impossible on the part of the trustee.

It is clear that a property of this kind is not a desirable one to hold as the chief asset of a trust-estate, and if it can be sold at an adequate price it will be to the advantage of all parties in interest, present or prospective. The Act of Assembly provides for a private sale—where a sale is shown to be desirable, “where a *better* price can be obtained . . . than at public sale;” and there seems to be no contradiction of the fact that a public sale would not bring as much as the present purchaser offers. But we are convinced that, irrespective of this, the price is entirely adequate and as much as any person will now give. Upon the question of adequacy the opinions of the parties in interest are of great weight. The trust is for five children of the testator, for their respective lives, with remainders to their children and issue, with limitation, in default of issue, to his surviving children, &c., &c., the shares thus accruing to *cestui que trusts* to be subject to the trusts. All of the *cestui que trusts* for life, except one who lives abroad and perhaps, therefore, is less qualified to judge than those in this country, and all of their children, having vested interests, of whom there are fifteen, except one (the child of the non-concurring *cestui que trust* for life, also living abroad), are urging the sale—such of the children as are minors being represented by their guardian, who is said to be a man of great experience as to values of real estate. All of the *cestui que trusts* except one have children, so that the contingent limitation in the event of death without issue is of comparatively little importance, while of the twenty-five persons interested in the contingency, among whom are included all the *cestui que trusts* and those of their children having vested interests in remainder, only the daughter and her son, already mentioned, the guardian of the children of a deceased son whose original share was given to him absolutely—the guardian being his widow, and a surviving son, who also received his original share absolutely, are opposing the sale. This is a consideration of much importance, and when added to it is the further fact that the price offered is \$500,000 greater than the value, high as it is, at which the property is assessed, and that it will yield an assured income of \$45,000, as against \$31,000, the present nominal, or \$16,000, the actual net income, it seems scarcely worth while to discuss the opinions expressed by the experts. It is enough to say that numerically the experts called in support of the sale exceed those testifying in opposition, while in experience and practical judgment they are at least their equal.

The subject has been carefully considered by the master, and we need say no more with regard to it: but to silence all possible question as to adequacy of price, we will defer the confirmation of the report until the expiration of thirty days from the filing of this opinion, in order that in the meantime those who refuse their assent may find a purchaser on terms more advantageous. (See Dundas's Estate, 16 W. N. C. 458; Brown's Appeal, 18 P. F. Smith, 53).

We are unable to see how the rent reserved as part of the consideration of the sale is changed from a rent service to a rent charge, as suggested by one of the exceptions to the master's report, by the covenant of the purchaser to pay a proportionate part of the principal at the deaths, respectively, of the *cestui que trusts* for life. A ground rent, that is, a rent reserved upon a conveyance in fee, is a rent service in Pennsylvania, simply because of the theoretical existence of a tenure between the grantor and grantee, giving rise to a duty on the part of the grantee to perform the services incident to the tenure, viz., the payment of the stipulated rent, which the grantor can enforce by the feudal remedy of distress: the rent also, by reason of this duty, being apportionable if released or extinguished as to part of the property, which a rent charge would not be. This was the case, at common law, in England (Littleton, § 216) prior to the statute of

Phillips's Estate.

Quia Emptores, which provided that in case of a conveyance in fee the grantee should hold, not of the grantor, as he had previously done, but of the paramount lord: but as that statute was never in force in Pennsylvania, a rent on such a conveyance remains as at common law. Such a covenant may, perhaps, have the effect in equity of converting the estate of the grantor in the rent and making it personalty; but as the legal estate in that case would remain until performance of the grantee, it is not apparent that the security would be imperiled in the meantime (see *Heist v. Baker*, 13 Wright, 9), and even this effect may be prevented by making the covenant to pay dependent upon the option of the grantor, its successors, or assigns.

A decree dismissing the exceptions and granting leave to sell in accordance with the recommendation of the master will be entered unless a more advantageous offer from a responsible bidder be obtained on or before the time hereinbefore mentioned.

Commonwealth v. Boettcher.

Killing birds—Jurisdiction, J. P.—Statutes—Practice, Q. S.

The Act of June 3, 1878, P. L. 160, provides for a trial before a justice of any person charged with violating the statute, and for a recognizance for appearance at the Quarter Sessions by a defendant who refuses to pay a fine which the justice imposes. The proper practice in the Quarter Sessions in such a case is by indictment.

Criminal law—Indictment—Insectivorous birds.

An indictment which, in the words of the statute, charges the killing of an insectivorous bird, duly named in one count, and having unlawfully in possession such bird in another count, is good.

Motion for a new trial and arrest of judgment. Q. S. Luzerne Co., Nov. Sess., 1900, No. 156.

Martin J. Mulhall and J. F. O'Neill, for Commonwealth.

John F. Shea, E. F. McGovern and E. V. Jackson, for defendant.

HALSEY, J., Dec. 10, 1900.—On Nov. 2, 1900, the defendant in this case was indicted for, that, on Oct. 6, 1900, he did willfully and unlawfully kill six insectivorous birds, to wit, six flickers; and in a second count in the said indictment, that he did willfully and unlawfully have in his possession, after the same had been killed, six insectivorous birds, to wit, six flickers.

The defendant, prior to the indictment, had been arrested upon a warrant dated Oct. 6, 1900, and taken before an alderman in the city of Wilkes-Barre, and, after a hearing, he was adjudged guilty of the offence, and was sentenced, in pursuance of the Act of Assembly, by the alderman. The defendant refused to pay the penalty as imposed, and entered into his recognizance to appear in this court and answer the said complaint, as provided by the statute. The Act under which the defendant is indicted is that of June 3, 1878, § 12, P. L. 160, which provides that no person shall at any time, within this State, kill, trap or expose for sale, or have in his possession after the same has been killed, any night hawk, . . . flicker, . . . or any other insectivorous bird, under a penalty of \$5 for each bird killed, trapped, exposed for sale or had in possession. This indictment covers two offences declared by the statute in the two counts as we have denominated them aforesaid. The indictment is properly here, because, under the said Act of June 3, 1878, *supra*, § 34, it is provided, that any justice of the peace or alderman, upon information or complaint made before him by the affidavit of one or more persons, of the violations of the provisions of this Act by any person or persons, is authorized to issue his warrant, directed to a constable, to cause such person to be arrested and brought before such justice or

DISTRICT REPORTS.

Commonwealth v. Boettcher.

alderman, who shall hear and determine the guilt or innocence of the person or persons so charged, and, if convicted of the said offence or offences, shall be sentenced to pay the fine or fines, penalty or penalties, attached to such violations, together with costs. . . . That the defendant, on refusing to pay said penalty, may enter into a recognizance, with one or more sufficient sureties, to answer said complaint on a charge of a misdemeanor before the Court of Quarter Sessions of the peace of the county in which the offence is committed.

We submitted, in our charge to the jury, the questions of fact: (1) Did the defendant kill, willfully and unlawfully, six insectivorous birds, to wit, six flickers? (2) Did the defendant willfully and unlawfully have in his possession, after the same had been killed, six insectivorous birds, to wit, six flickers? The statute under which the defendant was indicted, and under which the indictment has, in almost the language of the statute, been drawn, charges distinctly (1) that the defendant did kill the kind of birds that it is made an offence to kill under the statute; (2) that the defendant did willfully and unlawfully have in his possession, after the same had been killed, six insectivorous birds, to wit, six flickers. There are two offences in the statute, and they are properly alleged in the indictment in two separate counts. There is a certainty about each one of these counts that definitely fixes the crime charged under the statute; there is no duplicity in the indictment; and as the indictment is, in our judgment, in legal and proper form, and as the questions raised and required to be found, before there can be a conviction under this statute, were distinctly and plainly put to the jury for their determination, and the jury having found the facts required by the statute against the defendant, the conviction under the indictment was justified: Wharton's Criminal Pleading and Practice, §§ 243-251.

Motion denied.

From Sidney R. Miner, Wilkes-Barre, Pa.

Mack v. Eastern and Northern Railroad Company.

Eminent domain—Lien creditors—Equitable powers.

While damages assessed for appropriation of land under the right of eminent domain are payable to the owner of land, although he be insolvent, yet lien creditors, the collection of whose claims are put in jeopardy to the extent of the depreciation of the property, may have the fund apportioned to their liens by application to the equitable powers of the court.

Eminent domain—Mortgage—Ejectment.

A purchaser at sheriff's sale, under foreclosure of a mortgage which was a lien on the property taken by a railroad company before location of its line, cannot by ejectment recover possession of the franchise granted by the Commonwealth. The title in fee simple is held subject to the public use, notwithstanding voluntary settlement of damages was made with the owner.

Writ of ejectment for 3.29 acres appropriated under right of eminent domain, but which was bound by lien of mortgage. C. P. Northampton Co., April T., 1899, No. 38.

H. S. Cavanaugh, for plaintiff; *W. Fackenthall*, for defendant.

SCOTT, J., Dec. 3, 1900.—The facts were admitted upon the trial and a verdict directed for plaintiff, with a reservation whether there was any evidence which entitled her to recover: *Boyle v. Mahanoy City*, 187 Pa. 1. She was mortgagee of Sarah C. Brown, over whose property covered by the lien the defendant company located its railroad by final adoption of engineer's lines and surveys, Jan. 6, 1896. The whole tract consisted of 26 acres; the appropriated piece for right of way comprised 3.29 acres. The owner, Mrs. Brown, executed, under seal, a release of damages to the defendant for a nominal consideration on Nov. 1, 1895, granting to it present right of occupancy, and by the same instrument.

Mack v. Eastern and Northern Railroad Company.

ment stipulated for a conveyance in fee simple upon the payment of \$1000, "when the same may be demanded by the company or its agents." Under foreclosure proceedings and judgment upon her mortgage, the plaintiff became the owner of these premises by a sheriff's deed on Feb. 17, 1896. She demanded damages by reason of this appropriation of the land, released by her predecessor in title. Viewers were appointed upon the petition of this defendant, its bond filed in court, tendered and approved May 11, 1896.

The report of viewers was subsequently filed, and an appeal taken from the assessment of damages, upon the trial of which, June Term, 1896, No. 77, a verdict was returned for the defendant by my instructions Sept. 20, 1896. The complainant was not the owner of the property when taken under the right of eminent domain, and no claim to sustain a recovery in damages for the appropriation was incident to her as mortgagee. If any part of the damages for the location of a railway over land bound by liens may be applied to the relief of creditors whose security would be impaired, it can only be done by distribution under the equity powers of the court before the fund reaches the hands of the owner of the title: *Phila. & Reading R. R. Co. v. Penna. Schuylkill Valley R. R. Co.*, 151 Pa. 569, and cases cited. This remedy may be invoked when it appears that the lien creditors, or some of them, may be prejudiced by depreciation of the property in consequence of the servitude imposed upon it, if the amount of damages which measures the extent of that depreciation should be paid over to the debtor, and not applied either wholly or partially in liquidation of his indebtedness. This right of apportionment or payment, however, does not depend upon the fact that some of the land has been taken for the easement, and the value of the remainder diminished, but upon the essential and necessary condition that collection of these liens may be thus put in jeopardy: *Knoll v. New York, etc., Ry. Co.*, 121 Pa. 467. If a mortgage for \$1000 rests upon a tract worth \$10,000, and the location of a railway over part of it occasions a depreciation of \$5000, the lien still remains secure. Whether the owner receives the amount of damages assessed in condemnation proceedings for his loss, or releases them to the company for a nominal consideration, does not concern the mortgage creditor, nor give him standing in equity for any intervention.

It is part of the present case, by facts admitted, that when the sheriff sold under *lev. fa.* the property covered by plaintiff's mortgage, over a portion of which the defendant's road was located and constructed, that the price paid exceeded the mortgage debt and interest, and her counsel gave upon the docket a receipt for the amount of the entire obligation. It is obvious that, whatever remedy might have existed, if the debt had not been paid, by reason of settlement without notice, she had no interest in the question of damages, under the accepted rules, at the time of the trial.

This writ in ejectment followed. By the act of location, Jan. 6, 1896, after the prior release of the owner, the defendant acquired an absolute title to this servitude of the right of way by possession and occupancy: *Williamsport Ry. v. Phila. & Erie R. R.*, 141 Pa. 414. In principle, it is difficult to conceive how the subsequent purchaser of the fee simple title may regain possession of that part of the premises upon which the easement in favor of the defendant has been lawfully imposed, under a prior owner and compensation made, whether it be viewed as a case where the buyer at a judicial sale is affected by the rule of *caveat emptor*; takes the property with a right of way over it apparent, visible and notorious (*Memmert v. McKeen*, 112 Pa. 315); or as one where the servitude for public uses is conferred by the State as an attribute of its sovereignty paramount to every right of ownership: *Lewis's Eminent Domain*, § 3. Tenures in Pennsylvania are not feudal, but allodial, and while the Commonwealth is not a lord paramount in title, yet when any land "is wanted for public purposes, the

Mack v. Eastern and Northern Railroad Company.

State, in virtue of her political sovereignty, takes it, but she compels herself, or those who claim under her, to make full compensation to the owner:" Wallace v. Harmstad, 44 Pa. 501. Distinction has been made respecting the right to notice of condemnation proceedings between mortgage and judgment creditors, when the former are considered as holding an estate in the land, but this requirement is based largely upon statutory provisions which have no existence here. In Pennsylvania, while a mortgage is deemed a conveyance of the land (Tryon v. Munson, 77 Pa. 262), it is only a pledge for a debt. It is a personal chattel, goes to the executor and not the heir: Rickert v. Madeira, 1 Rawle, 328; Lenning's Estate, 52 Pa. 138; Moore v. Cornell, 68 Pa. 322. If, upon condemnation proceedings, damages are not assessed to the mortgagee, why should notice to a mortgage creditor *out of possession* be exacted if not required by the statute? And if such notice is not demanded, what analogies in legal reasoning would charge the defendant with an unfulfilled obligation to answer for the owner's debt?

It is suggested in Reese v. Addams, 16 S. & R. 43, that when property is taken for such uses, public policy requires that liens should be considered divested, but that the company is not bound to look to the application of the money, "unless, perhaps, on express notice." So in Deckert's Appeal, 5 W. & S. 343, it was said of a similar contention, "the owner of the land who was insolvent had the legal right to receive the money from the company, and payment to him would have been a good payment *without notice of the equitable interests.*"

If, then, the line of a railway be located, occupied and the work constructed, after compensation made with the owner, all of which, combining, give the company an absolute right from the State to possession under the easement (Williamsport Ry. Co. v. Railroad Co., *supra*), and satisfaction so made with the owner is without notice from a mortgage creditor, who is, besides, without an equity that entitled her to intervene, how may she, as subsequent purchaser, recover that possession from one who is invested with it by the supreme sovereignty of the Commonwealth, except by reversion after the termination of the servitude by grant, abandonment or otherwise.

I Knoll v. New York, etc., Ry. Co., 121 Pa. 467, the defendant had constructed its track along the centre of a public street in the city of Erie. The plaintiff held a mortgage upon a property abutting thereon. Satisfaction for any probable consequential damages to the premises had been made with the owner and a release executed. The mortgage creditor then instituted suit in trespass, complaining of impairment of the security for his debt by reason of the depreciation of the property. Judgment of non-suit by the trial court was affirmed on appeal for two reasons: 1. It did not appear that collection of the mortgage debt was in jeopardy. 2. Release of the owner was a bar to recovery by a lien creditor. Two of the judges did not concur in the conclusion, but the grounds of their dissent do not appear.

In the opinion by Judge Williams it is said: "Had the road been located over any portion of this lot, and had the damages been settled by the parties or adjusted without notice to the plaintiff, it is probable that the lien of the mortgage would not be divested, and the mortgagee might in that case proceed upon his mortgage in the same manner as if a sale of the mortgaged premises had been made to a private person, selling first that which still belonged to the debtor, and, if his money was not made thereby, then selling that which the railroad company had taken."

This is purely an *obiter dictum*, employed for the purposes of argument and illustration, but it nevertheless bears such a badge of authority that entitles it to weighty consideration. It does not, however, solve the present difficulty. While the mortgaged land was not levied and sold in two parcels, the security

10 DIST. R.

Mack v. Eastern and Northern Railroad Company.

here was treated as an existing lien upon all of it, and the plaintiff became the purchaser of the whole tract. It is not doubted that she owns the fee simple title. But the case cited gives no support to the contention that she is entitled to present possession of the portion included in the defendants' right of way, for which this writ has been issued. It is directed solely to the extent of lien and right of sale. If, in cases of appropriation by eminent domain, liens should be held divested by public policy, as suggested in *Reese v. Addams*, it is respectfully submitted that result must follow whether the company had actual notice or not. The record of them is constructive notice to all whom their existence affects. In jurisdictions which hold that a mortgage is divested without making the mortgagee a party, the lien in equity follows the fund as a substitute for the land: *Farnsworth v. Boston*, 128 Mass. 1; *Danforth v. Suydam*, 4 N. Y. 66; *Platt v. Bright*, 29 N. J. Eq. 128.

But in all the cases, "the question," says Judge McCollum, in *Phila. & Reading R. R. Co. v. Penna. Schuylkill Valley R. R. Co.*, 151 Pa. 576, "whether the party appropriating the land with notice of the liens would be protected by a voluntary payment to the owner, was not considered or raised."

Whatever may have been the relations between the parties prior to the sheriff's sale, all equities were extinguished when the mortgage debt was paid in full. The plaintiff's place, in any event, on this record of ejectment, is the same as that of a stranger to the previous controversy.

The entry of the defendant was under the Commonwealth. "No covenants or private contracts between citizens can possibly be violated in such a case, because none can stand in the way of State authority. It is a resumption by the sovereign of a clear right of sovereignty, in subordination to which the covenants of the deed were made. Had the parties contracted expressly against the exercise of this right, they could not have bound the sovereign; much less can their covenants made for other purposes be permitted to have the effect claimed for them:" *Brown v. Corey*, 43 Pa. 504. A covenant of warranty against eviction is not broken by the entry and occupancy of the Commonwealth in the exercise of its rights of eminent domain. The easement thus acquired authorizes possession for its enjoyment, while the seisin and a qualified use remain in the owner of the absolute title, who may exercise all acts consistent with the public: *Dobbins v. Brown*, 12 Pa. 75. The appropriation of ground for a public highway is not an eviction by the landlord, nor by one holding paramount title. "It is an exercise of the right of eminent domain which does not divest the tenant of his seisin and but partially disturbs his possession. Subject to this right, all property is held. . . . The tenant has exclusive possession of all except the surface, and even of that, diminished only by the public right of passage. Nothing has been taken from him which has diminished his right of property, for, in municipal society, property is ownership, subject to the right of eminent domain:" *Workman v. Mifflin*, 30 Pa. 369. When the public use ceases for which private property is taken, it reverts to the owner of the soil: *Jessup v. Loucks*, 55 Pa. 350.

By an application of these principles to the present case, it is clear that plaintiff took by sheriff's deed the interest of the mortgagor; that the mortgage contract upon her estate, when executed, was subject and subordinate to the right of the State at any time to resume its sovereignty in the land for public use upon making compensation to the owner, and that, until the franchise to the defendant is terminated, and the use reverts to the plaintiff, she is not entitled to recover possession and defeat the Commonwealth's grant: *Bean v. Kulp*, 7 Phila. 650.

If it be conceded that the plaintiff has succeeded to the rights of the option for sale expressed in the agreement between the mortgagor and the defendant,

Mack v. Eastern and Northern Railroad Company.

and that, under appropriate pleadings, specific performance could be decreed in ejectment, even if deed had been tendered, a contract providing for execution upon the demand only of the defendant is unilateral and not mutual: *Waterman's Spec. Perf.*, § 196.

Now, Dec. 3, 1900, judgment is entered for the defendant upon the reserved point *non obstante veredicto*.

From Henry D. Maxwell, Easton, Pa.

United States v. Blair.

Habeas corpus—Commitment by United States commissioner—Sufficiency of evidence.

When a party has been committed by a United States commissioner for an offence against the United States, the court should not, upon a writ of *habeas corpus*, review, as upon appeal or writ of error, the sufficiency of the evidence upon which the judgment of the commissioner, in making the commitment, was founded.

Habeas corpus. Circuit Court of the United States, Eastern District of Pennsylvania, Oct. T., 1900, No. 1.

The relator, who is captain of the schooner "Augustus Hunt," was held in custody by the marshal upon a commitment by a United States commissioner under section 5344, Revised Statutes, which provides that "Every captain . . . on any . . . vessel, by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed, . . . shall be deemed guilty of manslaughter, etc."

Alexander P. Colesberry, for relator.

James B. Holland, United States District-Attorney, *J. Whitaker Thompson* and *William M. Stewart, Jr.*, Assistant United States District-Attorneys, for United States.

DALLAS, Circ. J. (orally), Jan. 8, 1901.—There is much force in the argument which has been addressed to the court on behalf of the relator; but a preliminary question presents itself to my mind as controlling. The writ of *habeas corpus* was issued in this case, as in all cases in the United States courts, under a provision of the Revised Statutes, in these words: "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

The return, which has not been traversed, and must therefore be assumed to be correct, is that the marshal holds the prisoner by virtue of a commitment made under a certain other section of the Revised Statutes, by a United States commissioner. And the offer on behalf of the prisoner, stating it substantially, is to re-try at this time, upon the evidence that the commissioner heard, and upon the addition of other evidence thereto, the facts upon which the judgment of the commissioner in making the commitment was founded. Therefore, the preliminary question to which I have referred, is whether this court should, upon *habeas corpus*, deal with the case as if before it by appeal or upon writ of error. I have hastily examined the cases cited by the learned district-attorney, and they seem to me to be precisely in point: *In re Stupp*, 23 Fed. Cas. 296, and *In re Byron*, 18 Fed. Repr. 722. As I understand the effect of the decisions in those cases, they negatively answer the proposition which I have just stated, and the able argument which has been addressed to the court has not led me to doubt their correctness. In my opinion, the only question now is, whether there was any statute authorizing the exercise of his judgment upon the question by the commissioner, and whether, if there was such statute, there was also competent evidence upon which his judgment was reasonably

10 DIST. R.

United States v. Blair.

exercised. As I find neither of these questions substantially controverted on behalf of the prisoner, I feel great confidence in my own view of the subject. The section of the Revised Statutes upon which he was held is 5344, and, omitting the irrelevant portions of it, it provides: "That every captain, by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed, shall be guilty of manslaughter," etc.

Negligence, inattention or misconduct may consist either in acts of commission or of omission; and whether from facts proved, the deduction should be made of misconduct, negligence or inattention, in any instance, is, in my judgment, for the jury, subject to the instructions of the court. What the instructions of the court should be in this case, when it comes to trial, it would, I think, be manifestly inexpedient for me now to express any opinion upon. It is enough to say, that I do not feel that the court would be justified in interfering at this stage. The prisoner is held by due process of law, and is entitled to trial according to law, but is not entitled to have that trial interfered with in this summary manner. But this brings me to refer to a matter which his counsel has suggested, and which seems to be entitled to consideration, if I may be permitted to say so, as well by the district-attorney as by the court. I have been impressed with the belief that this is a case, the trial of which should be had as speedily as may be possible, and to that end the court now states to counsel that any arrangement that can be made, either, if it be found upon examination that the statute permits it, by borrowing a jury from the District Court, or by issuing a special *venire*, to have an early trial, will be approved and adopted.

The prisoner will be remanded.

Effinger v. Hain.

Equity jurisdiction—Specific performance—Mutuality of remedy essential.

Equity will not enforce specific performance of a contract unless there is mutuality of remedy between the parties.

Specific performance of lease—Agreement to transfer liquor license.

Equity will not specifically enforce, at the instance of a lessee, a lease of a hotel property and an agreement by the lessor to consent to and sign a petition for the transfer of the unexpired portion of a liquor license. The remedy at law is adequate under such conditions.

Demurrer to bill in equity. C. P. Lancaster Co., Equity Docket, No. 3, page 331.

Coyle & Keller, for plaintiff; *C. Reese Eaby*, for defendant.

LANDIS, J., Oct. 20, 1900.—The bill of complaint filed by the plaintiff in this case alleges:

"1. That the defendant is the owner and proprietor of the Southern Market Hotel, a licensed tavern, situate on the northeast corner of South Queen and Vine streets, in the city of Lancaster, Pennsylvania.

"2. That the said defendant, while the owner and proprietor of said hotel, to wit, on July 27, 1900, by a certain indenture in writing, under his hand and seal, leased and let the said hotel and premises, together with the stable in the rear thereof, on East Vine street, and the fixtures and furniture belonging thereto, to your orator, for the term of eight months, from Aug. 1, 1900, to April 1, 1901, with the privilege of re-renting for a further period of five years from April 1, 1901, by giving notice to the defendant, in writing, on Jan. 1 of each year; your orator agreeing to pay therefor to the said defendant the rent or sum of \$1066 $\frac{2}{3}$, in monthly instalments of \$133 $\frac{1}{3}$, beginning Sept. 1, 1900. A copy of said lease is hereunto attached, marked 'Exhibit A,' and made a part of this bill.

"3. The defendant further agreed, in consideration of the foregoing and the

payment to him by your orator of the proportionate amount of the license fee or tax from said Aug. 1, 1900, to the expiration of said license year, on April 1, 1901, that he would consent to the transfer of the license of said hotel to your orator and would sign a petition asking the Court of Quarter Sessions of said county to transfer the said license to your orator.

"4. In accordance with the terms of said agreement, your orator, through his representative, Alexander H. Gerz, on July 30, 1900, paid to C. Reese Eaby, attorney for said defendant, and who had represented the defendant throughout the negotiations relating to, and in the execution of, said agreement, the sum of \$366.66, being the full amount which, under the said agreement, was to be paid by your orator to the defendant for the transfer of said license, and was given a receipt by said C. Reese Eaby, a copy of which is hereunto attached, marked 'Exhibit B,' and made a part of this bill.

"5. On Aug. 1, 1900, the date on which, under said agreement of lease, the said hotel property was to be delivered over into the possession of your orator, your orator went upon the premises and demanded possession of the same, but the defendant refused to deliver up the premises so leased as aforesaid into the possession of your orator, or to carry out the terms of his agreement with your orator.

"6. Your orator, from the day last aforesaid, has always been, and now is, anxious, ready and willing to comply with all and singular the covenants and agreements on his part to be performed, and has paid all the moneys under said agreement for the transfer of said license which he had agreed or was called upon to pay.

"7. The said defendant, however, has failed to keep and carry out the covenants and agreements by him to be performed, and refuses to give your orator possession of the premises so leased by him as aforesaid, and also refuses to consent to the transfer of said license, or to sign any paper or petition asking the Court of Quarter Sessions as aforesaid to transfer the said license to your orator.

"8. Your orator further shows that the premises demised in said lease are particularly desirable, in that the said hotel is an old stand enjoying a good patronage, and that your orator cannot go into the open market at this time and secure a hotel of this character, and that no damages at law can adequately compensate him for the defendant's breach of said contract, and that he is entitled to have specific performance thereof."

Wherefore he prayed :

"1. That the said defendant, Charles Hain, be enjoined from transferring, selling or leasing the premises herein described contrary to the terms of said lease, or from transferring or agreeing to transfer the license connected with said premises to any one except your orator.

"2. That the said defendant, Charles Hain, specifically perform the said contract in its entirety, and deliver up to your orator possession of the said premises as described in said lease in accordance with the terms and conditions thereof; and, also,

"3. That the said defendant execute a paper or petition, asking for and agreeing to the transfer of the license of the said hotel to your orator, and that he specifically and fully perform his agreement with your orator relating thereto.

"4. That the said defendant account for and pay over to your orator such damages as he may have suffered by reason of the defendant's non-delivery of the possession of the leased premises to your orator, and his refusal to consent to the transfer of said license.

"5. Such other, further and general relief as to your honorable court may seem meet and proper."

10 DIST. R.

Effinger v. Hain.

To this bill the defendant has filed what he has termed "a motion to dismiss the bill," but which is in fact a demurrer. The reasons assigned are: "1. The said plaintiff has a complete remedy at law for the injury alleged in the bill. 2. The plaintiff has not, in and by his bill, made or stated such a case as entitles him, in a court of equity, to the relief for which he prays."

Conclusions of law.

The facts in the bill being by the demurrer confessed to be true, it only remains for us to ascertain whether or not the plaintiff has set forth a case which entitles him to equitable relief. That he entered into an agreement with the said Charles Hain for the leasing of the Southern Market Hotel, and paid a certain sum of money for the transfer of the license, and was then refused possession, and was also refused a transfer of the license, appears plainly on the face of the bill. But can he obtain possession of real estate and the license, except in an extraordinary case, by the strong hand of a court of equity? In answer to this question, we can do no better than quote what has been so well said by Green, C. J., in *Meehan v. Owens*, 198 Pa. 69: "As the privilege to sell liquor is a personal privilege, which requires the sanction of the Court of Quarter Sessions, and expires with the end of each license year, no new license issued for the succeeding year would be a substitute for the specific license which was the subject of the contract; but we cannot see why a remedy in damages for breach of contract is not an adequate remedy for the plaintiff's injury. There is no special or extraordinary feature of this transaction which takes it out of the class of ordinary contracts for the sale of personal chattels. We are not referred to any authority that sustains the claim made by the plaintiff, and we do not think any such can be found. It was said by our brother Dean, in delivering the opinion in one of our latest cases, *Rigg v. Reading, &c., Ry. Co.*, 191 Pa. 298: 'Nor do we agree with the court below in its conclusion that the plaintiff's remedy at law, if his cause of action on the facts be clear, is an inadequate one. We entirely concur with the court in holding that, in rare instances, equity will decree specific performance of a sale of chattels, such as all those enumerated by Justice Bell, in *McGowin v. Remington*, 12 Pa. 56, and in such cases as *Goodwin Gas Stove and Meter Company's Appeal*, 117 Pa. 514, where specific performance of a sale of stock in a particular manufacturing company was decreed;' and in exceptional cases, where gross fraud or forgery has been practiced to obtain possession of a chattel, equity will decree restitution; but, in nearly all cases, the test is, Is there an adequate remedy at law?"

Where the right is clear, is a computation of damages impracticable? There is no inadequacy at law because of a mere conflict of testimony as to value. In all such cases, proximate truth or fact is deducible from evidence. Not so with the value of a picture, heirloom, ancient manuscript, or the like: *Rigg v. Railway Company*, *supra*.

It has been endeavored to distinguish between the case of *Meehan v. Owens*, *supra*, and the present one, in that here, it is alleged, the application is made, not that the defendant be compelled to transfer the license, but that he be compelled to sign the petition for the transfer, and, also, in that the opinion of the Supreme Court was not rendered until after the expiration of the term. We cannot perceive that there is any practical difference between the two cases. As stated by the learned chief justice, the bill was "for the specific performance of a contract for the sale of the license, lease, good-will, fixtures and bar-room furniture, furniture on the third floor and in the dining-room on the first floor of the retail saloon at No. 2128 East Lehigh avenue, Philadelphia, for the price of \$5500." The buyer having refused to comply, the seller filed the bill to compel the specific performance of the contract, and, in that respect, the case

Effinger v. Hain.

was the converse of the one we are now considering, but it was actually a stronger case, for there there was an outright sale. In this case, the lease was for "the hotel and premises, together with a stable in the rear thereof, on East Vine street, and the fixtures and furniture belonging thereto," and the buyer is the plaintiff in the bill.

It is not every contract that courts of equity will specifically enforce. One of the fundamental rules adopted in bills of this character is, that there must be mutuality of remedy. Both parties must have a right to a decree: *Meason v. Kaine*, 63 Pa. 340; *Ballou v. March*, 133 Pa. 64. It is true that by this it is not meant that each party must have the same identical remedy, but there must be reciprocal remedies for breach of the contract. Suppose the plaintiff, instead of the defendant, had refused to perform this agreement, could the defendant, by bill or otherwise, have compelled him to enter into possession of the leased premises, take the transfer of the license and pay the rent? Assuredly, the rent could have been collected by *assumpsit* or distress, and no court of equity would have entered a decree for its payment.

Has then the plaintiff no adequate remedy at law? An action of ejectment will recover the premises, if he is entitled to them, or a suit to recover the money paid and such damages as plaintiff has sustained will compensate him for the defendant's default. Of course, he cannot, in this way, secure the license; but that, as his counsel admits, is within the control of the Court of Quarter Sessions, and if he secures possession and is a proper man, no great difficulty will meet him from this cause. Nor will the term elapse before the expiration of the contract, unless by the act of the plaintiff himself. Under its provisions, he can renew from year to year for five years; so that he is not so greatly deprived of relief in this particular as would at first appear.

We are persuaded that the case has not been brought in the proper forum; that the plaintiff is not entitled to maintain this bill, and that we should sustain the demurrer and dismiss it.

Demurrer sustained and bill dismissed, with costs.

From George Ross Eshleman, Lancaster, Pa.

Glace v. Hummel.

Malicious prosecution—Evidence—Plaintiff's character—Presumptions—Burden of proof.

In an action for malicious prosecution, the plaintiff may give evidence of his good character as a part of his case in chief, as tending to establish want of probable cause, if his reputation was known to the defendant when the prosecution was commenced.

It seems, also, that where the plaintiff and the prosecutor (defendant) resided in the same neighborhood for a number of months, and the reputation of the former is shown to have been good among his neighbors, a presumption arises that the latter had knowledge of his character at the time of the prosecution, sufficient to shift the burden of proving want of knowledge upon the defendant.

Motion by defendant for new trial. C. P. Dauphin Co., Sept. T., 1899, No. 23.

John C. Nissley and William M. Hargest, for plaintiff.

James A. Stranahan and E. E. Beidleman, for defendant.

WEISS, J., Dec. 12, 1900.—The plaintiff in this case was arrested on a warrant issued upon information made by the defendant before a magistrate, charging him with forgery, which consisted in signing her name to an article of agreement for the rent of a house, with intent to defraud her and to the prejudice of her rights. He was committed to jail for want of bail on July 4, 1899, and detained there for a period of twenty-four hours or more. On Sept. 27 of the 10 DIST. R.

Glance v. Hummel.

same year, the grand jury ignored the bill. He brought this action for malicious prosecution against the defendant, and the jury found a verdict in his favor. A motion was made by her for a new trial, and a number of reasons are assigned therefor. The only reason deemed necessary to consider is that there was error in admitting the testimony of witnesses respecting the plaintiff's reputation and character for honesty and integrity primarily, or, in other words, before it was attacked by the defendant. The general rule is that a person's reputation is presumed to be good, and that, until it has been attacked, the plaintiff may not adduce evidence to show that fact. The reason for the rule is that the character of the plaintiff is, generally speaking, not in issue.

This is the unvarying rule in actions for slander, especially where the words spoken are actionable in themselves. Evidence may be offered to enhance the damages; but this increase is punitive, not compensatory, with which the reputation of the plaintiff has no concern: *Chubb v. Gsell*, 34 Pa. 114. Where, however, character is in issue, or one of the factors which goes to make up the point in issue, the rule is different. The testimony may be offered in the first instance to show that it is good. Knowledge acquired by a witness from common report of the neighborhood, respecting the habits and integrity of a person, constitutes his character or reputation. "General report is general reputation. General reputation is general character. Character and reputation are the same. The reputation which a man has in society is his character:" *Kimmel v. Kimmel*, 3 S. & R. 336. The gist of an action for malicious prosecution is want of probable cause or want of reasonable ground for belief of guilt. This must be established by proof.

"The issue is whether the defendant had probable cause. His belief is not enough. Nor is it of any consequence that he was actuated by malice, as it is well settled that if he had probable cause, it is an answer to the action:" *Chapman v. Calder*, 14 Pa. 365. Before a cautious person is justified in the belief that the supposed offender is guilty, he must have a reasonable ground for suspicion. Usually he must consider all the facts which indicate probable guilt. "The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man, against a person of notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation:" *Bacon v. Towne*, 4 Cush. 241. He must consider the environments of the person as well as the facts which point to his guilt. He suspects; he mistrusts. In this suspicion enters the probability that a person did or did not commit the offence, and his reputation must be considered along with other facts in determining upon a criminal information. Certain facts may indicate that he did, but the fact that therefore he bore an unblemished reputation would cause hesitation before, if it would not altogether deter, an arrest. He has more ground for commencing a prosecution if the supposed guilty person lacks a good character than if he possesses it.

Character, then, is one of the elements or ingredients which must be taken into account by a person who seeks to institute criminal proceedings against another. It oftentimes secures an acquittal when invoked by the defendant, and it would be a harsh rule to relegate him to a presumption of good character when he becomes plaintiff in an action for malicious prosecution, until it is attacked, when the law enjoins upon the prosecutor the duty of considering character along with other matters before subjecting the supposed offender to arrest and imprisonment.

In slander, one of the objects of the action is "to punish the defendant for indulgence of his malice." The plaintiff's character can have nothing to do with the defendant's punishment. Even if the defendant reasonably suspected

the plaintiff of the guilt which the words import, the latter cannot primarily offer proof of good character, because the former would only disprove the existence of malice. "His reputation may have been untarnished, and yet the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant:" Chubb v. Gsell, *supra*.

Character is "put in issue" in an action of slander whenever the defendant traverses the presumption that it is good. If character enters in the determination whether reasonable suspicion of guilt exists, it is difficult to see why a plaintiff in an action for malicious prosecution, who must affirmatively show a negative, may not primarily introduce evidence of good character to show the absence of that suspicion or the want of probable cause.

It is a just requisite of a person contemplating criminal proceedings against another to have character considered as an element in justification of an arrest, and it is accordingly quite as much in issue in a malicious prosecution as it is in an action of slander, when a defendant invades its domain and seeks to show that it is bad. We do not know that this precise question has been decided in actions for malicious prosecution in Pennsylvania. There is abundant authority in other States, and they are quoted from at length in order to show the grounds upon which the decisions rest.

In *Woodworth v. Mills*, 61 Wis. 44 (50 Amer. Reps. 135), which was an action for malicious prosecution, the court says: "On the trial, the plaintiff was allowed to give evidence of his previous good character as a part of his case, and not in answer to an attack upon such character by the evidence of the defence. . . . The question seems to us to be this: In determining the probability of the guilt of a party charged with crime, has the previous good character any bearing upon the question? We think this question must be answered in the affirmative. The fact that it has weight in determining the question of guilt in all cases where there is any doubt of the guilt of the accused party is the basis of the rule in criminal actions, that the defendant may, in all such cases, and perhaps in all cases, give in evidence of his previous good character. The fact that he has such character is some evidence, and often very conclusive evidence, of the innocence of the accused. When, therefore, a person is about to make a criminal complaint against a citizen of previously known good character and reputation, it is reasonable that he should consider that fact with the other facts and circumstances in determining the question of the probability of the guilt of the accused. If I lose my horse under circumstances which indicate that he has been stolen, and shortly after he is found in the inclosure of a man who has the reputation of being a horse thief, I might have probable cause for believing that that man had stolen him; but if he was found under like circumstances in the inclosure of a man whom I knew to have sustained a good reputation for many years, there would be a question at least whether I would have probable cause to believe such man guilty of the theft. There are many cases which hold that in a civil action the character of the plaintiff is not in issue until the same is attacked by the defendant, and that until so attacked it is presumed to be good, and, therefore, there is no necessity or propriety in giving affirmative proof of such character. This, as a general rule, is undoubtedly the true rule; but in an action for the malicious prosecution of a criminal action, where the main question in the case is whether the defendant had probable cause for instituting such proceedings, an exception should be made. In such action the plaintiff must prove the negative, that is, prove that the prosecutor did not have probable cause to believe him guilty of the offence charged; and as bearing upon that question, he ought to be permitted to give evidence of his previous good reputation."

Glace v. Hummel.

In *Blizzard v. Hays*, 46 Ind. 169, the court says: "Had the plaintiff been on trial upon an indictment for the crime of forgery, it is well settled that he might have introduced evidence of his good character as a circumstance tending to show that he was not guilty: *Roscoe's Crim. Ev.*, 94, and note 1. It is held, however, in such cases, that the character of the prosecutor cannot be put in evidence by the State unless he opens the door by first introducing evidence of character himself. From the analogy of the case, it would seem to follow that, in an action for malicious prosecution, the plaintiff should be allowed to give evidence of his good character, and that the same was known to the defendant as a circumstance tending to show a want of probable cause for the prosecution. A defendant might, no doubt, meet this by evidence of his bad character. We are not called upon in this case to decide whether the defendant could or could not give evidence of the bad character of the plaintiff, before the plaintiff has opened the door, as that question is not before us. What we do decide on this branch of the case is, that the evidence offered by the plaintiff of his good character at the time of the prosecution, and that his character was known to the defendant, should have been admitted."

In *Israel v. Brooks*, 23 Ill. 575, it was decided that previous good character was admissible for the plaintiff, to show that the defendant had not probable cause for the prosecution. The court says: "The *onus* is on the plaintiff to show affirmatively, by circumstance or otherwise, that the defendant had no ground for the prosecution, no such reasonable ground of suspicion sufficiently strong in itself as to warrant a cautious man in believing that the person arrested is guilty of the offence with which he is charged: *Jacks v. Stimpson*, 13 Ill. 701; *Richey v. McBean*, 17 Ill. 63; *Hurd v. Shaw*, 20 Ill. 356. What these circumstances may be cannot be specified, but we would think, among them, the good character of the party accused would stand out prominently. All must admit that is, and must be, a strong fact, if known to the accuser, to ward off suspicion, and therefore, for this purpose, it is entirely competent for the plaintiff in the action, in his opening proofs, to show that his character was good, and known to be so by the defendant when he made the accusation. As the *onus* of proving a negative—the absence of probable cause—is thrown upon the plaintiff, slight evidence will usually suffice for such purpose. But the evidence of the uniform good character up to the time of the charge, is something more than slight evidence, and the plaintiff should have the benefit of it. If known to the prosecutor, what single fact is better calculated to weaken a belief, he being a prudent man, in the guilt of the suspected party? On the other hand, his bad character may be shown by the defence as good ground for augmenting a suspicion against him. We know, in no actions save criminal prosecutions and actions for defamation, can the character of the party as a general rule be inquired into; but in such a case as this, there seems so be great propriety in permitting it for the reasons here given."

In *Shannon v. Spencer*, 1 Blackf. 526, the court says: "The general rule that the plaintiff's good character is not in issue, and that it is presumed to be good until impeached by testimony, will admit of considerable modification and many explanations when applied to actions for malicious prosecution. . . . In criminal prosecutions, the defendant is permitted to prove the goodness of his general character. See *Com. v. Hardy*, 2 Mass. 317. And if he has given such testimony on the trial, and should bring an action for malicious prosecution, he may show all the testimony that was given on the trial, including (as a matter of course) the evidence of his good character. And it seems, under the same rule, that he might introduce such testimony, when he had not found it necessary to make use of it on the trial. We are aware of no reason that would restrain him in showing the want of probable cause from using the same testimony

by which he might defend himself against the prosecution. In malicious prosecution there seems more reason for the admission of such testimony than in other cases. They generally rest on the question of probable cause, which is frequently made up or attempted to be made up of a combination of circumstances, among which character will always have considerable weight."

In *Funk v. Amor*, 7 Ohio C. C. Reps. 419, the court says: "The first question to which we will call attention is whether, in a case for malicious prosecution, the plaintiff, without his character having been previously attacked by the defendant, may give in evidence his general reputation. . . . This question is one upon which there has been a great conflict in the decisions of the courts in this country and in England. We have examined it as thoroughly as we have time to do it, and have come to the conclusion that the plaintiff may, for the purpose of showing a want of probable cause, prove that his general reputation, in respect to the crime charged against him, was good at the time, and that the same was known to the defendant at the time he instituted this prosecution in this case."

In *McIntire v. Levering*, 148 Mass. 546, the court says: "There is some conflict of authority as to the competency of evidence of the reputation of the plaintiff in a trial of an action for malicious prosecution. . . . In a suit of this kind, where the prosecution complained of was for an offence implying moral turpitude, the plaintiff's general reputation at the time of the prosecution, if the defendant was where he would be likely to know it, is always involved in the issue, and the defendant may properly be permitted to show that it was bad. We see no good reason why the plaintiff should not be permitted, on the other hand, to show affirmatively that it was good.

"It is true that every one is presumed to be of good character until the contrary appears, and this presumption, ordinarily, saves the necessity of proof. Indeed, in civil cases, as a general rule, evidence of reputation is not competent upon a question as to liability for a particular act. But whenever character is in issue, the rule is different. One charged with a crime is not obliged to rest upon a presumption of good character. *In favorem libertatis*, he may prove the fact, if he can, by a weight of evidence far more effective than any mere presumption. A plaintiff in a suit for the malicious prosecution upon a criminal charge has the burden of proving that the prosecution was without probable cause. In defending against the prosecution he would have had the right to show his good reputation, although his character was not attacked otherwise than incidentally by the prosecution itself. The same incidental attack upon his character, necessarily, appears in the suit for the malicious prosecution. To prove that the attack was originally made without probable cause, we think he should be permitted to show his good reputation, known to the defendant when the prosecution was commenced."

This being the view taken of the law, there is to be considered the knowledge which the prosecutrix had, or is presumed to have had, of the character and reputation of Glace at the time she commenced the prosecution. She lived on Allison's Hill for a number of years, and Glace was her tenant nearby for a period of more than six months prior to his arrest. His reputation was known to be good by persons living in the same locality. The reputation thus generally known is presumed to have been known by the defendant. Living in the immediate neighborhood, and hearing nothing against it, she was bound by the presumption that the plaintiff's reputation was good. She was obliged to consider it as a feature in determining upon his arrest. She disregarded this mandate, or was indifferent to its consequences.

The reasons for a new trial are deemed insufficient to warrant the granting of it, and the motion for the same is accordingly overruled.

Brady et al. v. McEnroe et al.

Issue devisavit vel non—Burden of proof.

Upon an issue *devisavit vel non*, the burden is upon proponent to prove that a will executed by a dying man of advanced years five days before death, at the request of the beneficiary, who was a priest and second cousin, and, just before the request, had taken his confession, was his voluntary act.

Issue devisavit vel non—Evidence.

It is competent for the contestant's counsel to ask a witness if he had not been paid to prove the will, and also to ask the subscribing witnesses whether the beneficiary, who was largely instrumental in procuring the making of the will, had not sought to employ them as counsel for the estate after the contest.

Motion for new trial. C. P. No. 1, Phila. Co., June T., 1900, No. 999.

Alex. Simpson, Jr., and John T. Greene, for plaintiffs.

Maurice W. Sloan, for defendants.

BREGY, J., Jan. 30, 1901.—In my charge to the jury I used these words: "In this case, therefore, the burden is on Father McEnroe to prove that this will is the free will of William Baugh."

The case was a contest over the will of one William Baugh, sent to us by the Orphans' Court; Father McEnroe and some minor legatees under the will were the plaintiffs or proponents, and a niece named Catharine McEnroe, with some other relatives, are the defendants or contestants.

The proponents took the affirmative of the issues, being the plaintiffs, and proved the following facts as part of their case: On Sept. 7, 1899, William Baugh was very sick at the Charter House in Media; he was nearly seventy years old; his disease was cancer; he died on Sept. 13, 1899. On Sept. 7 the sick man was visited by Father McEnroe, a priest of the Roman Catholic Church, a second cousin by relationship and an intimate friend of many years. On page 113 of the official notes, Father McEnroe states that he found him a great deal worse than on his last visit; that he felt the cancer and made up his mind it was all over with the sick man. On page 114, he further states that Mr. Baugh said "he was too sick to see any one; that he could not talk to them; that it hurted him to talk."

In the evening Father McEnroe left the hotel and went to spend the night at the residence of the parish priest, telling the nurse, Dr. Makurjee, to send for him if Mr. Baugh got any worse. During the night the patient did get worse, had a number of severe hemorrhages from the cancer and was very much prostrated. Early in the morning the nurse went to the priest's house and told Father McEnroe and the parish priest, Father Brady, that the patient was very bad, and had a very bad night. Fearing that he was about to die, Father McEnroe made an arrangement with Father Brady, that he, Father McEnroe, would go at once to the Charter House and take the dying man's confession, and Father Brady was to follow later and administer the sacrament. When Father McEnroe got to the hotel he found the doctor there, who told him the chances were the patient was going to die. On page 172, he says, "He was confounded at seeing the change in the condition of the man from the day before."

After the doctor left, Father McEnroe took the confession of the dying man, he says, at the request of Mr. Baugh himself. After the confession, he says, he asked the sick man if he had made a will, and on being informed that he had not done so, Father McEnroe expressed surprise, and told him he ought to do so; then, he says, Mr. Baugh asked him to draw a will for him, and he agreed to do so. He says, he took down on the back of an envelope a memoranda of what Mr. Baugh told him, and went down stairs to get some paper to draw the will; there he met Father Brady, who, on being informed of the affair, advised him

not to draw the will. At that time a lawyer residing in Media, Frank B. Rhodes, Esq., was coming up the street, and Father Brady introduced him to Father McEnroe as a proper person to draw the will. When Mr. Rhodes was spoken to about the matter, he asked Father McEnroe to come to his office, which was nearby, and there received from Father McEnroe instructions as to what the will was to contain. Pursuant to these instructions, the will was drawn, which left Father McEnroe practically the entire estate. After the will was drawn, the lawyer took it over to the hotel and read it to the sick man, who assented to its contents and signed it. I should have stated that the lawyer, after getting his instructions from Father McEnroe, went to the sick-room and read to Mr. Baugh the instructions he had received, and Mr. Baugh assented to their correctness.

Father McEnroe accompanied the lawyer to the sick-room and introduced him to Mr. Baugh, and was in and out of the room during this interview. While Father McEnroe was giving instructions about the will to the lawyer in his office, Father Brady was in the room at the hotel administering the sacrament to the dying man. As already stated, he lingered until the 13th inst., when he died. The will was executed on Sept. 8.

Father McEnroe states, on page 125 of the notes, this as to the condition of the sick man in his interview, in which he received the directions as to the contents of the will, or rather disposal of the estate. I quote: "Then he went on to think about other things, and, he said, 'I am getting tired of this matter, I am getting tired; couldn't you do that?' 'I can't do anything at all at it; you must mention the things.' 'Well,' he says, 'I leave the whole to you, and let you do as I would do myself; and I know you would do as I would do myself.' 'Well,' said I, 'what do you want to leave them?' 'Leave it to charities and the poor.' And, he says: 'You round it as you think yourself, as suits yourself; do as I would do myself with it.'"

All the witnesses admit Baugh was a sick and dying man; the two lawyers say he did not appear as sick as they expected to find him. The contestants' witnesses, the doctor and nurse, claim that he was incapable of understanding the will at all.

It appears to me the case is clearly, from the plaintiffs' own testimony, one in which a sick and dying man, nearly seventy years of age, is requested by the priest, who has just taken his confession, to make his will; as a consequence of this request or advice, the priest, a second cousin and friend, it is true, procures a lawyer, gives him the instructions as to the contents of the will, which instructions are assented to by the sick man only, who seems desirous of letting Father McEnroe manage the whole affair, and the result is a will in which Father McEnroe is the recipient of practically the whole estate. I think about \$40,000, out of an estate of \$42,000.

This is an outline of the conditions attending the making of the will. If it does not come within the rulings of the cases that cast the burden on the proponents, I misunderstand them.

These facts are the proponents' facts. Should I have left it to the jury to say whether it cast the burden on the plaintiffs, or should I have told them, as I did, that these facts did put the burden on the plaintiffs?

In *Scattergood v. Kirk*, 192 Pa. 283, the Supreme Court reversed the court below because of the refusal to affirm a point that asked for binding instructions to find against the will. That case is certainly authority for the proposition, that when the facts justify it, it is the court's duty to tell the jury the effect of the evidence.

I will not discuss the objections to the admission of certain questions further than to say, that I think it was clearly competent for defendant's counsel to ask

Brady et al. v. McEnroe et al.

a witness if he had not been paid money to come to Philadelphia to prove the will, and also to ask the subscribing witnesses whether the beneficiary and the man who was so largely instrumental in procuring the making of the will had not sought to employ them as counsel for the estate after the contest.

The other reason urged at the argument of this motion was "that a man has right to urge another to make a will in his favor." I quite agree that *Boyd v. Boyd*, 66 Pa. 291, puts the doctrine as fairly as it can be put. But I do not think the charge announces a different doctrine from that case.

Rule discharged.

Borda's Estate.

Titles—Decedent's estate—Partnership—Principal and income—Burden of proof.

Where executors, under testamentary directions of testator, allow money of the estate to remain in a firm, of which he was a member at the date of his death, receiving interest thereon, the burden of proof is upon the residuary legatees to show that a payment by the surviving partners, equal in amount to the interest due, made shortly before the firm was dissolved by a decree appointing a receiver, was in part liquidation of the principal of the debt due by the surviving partners and not merely interest thereon, and properly credited by the accountant to income.

Wills—Construction—Life-tenant and remainderman.

Testator bequeathed his property as follows: "My whole income is to be divided equally amongst my children living at the time of my death, or to the children of my son Charles and my daughter, Mrs. Bigelow, if dead. . . . At the expiration of partnership of Charles A. Borda and James B. Mingus, from any cause whatever, my son, Charles if living, is to get his share, deducting what he may owe to me as shown by the books of the firm, and my daughter, Mrs. Bigelow, is also to receive her share, if living, and if either or both should be dead, their shares to remain in the general fund and the income go to their child or children. At the death of any of my unmarried children, his or her share is to be divided equally amongst the rest. When the houses are sold, the personal property is to be divided amongst the survivors as per appraised value. Ultimately, my whole estate is to go to my son Charles and my daughter, Mrs. Bigelow, or their children." Held, that Charles and Mrs. Bigelow, having survived the period of the dissolution of the partnership between Borda and Mingus, took an absolute interest.

"The provision is not that there shall be a devolution to the son and the daughter named and their children, but to them 'or' to their children. The contingency under which the children were to take was as to the partnership assets, if Charles or Mrs. Bigelow should not be living at the time of the dissolution of partnership. The contingency upon which the children of Charles and Mrs. Bigelow were to take as to any other portion of the estate was in case of the death of Charles or Mrs. Bigelow before the testator." Per FERGUSON, J., auditing Judge.

Exceptions to adjudication. O. C. Phila. Co., April T., 1899, No. 171.

George L. Crawford, for exceptant; *John G. Johnson*, contra.

HANNA, P. J., Feb. 2, 1901.—It appears the interest of the testator in the firm of which he had been a member at the date of his death, in pursuance of an agreement entered into by him with his copartners and the provisions of his will, was allowed to remain in the business carried on by the surviving copartners; they paying to the executors, for the use of the moneys due testator, interest thereon. The surviving partners continued to make these payments of interest until June 1, 1899, when the last payment was made. Subsequent to this, upon a bill filed for dissolution of the partnership, a decree was entered by the Court of Common Pleas No. 1, to December Term, 1898, No. 921, dissolving the copartnership and appointing a receiver. We are unable to discover the date of the decree or the date of the appointment of the receiver.

The executors charge themselves with the amount thus received from the firm as income of the estate. At the settlement of their account, however, it was

Borda's Estate.

claimed on behalf of one of the residuary legatees that this sum should not be considered income, but a payment by the firm on account of the debt due by it to the testator, and, therefore, to be treated as principal of the estate. This is the question suggested by the first exception.

The burden is consequently upon the residuary legatee to show that the payment mentioned was in part liquidation of the debt due by the surviving copartners to the estate of testator.

After a careful examination of all that is stated in the adjudication and by counsel, we fail to discover any proof to sustain the allegation of the residuary legatee. If the payment was prior to the dissolution, and this we conclude to be the fact, for it was not made by the receiver, it was clearly interest due by the surviving copartners, properly received by the executors as income. They had not then been declared insolvent, were still continuing the business, and interest paid by them to the executors was as much a proper payment out of what they supposed to be profits of the business as rent paid to their landlords, fire insurance, office and other expenses. Moreover, it does not appear that, in the settlement of the account of the receiver, this payment to the executors was deducted from the *pro rata* awarded to them as creditors of the firm. If it had been a payment in part of the debt due the estate, we cannot think it would be overlooked in that distribution. As we are of opinion the item referred to is properly included in the account as income and not principal, the exception is sustained.

The remaining exception is to the award to the son and daughter of testator of one-fifth of the principal of the estate absolutely, and not for life, with remainder to their children respectively. This question has been carefully considered by the auditing judge, and, as we agree with the construction placed by him upon the language of the will and his ascertainment of what appears to be the evident intention of the testator, the exception is dismissed.

A final decree in accordance herewith will be prepared by counsel.

FERGUSON, J., dissents from so much of the above opinion as refers to the payment of money as income out of the principal of the estate.

Lukens's Estate.

Wills—Discretion to sell real estate given to executors—Petition for order to sell for payment of debts—Protecting unsecured creditors.

Where there is no express direction in the will to sell real estate, nor is it obligatory upon the executors to sell except at their discretion, the creditors of testator can file a petition for an order on the executors to sell the real estate for payment of debts. Such petition will be granted to protect the rights of the unsecured creditors, although the petitioners represent but a small proportion of the total indebtedness, and the executors directed to sell sufficient of the real estate to pay the balance due them, notwithstanding the executors have made every effort to sell at private sale, unless an agreement be filed, signed by all parties, that the lien of all the unsecured debts may be continued.

Petition for order on executors to sell, etc. O. C. Phila. Co., Jan. T., 1900, No. 49.

William H. Waxler, for petitioners; Charles H. Burr, Jr., for executors.

HANNA, P. J., Feb. 2, 1901.—This is a petition by creditors for an order on the executors to sell real estate of testator for payment of debts and the purposes of the will. They have received a *pro rata* award of their claims upon the settlement of the account of the executors, leaving a balance still due, and to pay which they desire the real estate sold.

10 DIST. R.

Lukens's Estate.

From the answer of the executors, it appears they have still certain unconverted personal estate, consisting of mortgages and securities pledged by testator to secure a loan which it seems are unsalable or impracticable to realize upon. One mortgage is a second lien, and a small mortgage is expected shortly to be paid, while in nearly every instance the real estate is encumbered, and will be difficult to sell at a public sale for its fair value; that the executors are endeavoring to sell the real estate at private sale, have found purchasers for some of the properties, are negotiating with other expectant purchasers, and which sales they anticipate soon to complete; and if a public sale be now ordered, it would result in deterring prospective purchasers, who will then seek to purchase the real estate at a cheaper price than now sought to be obtained by private sales.

Upon an examination of the will of testator, it will be observed he devised and bequeathed the residue of his estate, real and personal, to his executors in trust to sell and dispose of the same at public or private sale "whenever they may deem it to be to the best advantage to the estate," etc. Thus, it is seen, there is no express direction to sell, nor is it obligatory upon the executors to sell except at their discretion. There is merely a power of sale, which they cannot be compelled to exercise, except by a proceeding in the first instance, requiring them to apply to the court for leave to sell for payment of debts, in default of which they may be dismissed: *Hutchison's Estate*, 10 Pa. C. C. Reps. 592. But we may treat this petition as in proper form.

The question then arises, should the court, in view of the facts alleged in the answer, direct the executors to apply for authority to sell the real estate at public sale? The executors aver that, in their judgment, a sale at the present time will work an injury and loss to the creditors, and the petitioning creditors represent but a small proportion of the indebtedness of the estate, while the creditors, whose claims far exceed those of the petitioners, are satisfied with the efforts made by the executors to dispose of the properties as they are now endeavoring to do. In *Woolman's Estate*, 6 District Reps. 205, in a case similar to the present, where the executor was the petitioner for leave to sell, the court declined to grant the order of sale because "the principal creditors are willing to wait for a reasonable time for the payment of their claims."

But is there any urgency for a sale at the present time? The testator died March 16, 1899, so that the lien of his debts not secured by mortgage or judgment will not continue longer than two years after his decease: Act of June 8, 1893, P. L. 392. It would, therefore, seem to be the duty of the court to protect the rights of the unsecured creditors. Nor need it be said they should be postponed for the benefit of either secured creditors or legatees, or compelled by proceedings in another court to continue the lien they now possess. Notwithstanding the well-grounded objections, perhaps, of the executors, the rights of the petitioning creditors should not be imperilled, but, in all fairness, secured to them. To do this, the executors should sell sufficient of the real estate to pay the balance due the unsecured creditors; and we will direct them to apply to the court for authority to do so, unless an agreement be filed on or before Feb. 11, 1901, signed by the executors, all the creditors, legatees and annuitants, with a proper affidavit that they are all the parties interested, that the lien of all the unsecured debts may be continued, and waiving all objection thereto under the Act of June 8, 1893. Should said agreement be not filed as above, a decree will be entered as indicated.

To this extent the petition is granted; but upon the filing of said agreement, to be dismissed, without prejudice to the right of the creditors to apply for further relief.

Hunter's Estate.

Wills—Construction—Disinheriting whole class—"Or" read "and."

Before a decision, whose immediate effect is to disinherit a whole class, can be reached, the intent of the testator to achieve such result must be unmistakably apparent, and, for that purpose, it will not be sufficient to interpret his language exclusively by the rules of grammar. Hence, to avoid such result, "or" will be read "and."

Testator died in 1889, leaving five children surviving him. One died in 1890, leaving issue a son, T. R. T., and one, S. H., died in 1900 without issue. Testator gave his estate in trust to divide the income into as many parts as he should leave children, or the issue of deceased children surviving (the issue to take the parent's share), and to pay the income to them respectively for life. He provided further as follows: ". . . But should such child or grandchild so dying leave no children to survive him or her, then I direct that the said portion of the principal . . . shall fall into and become part of my general residuary estate as if the child or grandchild so dying had not survived me, and the income and principal thereof are to be divided among my then surviving children or grandchildren as hereinbefore provided." *Held*, T. R. T. was entitled to one-fourth of the share of S. H. upon her decease.

Exceptions to adjudication. O. C. Phila. Co., April T., 1890, No. 505.

W. S. Roney, for exceptant; *A. B. Roney*, contra.

ASHMAN, J., Feb. 2, 1901.—Thomas Ross, the father of the decedent, who died in 1889, left surviving five children, of whom two afterwards died—one of them in 1890, leaving issue a son, Thomas R. Thompson, and the other, Susie Hunter, in 1900, without issue. He gave his estate in trust to divide the income into as many parts as he should leave children, or the issue of deceased children surviving (the issue to take the parent's share), and to pay the income to them respectively for life. He provided further as follows: "And as each of my said children or grandchildren, respectively, departs this life, leaving children to survive him or her, I direct my trustees to divide that portion of the principal which had been producing the income paid to said child or children, among such children of said deceased child or grandchild as may survive him or her. But should such child or grandchild so dying leave no children to survive him or her, then I direct that the said portion of the principal . . . shall fall into and become part of my general residuary estate as if the child or grandchild so dying had not survived me, and the income and principal thereof are to be divided among my then surviving children or grandchildren as hereinbefore provided." The exceptions raise the simple question whether Thomas R. Thompson, the grandson, is entitled to participate in the share appropriated for the use of Susie Hunter, the deceased daughter. The adjudication held that the direction to divide the share of a child dying without issue among testator's then surviving children or grandchildren embraced only the children of testator who survived Mrs. Hunter, and excluded the grandchild. The decision was based wholly upon the use of the word "or" instead of "and" in the gift over, and its immediate effect was to disinherit a whole class. Before such a result can be reached, however, the intent of the testator to achieve it must be unmistakably apparent; and for that purpose it will not be sufficient to interpret his language exclusively by the rules of grammar. Very few wills, even those written by lawyers, will bear that strain. This caution is especially applicable here. In his use of "or" the testator, we believe, has simply followed the very prevalent practice by which the words "or" and "and" are used indifferently for each other. Indeed, "or" is of such equivocal effect that, according to Burrill, it has been excluded from indictments in England. The books abound with cases in which the courts have substituted "and" in its place, in order to carry out a manifest testamentary intention. That remedy is not called for in this case. Not to paraphrase his language in the least, the testator has simply said, "I wish my children or if any of them dies leaving issue my grandchildren also to share in the residue." Such a construction not only harmonizes with 10 Dist. R.

Hunter's Estate.

the rest of the will, but it prevents the intestacy as to her share, which the adjudication declares will follow from its own theory if the last surviving daughter shall die without issue living at her death.

The exceptions are sustained, and the adjudication is corrected so that the award shall be of one-fourth of the principal to the guardian of Thomas R. Thompson, and three-fourths to the accountants, in trust for testator's children.

Davenport's Estate.

Life-tenant and remainderman—Repairs.

Where a testator devises real estate, occupied by a tenant under a lease for a term of years, which does not expressly charge the landlord with the duty of repairs, to one for life, with remainder over, the measure of the life-tenant's liability to remaindermen for repairs is, at most, the cost of restoring the premises to the condition in which they were when the lease expired, as distinguished from the cost of restoring them to the condition in which they were at testator's death.

Decedent's estate—Finding of auditing judge.

The finding of the auditing judge that the life-tenant did all she was bound to do in the way of repairs, has precisely the effect of the verdict of a jury.

Executors and administrators.

Where real estate is devised to one for life, with remainder over, the testator's executor has no standing to present a claim for repairs against the executor of the life-tenant. The right of action in such case is vested in the remaindermen.

Exceptions to adjudication. O. C. Phila. Co., July T., 1900, No. 285.

L. H. R. Nyce, for exceptant; *Joseph B. Townsend, Jr.*, contra.

PENROSE, J., Feb. 2, 1901.—Claims against the estates of decedents cannot be allowed unless everything essential to recovery is clearly established, nothing being left to mere surmise or conjecture. In this case, it is sought to recover from the decedent, as tenant for life under the will of her husband, the amount required to put the devised property, which at her death passed to the husband's children, in thorough repair. It appears from the evidence that the building was a very old one at the time of his death, so situated as to be peculiarly exposed to the action of the elements, and that it was subject to a lease having several years to run. This lease was not produced, but it is to be presumed that it contained the usual covenant on the part of the lessee to surrender the premises, at the expiration of the tenancy in the condition in which they were at its dates, reasonable wear and tear excepted; and whether it did or not, the duty of doing such repairs as were required to keep the premises in tenantable condition was upon the lessee (*Kline v. Jacobs*, 18 P. F. Smith, 57; *Moore v. Weber*, 21 P. F. Smith, 429; *Wheeler v. Crawford*, 5 Norris, 327). Since the expiration of the written lease the tenant has held over from year to year, and still holds as tenant under the remaindermen. Whether, under any circumstances, the claim can be sustained against the estate of the tenant for life while the lessee is still in possession, is by no means clear: *non constat*, that the lessee will not perform his duty with regard to repairs. But the tenant for life certainly was not in default by reason of the delinquencies of the lessee under the lease created by the testator, and the measure of her liability would, at most, be the cost of restoring the premises to the condition they were in when that lease expired. Upon this point there is absolutely no testimony.

The question is one of fact, and the finding of the auditing judge that the decedent did all that she was bound to do in the way of repairs has precisely the effect of the verdict of a jury.

Davenport's Estate.

We have not been furnished with a copy of the will of the husband, but in the paper-book of the claimant, who is his "surviving executor," it is stated that at the death of the wife, against whose estate the recovery is sought, "the premises went to the children of John Davenport, namely, John Davenport, Jr., Mrs. George L. James, and Mrs. Robert Boon, in equal shares as tenants in common, absolutely." It is clear, therefore, that his executor had no right of action, and the claim might well have been dismissed on that ground alone.

The exceptions are dismissed, and the adjudication confirmed absolutely.

Bott's Estate.

Decedent's estate—Marriage—Cohabitation and reputation.

The presumption of marriage from cohabitation and reputation is rebutted by claimant's admissions, on the witness-stand and elsewhere, that she lived with decedent in reliance upon his promise to marry her, and no marriage had ever taken place.

Exceptions to adjudication. O. C. Phila. Co., July T., 1900, No. 218.

Arthur B. Houseman and William S. Divine, for exceptant.

Benjamin F. Perkins, contra.

FERGUSON, J., Feb. 16, 1901.—The claimant claimed the share of the testator's estate to which she would be entitled as his widow under the intestate laws, he having made no provision for her in his will. There was no proof of any marriage ceremony ever having taken place between them. In fact, this was not even alleged. The claim rested upon repeated acknowledgments of the testator that she was his wife, and overwhelming testimony that they lived and cohabited together and had the reputation of being husband and wife in the circle in which they moved. The evidence showed that they lived together for about ten years; that the testator introduced her to others as his wife and spoke of her as such, and she spoke of him as her husband; that she went by the name of "Mrs. Bott," and that his family and her family visited them and always regarded them as husband and wife; that the testator introduced her brother as his brother-in-law, and told the storekeeper to give her credit as his wife. When a child was born unto them, it was named Edward Bott, after the testator, and they went together to St. Augustine's Church and had it christened by that name, her brother standing up with them as godfather of the child. While the birth of this child does not appear upon the registry of the health office, another child, which was subsequently born and has since died, appears upon the registry as the child of Edward and Margaret Bott. The testator in every way recognized the child as his own, and when his alleged wife by her profligate behavior became an unfit person to have charge of it, he took it to his mother's house. By his will, the testator left his whole estate to his son, Edward Bott, thus recognizing in the most solemn way not only the paternity of this child, but its legitimacy. If recognition and acknowledgment by the parties is any evidence of a marriage, the facts above referred to present the strongest possible case which, when taken in connection with the proof of cohabitation and reputation for years, might well justify a finding in favor of this claimant: Strauss's Estate, 168 Pa. 561.

But unfortunately for this claimant, having been called as a witness, she destroyed her case by admitting that she and the testator were never married. She testified that he said, "He would marry me and do right. We went together as man and wife." "Did he marry you?" "No, sir." Her brother testified that, after the child was born, he visited her in Camden, where she then lived, and upbraided her for having a child without being married, when she said, "It would be all right, as Ed had promised to marry her." This

Bott's Estate.

interview took place about a year and a-half after the relation between the testator and the claimant commenced, so that it undoubtedly was illicit at its commencement, and there is not only nothing in the case to show that it was ever changed, but her own testimony is to the contrary. This case is very different from the recent ones, where a marriage was held to be good, notwithstanding the absence of any ceremony. In Comly's Estate, 185 Pa. 210, there was an agreement to live together as husband and wife, immediately acted upon by the husband leasing a house and the two going to live in it together. Nor was there any ceremony in Hines's Appeal, 10 Pa. Superior Ct. 126, where the decedent said to the claimant, "I will take you for my wife," and asked me if I was satisfied, and I said "Yes," also followed by going to live together. In both of these cases the words used were *in presenti*, and not *in futuro*, and were followed by the consummation of the act agreed upon. There was not merely a promise to do a thing, but the thing was done immediately after the promise. In this case, however, the living together of the testator and the claimant, his repeated acknowledgments of her as his wife, and her children as his, and their reputation as husband and wife, might be sufficient to overcome the fact that there was no proof of an actual marriage, were it not for the claimant's own admissions, made on the witness-stand and to her brother, that they were not married. In the face of these admissions, it would have been hard for the auditing judge to have found that there was a marriage. We think his finding was correct, and therefore the exceptions are dismissed.

Weller v. Hanaur.

United States Courts—Constitutional law—Jurisdiction—Suits between citizens of a Territory and those of a State.

A citizen of a Territory cannot sue a citizen of a State in the Federal courts.

Jurisdiction—Co-plaintiffs.

Where there are more plaintiffs than one, each must be capable of suing in the Federal courts, or the necessary jurisdiction does not exist.

Amendments—Jurisdictional averments.

Where jurisdiction actually exists, erroneous or defective statements of jurisdictional facts may be corrected so as to show the truth; but where the real facts, as averred in the statement, show a want of jurisdiction in the Federal courts at the time the suit was brought, a plaintiff cannot amend by striking out the averments showing want of jurisdiction and inserting instead averments based upon facts which have occurred since suit was brought, which, if they had existed at the time suit was brought, would have been sufficient to confer jurisdiction. Hence, where the declaration avers that one of the plaintiffs was a citizen of the Territory of Oklahoma at the time suit was brought, and the other a citizen of Missouri, and that the defendants were citizens of Pennsylvania, the United States Courts have no jurisdiction, and the defect cannot be cured after the trial by an assignment by the citizen of Oklahoma transferring all his interest in the claim to the citizen of Missouri, and consenting that the suit should be brought and continued by the latter individually; and a motion to amend, based upon such assignment, by striking out the name of the citizen of Oklahoma as a party plaintiff, will be refused and judgment entered for defendant *non obstante veredicto*.

Motion by defendants for judgment on reserved point, and motion by plaintiff to amend record. Circuit Court of the United States, Eastern District of Pennsylvania, April Sess., 1898, No. 84.

C. Wilfred Conard, for plaintiff.

Ira J. Williams and Simpson & Brown, for defendants.

MCPHERSON, J., Dec. 11, 1900.—The declaration avers and the testimony at the trial proved, that one of the plaintiffs was a citizen of Oklahoma Territory at the time suit was brought, the other plaintiff being a citizen of Missouri, and

Weller v. Hanaur.

the defendants being citizens of Pennsylvania. This raises a question of jurisdiction, and upon this ground alone the defendants were entitled to binding instructions in their favor; and as their point requesting such instructions was reserved, they are now entitled to judgment, notwithstanding the verdict against them. No argument is needed to establish the proposition that a citizen of a Territory cannot sue a citizen of a State in the Federal courts. There are many decisions to this effect, of which one or two may be cited: *New Orleans v. Winter*, 1 Wheaton, 91; *Hooe v. Jamieson*, 166 U. S. 395. It is also beyond dispute that where there are more plaintiffs than one, each must be capable of suing in the federal courts, or the necessary jurisdiction does not exist. The present suit therefore was brought in the wrong tribunal, and as the defect of jurisdiction appears in the record, it is the duty of the court to sustain the defendants' objection and dismiss the suit at any stage of the proceedings. Conceding the correctness of this position, the plaintiffs seek to cure the defect by amendment. They produce an assignment executed since the trial by the citizen of Oklahoma transferring his interest in the suit to the citizen of Missouri, and consenting that the suit should be brought and continued by the latter individually. Upon this assignment they found a motion to amend the record by striking out the name of the citizen of Oklahoma as a party plaintiff, and by further amending so that the plaintiff may now be described as "J. H. Weller, a citizen of the State of Missouri, who was with Robert T. Weller, late trading as Weller Bros." It is clear that the motion must be denied, and I think that only one objection need be noticed. This is an attempt by a subsequent act of a party to confer a jurisdiction that did not exist, and such an attempt certainly cannot succeed. Courts exercise the power of amendment liberally, but it has never been used for such a purpose as this. Where jurisdiction actually exists, an erroneous or defective statement of jurisdictional facts may, no doubt, be corrected so as to show the truth, but that is very different from what is now proposed. This motion is intended, not to show the truth, but to make the record declare what is not true, namely: that the suit was brought originally by one plaintiff alone, and the court had thus acquired a jurisdiction which confessedly it has never yet had. Jurisdiction cannot be given by such an act of a party so as to have a retroactive effect, and put life into what has hitherto been void. I do not consider the objection, that one partner could not sue in his separate name upon a cause of action that had accrued to the partnership. The motion to amend is denied. Judgment will be entered in favor of the defendants, notwithstanding the verdict, but without prejudice to the right of the plaintiffs to bring another suit in a court having competent jurisdiction.

Notes of Treasury Department Decisions.

From January 31 to February 16, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Accounting for Excesses Arising from Fractions.

No. 280, February 14, 1901. 4 Treasury Decisions, No. 8, page 27.

Amendment to Internal Revenue Laws.

No. 275, February 9, 1901. 4 Treasury Decisions, No. 7, page 35.
10 DIST. R.

Notes of Treasury Department Decisions.

Bank Checks of Sheriffs.

Stamp tax. Bank checks drawn by sheriffs in disbursing private funds not exempt from tax. No. 283, February 15, 1901. 4 Treasury Decisions, No. 8, page 28.

Building and Loan Associations.

Stamp tax. Deeds of building and loan associations, conveying real property to a non-shareholder, taxable. No. 285, February 15, 1901. 4 Treasury Decisions, No. 8, page 29.

Conveyances.

Stamp tax. Conveyances of real estate by joint tenants or tenants in common to each other, for the purpose of making division, not taxable. No. 287, February 16, 1901. 4 Treasury Decisions, No. 8, page 32.

Depositing Proceeds of Sales of Real Estate.

No. 278, February 12, 1901. 4 Treasury Decisions, No. 8, page 26.

Distilled Spirits.

Packages containing distilled spirits must be so marked as to show the kind of spirits as known to the trade. No. 286, February 15, 1901. 4 Treasury Decisions, No. 8, page 30.

Extending Time for Filing Returns with Collectors by Manufacturers of and Wholesale Dealers in Oleomargarine.

No. 281, February 15, 1901. 4 Treasury Decisions, No. 8, page 27.

Leases with Power of Attorney Clause.

Stamp tax. Leases embodying powers of attorney must pay tax required for both instruments. No. 282, February 15, 1901. 4 Treasury Decisions, No. 8, page 28.

Legacy Tax.

Where a legatee became entitled to a legacy through the exercise of power of appointment subsequent to June 13, 1898, legacy tax is required to be paid. No. 274, February 8, 1901. 4 Treasury Decisions, No. 7, page 34.

Oleomargarine.

No. 277, February 12, 1901. 4 Treasury Decisions, No. 8, page 25.

Pool Tables.

Special tax. The proprietor of the so-called "Twentieth Century pool table," which is "open to the public with or without price," is required to pay special tax thereon. No. 279, February 13, 1901. 4 Treasury Decisions, No. 8, page 26.

Receipts Used in Withdrawing Money.

Stamp tax. The use of unstamped receipts in withdrawing money from banks strictly confined to the depositor, and must be presented by him in person. No. 271, January 31, 1901. 4 Treasury Decisions, No. 6, page 29.

Refunding Claims.

Transfers and assignments of claims are null and void, unless made after the allowance of the claim, etc. No. 276, February 12, 1901. 4 Treasury Decisions, No. 7, page 35.

Reporting Delinquent Special Taxpayers for Assessment of Taxes and Revising Circular 410.

No. 272, January 31, 1901. 4 Treasury Decisions, No. 6, page 29.

Sale of Seized and Distrained Property.

No. 273, February 5, 1901. 4 Treasury Decisions, No. 7, page 33.

Tivoli Peg Pool Tables.

Special tax. No. 234, February 15, 1901. 4 Treasury Decisions, No. 8, page 29.

Minnich v. Lancaster, Mechanicsburg & New Holland Ry. Co.*Electric railways—Injunction by land-owner against occupation of turnpike.*

A preliminary injunction, at the instance of an abutting land-owner holding title to the middle of the turnpike road, restraining an electric railway company from constructing a trolley road on the turnpike in front of his property, will be continued to final hearing only when so modified as to cover merely the half of the turnpike on the plaintiff's side.

The extent of the injury is not deemed an important factor in such case; if the invasion of the land is without right, and the injury consists in having fixed upon it for all time the rights given to the railway company, the remedy at law is inadequate, and equity will interpose to protect the land-owner if he asks its aid in proper time.

Street railways—Injunction—Laches.

The land-owner is not deprived of his right of relief by laches because six years ago a former company, which assigned its rights to the present company defendant, entered upon his side of the turnpike without objection from him and slightly graded an intended road-bed on which, as then constructed, the present company proposes to lay its ballast, ties and rails.

Street railways—Variance in route.

If there is a variance from the charter route of an electric railway greater than is necessary, or the charter itself is open to objection, the Commonwealth alone can raise the question.

Motion to dissolve preliminary injunction. C. P. Lancaster Co., Equity Docket, No. 3, page 329.

H. M. North and Lewis N. Spencer, for plaintiff; *W. U. Hensel*, for defendant.

LANDIS, J., Aug. 25, 1900.—An inspection of the first four paragraphs of plaintiff's bill of complaint shows that the plaintiff has been, since Dec. 8, 1879, the owner in fee simple of a plantation of land, situated in Manheim township, Lancaster county, containing 119 acres and 125 perches, lying principally on the northwest side of the Lancaster and New Holland turnpike, and extending to the middle of the turnpike, for a distance of nearly 3100 feet. It also shows that the defendant company was duly incorporated under the Act of 1889 for the purpose of constructing, maintaining and operating a street railway company for public use and the conveyance of passengers by power other than by locomotive, from a point in said turnpike near the northeastern limit of the city of Lancaster to the borough of New Holland. The fifth and sixth paragraphs allege that said company is about to construct its passenger railway on the said turnpike road, and, for that purpose, to grade and occupy part of the land of the plaintiff, and to lay railway rails and ties and dig holes and erect poles for its use in operating said railway on the land of the plaintiff, without his consent, and without right, power or authority to enter upon any part of the said land for any purpose. The prayer of the bill is, first, that a temporary injunction be granted, restraining and enjoining the defendant, its officers and employees, from constructing any part of its railway or appliances on any part of the land of the plaintiff, or on any part of the turnpike in front of the same, until a final hearing, and perpetually thereafter; second, that the court examine whether the defendant does in fact possess the right of franchise to construct and operate a railway on the said turnpike road, as described in its charter, to the injury of the private rights of the plaintiff; and, third, general relief.

10 DIST. R.

Minnich v. Lancaster, Mechanicsburg & New Holland Railway Co.

Defendant's answer admits the averments contained in the first, second, third and fourth paragraphs of the bill to be true. As to the fifth, while it admits that the company is about to construct its railway on the said turnpike, and in said construction will occupy that portion of the same which runs by and along the plaintiff's premises, it denies that it proposes to grade any part of plaintiff's land other and further than it has already been graded before the defendant entered upon and occupied said land. It avers that, without the obstruction or intervention of the plaintiff, a former passenger railway, known as the Lancaster and New Holland Railway Company, entered upon the lands of the plaintiff and graded them to their present condition, and that the defendant company has not altered, and does not propose to alter, the grade from the condition in which it was found. It, however, admits that it proposes to lay rails and ties and dig holes and erect poles for its use in operating said railway on the land of the plaintiff, so far as the plaintiff may have title to lands to the middle of the right of way of the turnpike road; but it claims to have entered upon the said turnpike road with the consent of, and under an agreement with, the turnpike company. It denies that the plaintiff will suffer irreparable damage, or any damage whatever; but says that, on the contrary, his property will be improved and enhanced in value. The sixth paragraph of the answer concedes that the defendant has never obtained plaintiff's written consent to the occupation by it of any part of plaintiff's land for the purpose of constructing, operating and maintaining said railway; but again claims that it has the full consent and permission of the turnpike company, and, by reason thereof, has the right and authority to dig holes and erect poles and lay railway ties and rails, for the purpose of constructing and operating a street railway, over the entire bed and roadway of the said turnpike, along and by plaintiff's premises.

There are few additional facts adduced that may, in any wise, either directly or collaterally, affect the issues now before the court. From the testimony taken, it appears that six years ago the Lancaster and New Holland Railway Company entered upon the summer road of the turnpike in front of plaintiff's premises, and with the consent of the turnpike company, did some grading, the extent of which does not definitely appear. Nothing more, however, was done in the construction of that road; neither ties nor rails were laid, and, in 1899, the interest of the Pennsylvania Traction Company in the lease of the New Holland Turnpike Company and the Lancaster and New Holland Railway Company was sold to W. S. Kurtz, trustee, and by him subsequently assigned to the Lancaster, Mechanicsburg and New Holland Railway Company, the defendant.

Conclusions of law.

A careful examination of the decisions in this State has convinced us that this injunction should be continued in a modified form. It is admitted—and, in fact, it could not for a moment be controverted—that street railway companies are not endowed with the right of eminent domain: *Pennsylvania R. R. Co. v. Montgomery County Pass. Ry. Co.*, 167 Pa. 62; *Heilman v. Lebanon and Annville Street Ry. Co.*, 175 Pa. 188; *Heilman v. Lebanon and Annville Street Ry. Co.*, 180 Pa. 627; *Becker v. Lebanon and Myerstown Street Ry. Co.*, 188 Pa. 484; *Pennsylvania Canal Co. v. Lewisburg, &c., Pass. Ry. Co.*, 10 Pa. Superior Ct. 413; *Scranton and Pittston Traction Co. v. Delaware and Hudson Canal Co.*, 1 Pa. Superior Ct. 406.

The Street Railway Act of May 14, 1889, did not contemplate or provide for the construction of long lines of transportation connecting widely separated cities and towns by electric railways traversing country roads. They were to be built in the cities and towns, and did not, therefore, need the right to take property, and were not given it. They are only modern conveniences, the loca-

Minnich v. Lancaster, Mechanicsburg & New Holland Railway Co.

tion and construction of which are subject to the will of the public they are intended to serve. Such companies cannot force themselves into neighborhoods where they are not wanted. It was, therefore, held that, when the supervisors of a township give their consent to the occupation of township roads by a street railway, they act as the representatives of the people who build and use the roads, and not as the representatives of the owners of the private property over which the roads pass, and that the company can only protect itself by securing the consent of every property-owner along the road which it wishes to occupy: *Pennsylvania R. R. Co. v. Montgomery County Pass. Ry. Co.*, *supra*.

Arising out of this right, which it was held vested in the adjacent land-owners to the middle of the way, whether such a way be an ordinary country road or a turnpike, came the right to restrain trespasses upon said land, even though the same lay within such roads; and it has been but lately held that, where a landholder promptly files a bill in equity against a street railway to prevent the construction of its railroad upon a turnpike road abutting upon his property, and promptly seeks to enjoin the building of the road, he is entitled to a decree, for his legal rights have been invaded, and the court should restrain the defendant at the outset: *Pennsylvania R. R. Co. v. Greensburg, &c., Street Ry. Co.*, 176 Pa. 559.

Some modifications of this doctrine have grown out of peculiar situations arising in certain reported cases. These modifications, to a certain extent, rest upon the laches or the bad faith of the plaintiff, and the rights and conveniences of the public which in the meantime vested. For instance, in *Pennsylvania R. R. Co. v. Montgomery County Pass. Ry. Co.*, *supra*, it was said that where township officers and owners of land abutting upon roads have stood by, and the expenditure of large sums of money has been permitted in the construction of a street railway upon the roads, they cannot afterwards demand that the railway should be torn up or its use enjoined, but they are left to their remedy by an action for damages. And in *Hellman v. Lebanon and Annville Street Ry. Co.*, 175 Pa. 188, where a street railway was laid upon a public township road without the consent of the township authorities and without compensation to the land-owners, and during the construction of the road an owner of abutting property filed a bill in equity which looked to compensation, and two years after the completion of the road he amended his bill so as to pray for an injunction, and, in the meantime, the township authorities had approved and ratified the use of the highway, it was held that, in view of the rights of the public in the road, and of the large outlay made by the company, and of the delay of the plaintiff in asserting his right, an injunction should not be awarded.

In *Becker v. Lebanon and Myerstown Street Ry. Co.*, 188 Pa. 484, where a landholder promptly filed his bill in equity against the street railway company to prevent the construction of its railway upon a turnpike road abutting upon his property, but made no motion for a preliminary injunction until the road had been built and was in full operation, and took no further steps in the case for two years and a-half; and it appeared that, although the track was constructed without legal authority, yet, by the use of proper care and skill, serious changes in the grade of the turnpike were avoided and facilities furnished for crossing the track conveniently, and that the injury to the complainant was slight and might be readily compensated in damages, an injunction was refused, as it would then inflict great inconvenience on the public and a serious loss upon the company. And in *Messner v. Lykens and Williams Valley Ry. Co.*, 13 Pa. Superior Ct. 429, an injunction to restrain the completion of a trolley track was refused when it appeared that the plaintiff's principal purpose in purchasing the property (the prior owner of which had verbally consented to the railway) was to harass the defendant company, and the case, as presented,

Minnich v. Lancaster, Mechanicsburg & New Holland Railway Co.

was marked with such questionable methods as to prevent the plaintiff from deserving equitable relief. He was remitted to his remedy at law, upon the defendant giving security for the payment of such damages as might be recovered.

The extent of the injury has never been deemed an important factor in such a case. Though it may be slight, or none at all, or an actual benefit to the property and a convenience to the public be the result, if the invasion of the land is without right, and the injury consists in having fixed upon it for all time the rights given to the railway company, the remedy at law is inadequate, and equity will interpose to protect the land-owner, if he comes in proper time, by enjoining the construction of the railway across his land.

The defendant not being vested, as we have before stated, with the right of eminent domain, the public highway or turnpike road over lands owned in fee by the complainant cannot be used without his consent for any other purpose than the free and uninterrupted use of the road, subject to the charter rights of the turnpike, for the passing and repassing upon the same by the public. This use includes the right of the public, or the corporation using it for the purposes of ordinary public travel, to construct and maintain thereon a safe and convenient roadway, which shall, at all times, be free and open for the public use as a highway. No principle is better settled than that the right of the soil of a highway resides in the proprietor of the land over which it has been laid, and that the citizen has no more than a license to pass along it with carriages, cattle, etc.: *Lewis v. Jones*, 1 Pa. 336; *Philadelphia and Trenton R. R. Co. v. Philadelphia and Bristol Pass. Ry. Co.*, 6 District Reps. 269.

The plaintiff being, then, the admitted owner of the fee, we cannot conceive how, under the facts of the case, he falls within the exception to the rule and is estopped at this time from maintaining his bill. Even though some work was done in the grading of the summer road before his premises about six years ago by the former company, there was little labor and expense, as the cuts and fills, under the testimony, are not of a serious nature, and no ballast, ties nor rails were ever placed upon the land thus graded. Taking into consideration the fact that at that time the law was uncertain, and it was a serious question with lawyers and laymen as to the right of the land-owner to enjoin the trespass, and also considering the long delay since that trespass was committed, it would seem to us that the defendant is not entitled to invoke against the plaintiff his laches, even though laches there should be, for the defendant's vendor was equally guilty, and the defendant itself has, so far as it appears, expended little or no money before these premises.

But the plaintiff, owning only on one side of the road, holds to the middle of the way, and he has, therefore, no right, by reason of the occupation of the other side, before damages of any kind have been suffered by him, to restrain, by injunction, the construction of the street railway on that side. His fears are, at best, only anticipatory and may never be realized. No portion of his land will be taken, and no damages of any kind may be by him sustained. If the turnpike company and the adjoining owner on the south see fit to give the defendant the right of passage, the plaintiff can only object in case, by reason of the character of the construction, his property is injured and made less valuable; but even in that case it may be that he cannot maintain his injunction, for he may have an adequate remedy at law in compensation for damages. It is true that the company has no right to grade or fill or in any manner obstruct the access to private property from the highway, or so to construct the road as to interfere with public travel or disturb adjacent land-owners: *Hellman v. Lebanon and Annville Street Ry. Co.*, 180 Pa. 627; but there may be no such grades or fills or interferences. "Sufficient for the day is the evil thereof."

Minnich v. Lancaster, Mechanicsburg & New Holland Railway Co.

Trolley lines have become a source of great convenience in connecting rural communities with the larger cities. It would seem that they should have the same right in the building of their roads as is given to telegraph, telephone, pipe-line and railroad companies, for they are equally of a public character; but the legislature has not as yet seen fit to endow them with the power to take land for the purposes of their rights of way and the construction of their roads, and the only method that they have to obtain it is by right of purchase. In doing this, they are placed upon the same level as all individuals in the community, and if they wish to buy, they must pay the price. This may appear unequal and unfair, but so the law is written, and it is our duty not to make the law, but to interpret it.

The only other proposition raised in this case is set forth in the second prayer of the bill, which denies that the corporation possesses the right of franchise to construct and operate the railway on the said turnpike. This needs but little attention. In *Pennsylvania R. R. Co. v. Greensburg, &c., Street Ry. Co.*, 176 Pa. 559, it was held that, if the variance from the charter route is greater than is necessary, or the charter route itself is open to objection, the Commonwealth alone can be heard to make it in the interest of the general public. In like manner, in this case, the plaintiff is not in a position to question the right of the defendant company, for that can only be done at the instance of the State.

We are therefore of opinion that the temporary injunction granted, restraining and enjoining the Lancaster, Mechanicsburg and New Holland Railway Company, and its officers and employees, from constructing any part of its railway or appliances on any part of the land of the plaintiff, described in the bill of complaint, which includes that part of the Lancaster and New Holland turnpike road to the middle of the way which belongs thereto, or upon any part of said turnpike, should be modified so as to confine it solely to the land of the plaintiff, mentioned above in this opinion, and, as thus modified, it is continued in full force and effect until the final hearing of this bill.

Injunction continued as modified.

From George Ross Eshleman, Lancaster, Pa.

Stuart's Estate.

Executor—Liability to account—Absence of assets.

Where it appears that the executrix has no personal property of the estate, all having been consumed by the widow's claim and in the payment of preferred debts, an accounting will not be compelled by the court. No benefit would enure to the creditors, and the only result being the imposition of costs, it would be a vain proceeding.

Citation to executrix to file an account. *O. C. Cumberland Co.*

G. W. Swartz, for citation; *G. M. Hays* and *E. M. Biddle, Jr.*, contra.

EDW. W. BIDDLE, P. J., Dec. 21, 1900.—It appears by the answer in this case, the truth of which is not controverted, that the small amount of personal property of which the testator died possessed has been consumed by the widow's claim for exemption and in the payment of preferred debts. It further appears that the executrix has advanced her own money to pay other preferred debts, and that she has no funds whatever in her hands belonging to the estate.

To compel her to file an account under these circumstances would not in any respect benefit the petitioner or any other creditor, but would merely result in imposing on the estate an unnecessary expense. In view of the foregoing, the citation must be dismissed: See *Hutchison's Estate*, 10 Pa. C. C. Reps. 592; *Mead's Estate*, 4 District Reps. 750; *Guinane's Estate*, 5 District Reps. 118.

And now, Dec. 21, 1900, citation dismissed.

From A. G. Miller, Carlisle, Pa.

10 DIST. R.

McKeown's Estate.

Practice, O. C.—Appeal from register—Defective petition—Admitting amendments.

Where an appeal from the decision of the register granting ancillary letters and a petition for an issue are hopelessly confused, the Orphans' Court will admit, in order to expedite the case, that all necessary amendments have been made and that the petition embodies an appeal from an alleged probate of a will by the register.

Wills—Issue devisavit vel non—When demurrer to petition will be sustained without prejudice.

Under the Act of March 15, 1892, §§ 12 and 13, P. L. 185, an issue to test the validity of a will cannot be had at the place of ancillary administration, and a demurrer to the petition for an issue will be sustained; but without prejudice to the right of the petitioner to file a new bill when the facts alleged in the petition show that the respondent offended against the doctrine that the validity of a will of personal property is to be determined by the law of the domicile, which was within the jurisdiction, that he and all parties interested in the estate are residents within the jurisdiction, and that he probated the will in a forum remote from the domicile, for purposes of his own and to ward off any effectual inquiry respecting his agency in its procurement.

Appeal from register. O. C. Phila. Co., July T., 1900, No. 97.

John M. Vanderslice, for appellant.

Mayne R. Longstreth, F. B. Bracken and John G. Johnson, for appellee.

ASHMAN, J., Feb. 2, 1901.—The petition narrates some anomalous incidents. The testatrix, whose will is dated March 7, 1899, died on April 12, 1899, while domiciled in Philadelphia, but during a temporary stay at Saranac Lake, New York. She had reached her majority when her father died a resident of Florida, but she had lived almost continuously with her grandfather in Philadelphia, her father having followed the sea until three years before his death. He died July 15, 1892, intestate, leaving real estate valued at \$100,000 in Florida, and some personal estate of unascertained value in Philadelphia, and leaving the testatrix as his sole heir and next of kin. The will of the testatrix was proved in Florida, and, on May 11, 1899, a certified copy thereof was filed with the register in this city, and letters testamentary were granted to the respondent as executor. The petition by the next of kin alleges that the will was procured through undue influence on the part of the respondent, who was named as executor and sole legatee and devisee. The petition sets out other facts, which, if true, go far to fasten fraud upon the respondent, and concludes with the prayer that "the appeal from the decision of said register in admitting said instrument to probate as the last will and testament of the said decedent shall be sustained, the decision of the register set aside," and an issue awarded.

The appeal which was actually taken, however, does not correspond with the terms of the petition, and in its present shape is hopeless of remedy and hopelessly confused. Its language is, "the undersigned hereby appeal to the Orphans' Court of said (Philadelphia) county from the decision of the county judge of Monroe county, Florida, in the above estate, admitting to probate a certain paper writing, dated March 7, 1899, as the last will and testament of said decedent, and granting letters testamentary thereon in Philadelphia county, Pa." The Orphans' Court of Philadelphia has no jurisdiction to review the decision of a court in Florida, and the Florida court did not grant letters testamentary in Philadelphia county. We will admit, in order to expedite the case, that all necessary amendments have been made, and that the petition embodies an appeal from an alleged probate of a will by the register of this county. This will start the inquiry whether the granting of letters testamentary, upon the production of a certified copy of a probate had elsewhere of a will, is a purely ministerial function, in the exercise of which, after satisfying himself as to the

McKeown's Estate.

genuineness of the copy and as to the identity of the parties, the register has no discretion whatever. If he has none, or if the court to which an appeal from his action may be taken has none, an instance of hardship by no means the gravest which can be put, would be a case in which a testator shall die seized of many pieces of real estate lying in as many States of the Union, while his domicile and that of all of his devisees, legatees and relatives may be here. For purposes of his own, the executor may probate the will at a point, it may be, more distant and inaccessible than Florida, and so may throw in the way of a contest over the validity of the instrument almost insuperable barriers. In the case in hand, the testatrix herself, who, it is alleged, was falsely declared before the register to have been at her death a resident of Florida and all of her kindred had their domicile in this jurisdiction.

This point of the power of the register is the only one which, under the peculiar wording of the petition and the accompanying appeal, we can at this time decide. By the Act of March 15, 1832, § 12, P. L. 135, his authority, where the copy of a will proved in another State or county is offered for probate and is accompanied with a copy of the record and of the letters testamentary duly attested at the place of such probate, is restricted to the consideration of the validity of such proofs, and if he is satisfied respecting them he is compelled to grant ancillary letters without the production of the witnesses attesting the will. The same Act, by section 13, limits the appeals which may be taken to probate to the admission to probate of original and testamentary writings only, and in its form of precept the proponent is made to aver that "the said writing is the last will and testament" of the testator. These provisions adequately show that an issue to test the validity of a will cannot be had at the place of ancillary administration. In *Ives v. Salisbury*, 56 Vt. 565, the testatrix died domiciled in Vermont, and owning property in that State and in Indiana. Her will was proved in the latter State, and afterwards, upon a certified copy of that probate, letters testamentary issued in Vermont. An attempt was made in Vermont to contest the will on the ground of mental unsoundness and undue influence, but the court refused, saying that the Indiana court having jurisdiction to admit the will to probate its judgment was conclusive.

This is undoubtedly true, and these principles and the language of the statute would seem to compel the dismissal of the petition. But the respondent, if the facts alleged in the petition are true—and their verity is admitted by the demurrer—has offended against the doctrine which is universally recognized, that the validity of a will of personal property is to be determined by the law of the domicile. It would seem to be a necessary corollary that the courts of the domicile have primary jurisdiction of the probate of the will. Especially is this the case where the executor and all the parties interested in the estate of the testator, whether by testamentary provision or by consanguinity, are residents within that jurisdiction. We do not propose to discuss at length the remedies which lie against an executor, who, for purposes of his own and to ward off any effectual inquiry respecting his agency in its procurement, probates the will of his testator in a forum remote from that of the domicile. Certainly some restraint is possible of application to a course of action whereby a single individual is able so to invert the functions of the original and ancillary tribunals that the court of secondary jurisdiction shall pass upon the final account and award the final distribution of a testator's estate. We believe we have power to frustrate such chicanery. In *Hope v. Carnegie*, 12 Jur. N. S. 234, where a testatrix residing in England disposed by will of her real and personal estate in England and Holland, the English Court of Chancery granted an injunction against proceedings begun in Holland to administer the estate in that country. See, also, *Bunbury v. Bunbury*, 1 Beav. 318, where the master of the

10 DIST. R.

McKeown's Estate.

rolls said : " It is undoubtedly competent for this court to direct the parties so to conduct themselves in any proceedings here or elsewhere as to raise the necessary questions which it is important to have decided between them." Without straining our authority, we may call upon the respondent to produce the original will before the register of this county, and we may enjoin him from proceeding here or elsewhere adversely to the rights of claimants or contestants here ; and if fraud is apparent in his conduct, we may dismiss him summarily from his trust.

The demurrer is sustained, but without prejudice to the right of the petitioner to file a new bill.

Wright's Estate.

Issue devisavit vel non—Burden of proof.

Upon a petition for an issue *devisavit vel non*, every presumption is in favor of the validity of the will, and the burden of proof is upon those who assert the contrary.

Will—Devisavit vel non—Testamentary capacity.

Upon an application for an issue *devisavit vel non*, the test of testamentary capacity is, were the testator's mind and memory sufficiently sound to enable him to know and understand the business in hand at the date of the execution of the will.

Evidence of frequent sleepiness, flightiness or violent outbursts of passion, resulting from excessive use of intoxicants and narcotics, is not sufficient to establish incapacity. The existence of intemperate habits before the execution of the will is insufficient to invalidate it: the proof must go to the extent of showing that the testator was mentally unfit to dispose of his property intelligently.

Exceptions to refusal of issue. O. C. Phila. Co., July T., 1900, No. 76.

E. Spencer Miller, for contestant.

J. Campbell Lancaster and *Charles E. Lex, Jr.*, for proponents.

HANNA, P. J., Feb. 6, 1901.—These exceptions are filed and the appeal is taken by a brother of testator, to whom no bequest nor devise was given by testator. We have no doubt he is disappointed by the discovery that his three sisters are each provided for, and his brother thought proper to make them his beneficiaries to his exclusion. He therefore concluded that his brother could not possibly make such a disposition of his estate unless he was of unsound mind at the time he executed his will, or that undue influence had been exerted upon him, whereby, instead of dividing his estate equally among his sisters and brother, he chose to prefer the former and wholly overlook the latter. To work out the equality, which insanity or malign influence alone prevented, the remedy is to have a jury declare that testator was not possessed of sufficient mental capacity to intelligently dispose of his estate, or that improper, perverting and undue influences were used to induce him to execute his will. This is now sought by the disappointed brother. It needs no citation of authority to maintain what is so well settled, that every presumption is in favor of the validity of the will, and the burden of proof is upon those who assert the contrary.

The will in question bears upon its face every indication of regularity, premeditation and discrimination. It was prepared by a scrivener employed by testator, in the privacy of his office, from instructions there given by testator, and, after its approval, was executed by him in the presence of the scrivener and his son, who became subscribing witnesses. After its execution, the testamentary paper was given into the possession of the testator, who placed it in his box in a trust company, where it remained until after his death, a period of five years. Both subscribing witnesses testified that, in their opinion, on Jan. 18, 1896, the date of the will, testator possessed entire testamentary capacity. And although the testimony of witnesses for contestant is, that for some years prior

Wright's Estate.

thereto, while testator was a resident of a neighboring city, he was addicted to the excessive use of intoxicating liquors, and to such an extent as to render him maudlin, that is, tearful, excessively sentimental, weak and silly, and, owing to these habits, he finally lost a position he had occupied a number of years, and which, in the opinion of a fellow-workman, rendered him, in 1893, unable to intelligently execute a will or sign any other paper, it is somewhat remarkable that another witness for contestant, his daughter, testified she resided in the same city with her uncle, the testator; that they visited each other; that he was an excessive drinker of liquor, which she always produced and kept for his use when he visited her, yet declared "it didn't seem to have any other effect except to give him a little more nerve, you know; a little more strength." And after testator returned to this city, his birthplace, to reside with one of his sisters, there is no evidence he continued his habits of intoxication or even indulged in the use of liquor to the slightest degree, nor that he was intoxicated at the time he executed his will; but quite the reverse. And conceding testator was a man of intemperate habits prior to the execution of his will, yet this is not sufficient to invalidate it; the proof must go to the extent of showing that he was mentally unfit to intelligently dispose of his property. And even if he had been declared an habitual drunkard, and was given to the habitual use of liquor to excess, it must also be proved that such use was to such an extent as to impair his mental faculties: *Dugan's Estate*, 6 District Reps. 222; *Hannum v. Worrall*, 2 Del. 49; *Weisman's Estate*, 5 Pa. C. C. Reps. 561.

Evidence of frequent sleepiness, flightiness or violent outbursts of passion, resulting from excessive use of intoxicants and narcotics, were held not sufficient to establish testamentary incapacity. The test of capacity is, were the testator's mind and memory sufficiently sound to enable him to know and understand the business in hand at the date of the execution of the will? *McCullough's Will*, 35 Pitts. L. J. 169.

We have carefully examined the testimony on the part of the contestant which refers to the period of time at or about the execution of the will. It mainly consists of a relation of the untidy appearance of the testator, both in his person and clothing, of his habits and behavior, considered by some of the witnesses not only objectionable, but indicating feebleness of intellect. But these, in themselves, furnish no indication nor proof of testamentary incapacity. One witness, having testified as to the habits, conduct and appearance of testator, said: "He was never any better as to being queer or silly." Another witness testified: "The testator seemed to be childish, you know, and all that way." "You couldn't say he was crazy, but he was silly; what I mean to call real, down silly," but also admitted she did not see him to talk to, only to speak to occasionally. That he was "not crazy," but childish or silly, or something like that. Another witness testified testator had peculiarities. He would speak of bodily ailments, and yet be able to walk upon the street daily. That he would often be in tears and talk to the school-children, who would run after him. And in the summer of 1898 he wandered away from home. In cross-examination, this witness admitted testator was very kindly disposed and kind to children. Another witness testified, testator, in conversation, would talk about his wife and cry. That she did not talk to him on many occasions, but "thought his mind seemed to be impaired. I don't know whether it was weakness or something." And "I did not say he was insane; I would not like to say that." These are specimens of the vague, indefinite and unreliable testimony produced. But a single witness, a fellow-workman with testator, before referred to, ventured to say that testator did not possess sufficient mental capacity prior to or subsequent to the execution of his will, or that he was unable to manage his business affairs and intelligently dispose of his property. Even his niece, also

10 Dist. R.

Wright's Estate.

before referred to, who visited him and was intimately acquainted with him and resided in the same city with testator several years prior to the date of the will, does not intimate or suggest a doubt of his mental capacity. Against this, there is the intrinsic evidence from the will itself, of the comprehension by testator of his estate, the disposition he desired to make of it, and of those he intended to benefit. And the signature thereto was not that made by a total wreck from intemperate habits, but the clear, legible and graceful sign-manual of one self-controlled, intelligent and skillful in penmanship. There is also the testimony of the scrivener and his son, before referred to, to whom testator, unaided and alone, gave the instructions for the preparation of his will. Both clearly and without hesitation expressing their belief in his entire testamentary capacity, and of other uncontradicted and disinterested witnesses to the same effect. After a careful review of the whole testimony, we fully concur with the conclusion reached by the judge before whom the appeal was held, and, in fact, little need be added to what is so well said by him in its dismissal.

We are unable to find anything in the testimony which would warrant a verdict against the will on the ground either of the want of a disposing mind or undue influence: Maxwell's Estate, 6 District Reps. 75; Cahill's Estate, 180 Pa. 131; Oberdorf's Estate, 2 Lack. L. N. 43; and for this reason the issue should not be granted.

In the late case of Seiler's Estate, 14 Pa. Superior Ct. 504, Rice, P. J., follows the prior decisions of the Supreme Court upon the subject cited by him, and applies the rule now so familiar that it need not be quoted, declared in the Appeal of Knauss et al., 114 Pa. 10, where Sterrett, C. J., says: "This simple and only test is supported alike by reason and authority."

The exceptions are accordingly dismissed, and the order dismissing the appeal and refusing the issues prayed for is affirmed.

Stephens v. Wyoming School District et al.

School orders—Negotiability of—Drawn in violation of law—Payment restrained.

School orders, drawn by the president and secretary of a school board on the treasurer of the board, are not negotiable, and the transfer of such orders to an innocent holder does not prevent the school board from setting up any defence against the indebtedness for which the orders were given.

The action of the president and secretary of a school board in drawing orders on the treasurer of the board for articles which the board at no regular or special meeting contracted for or authorized, is in violation of law, and an injunction will issue to restrain the treasurer from paying the said orders.

Motion to continue preliminary injunction. C. P. Luzerne Co., Dec. T., 1900, No. 8, in Equity.

Bill in equity filed Nov. 30, 1900, by A. B. Stephens, resident and taxpayer of the school district of Wyoming borough, plaintiff, against John Hopper, president of the school board, etc.; Robert J. Whiteley, secretary, etc.; G. F. Townend, treasurer, etc.; Harry Jones, Harry Sanders and E. S. Hayes, school directors, etc.: The Melodia Company and the Second National Bank of Wilkes-Barre, Pa., defendants, asking for an injunction restraining the said treasurer from paying certain school orders, the said bank and Melodia Company from receiving any moneys of said district on account of said orders, and the said school board from receiving the books and supplies in payment for which said orders were given, etc. Same day, preliminary injunction granted.

C. E. Terry, for plaintiff.—Contracts for school supplies must be made by the board regularly convened: Baltimore Turnpike, 5 Binney, 481; Allegheny

Stephens v. Wyoming School District et al.

County Workhouse v. Moore, 95 Pa. 408; Pike County v. Rowland, 94 Pa. 238; Railroad Co. v. Railway Co., 167 Pa. 62; Union Township v. Gibboney, 94 Pa. 534; Somerset Township v. Parson, 105 Pa. 360; Road Machine Co. v. Township, 9 Pa. Superior Ct. 105. School orders are not negotiable: Bank v. Rush School District, 81* Pa. 307; Snyder Township v. Bovaird, 122 Pa. 442. A taxpayer may intervene to restrain unlawful acts of municipal officers: Page v. Allen, 58 Pa. 338; Frame v. Felix, 167 Pa. 50; and a court of equity has jurisdiction in such cases: Sank v. Philadelphia, 4 Brewster, 141; Bergner v. Harrisburg, 1 Pearson, 291; Johnston v. Price, 172 Pa. 427; Steigerwalt v. Smeych, 9 Pa. Superior Ct. 363; Gas Co. v. Gas Co., 186 Pa. 443.

E. F. McGovern, for Melodia Co.; *T. H. Atherton*, for Second National Bank.

HALSEY, J., Jan. 7, 1901.—On July 30, 1900, Harry Jones, president of the board of school directors of the school district of Wyoming, and Robert J. Whiteley, secretary of the board, issued an order on G. F. Townend, the treasurer, for \$129.50 to The Melodia Company, one of the defendants, to pay for twenty dozen music books. This order was subsequently endorsed to the Second National Bank of Wilkes-Barre, Pa., by R. M. Truax, agent for The Melodia Company. On Aug. 6, 1900, an order was issued by the said Harry C. Jones, president, and Robert J. Whiteley, secretary of the said school board, on the treasurer of the said school district, in favor of The Melodia Company, for \$182.70 for supplementary books, and this order was subsequently endorsed as aforesaid to the Second National Bank of Wilkes-Barre; and on Aug. 6, 1900, an order was issued by the said Harry C. Jones, president, and Robert J. Whiteley, secretary, on the treasurer, in favor of The Melodia Company, for \$162 for "Music Methods," and this order was subsequently endorsed to the Second National Bank of Wilkes-Barre, Pa. These respective orders were issued without any action by the board of school directors of the school district. In explanation as to how they were issued, Robert J. Whiteley testifies "that Harry C. Jones, the president, and he, as secretary, drew the orders on G. F. Townend, for the amounts named, to The Melodia Company, and that at no meeting of the school board, regular or special, did the board ever contract for any articles for which said orders were given, nor did it ever at any meeting, regular or special, authorize the issuance of the orders named." It is fixed by statute that the board of directors of every school district shall have, *inter alia*, the following powers and duties: They shall pay all necessary expenses of the schools by drafts on the district treasurer, signed by the president and attested by the secretary of the board, the same being entered on the minutes. A school board must exercise its powers by joint action as a board. Loose discussion without any motion or united action are not sufficient: Butler v. School District, 149 Pa. 356; School District v. Feuss, 98 Pa. 600; Nason v. Poor Directors, 126 Pa. 445. The minutes of this school board that have relation to the payment of the bill for which the orders were issued in this case were of a meeting held on July 23, 1900. From an examination of the minutes of this meeting, there was nothing done except that a committee was appointed on text-books, with right to purchase and have power to act on same, and that at another meeting of the board, held on Aug. 3, 1900, the committee on text-books, and the power granted to them on July 23, 1900, was rescinded by the action of the whole board. It does not appear that between the dates of July 23, 1900, and Aug. 3, 1900, that the committee on text-books acted upon the purchase of the books described in the orders. No report was made during that period to the board of school directors, and no approval of the action, if any had been taken during the time, was made by the board, and such action entered upon the minutes. The board of school directors of the school district at no time authorized the making of a

10 DIST. R.

Stephens v. Wyoming School District et al.

contract with the defendant, Melodia Company, for the purchase of the books named in the orders, and in payment for which the orders were issued.

The action of the president and secretary in issuing the said several orders in favor of The Melodia Company was in violation of law. The appropriation of the money by the president and the secretary, as represented by these orders, was an illegal appropriation of the public moneys of the school district. Acts by municipal officers not authorized by law may be restrained by a proceeding in equity : *Bergner v. Harrisburg*, 1 Pears. 291.

These orders, although payable to The Melodia Company and endorsed "pay to the order of the Second National Bank of Wilkes-Barre, Pa.," are not negotiable contracts, and, therefore, the transfer of them to an innocent holder does not prevent the school district from setting up any defence which it may have, as against the indebtedness for which the orders were given, when such orders are held by an endorsee or an assignee : *Bank v. Rush School District*, 81* Pa. 307 ; *Snyder Township v. Bovaird*, 122 Pa. 442 ; *Boies v. Scranton*, 1 Lack. L. Rec. 261 ; *Loomis v. Reynolds*, 7 Luz. L. Reg. 15.

The injunction is continued, and counsel are directed to submit formal decree.

From Sidney R. Miner, Wilkes-Barre, Pa.

Wilmer v. Lewis.

Judgments in sister States—Constitutional law.

Where no statute or other authority authorizes the prothonotary to enter a domestic judgment upon an exemplification of the record of a judgment in a sister State, a judgment so entered will, on motion, be stricken off.

Motion to strike off. C. P. Schuylkill Co., Nov. T., 1898, No. 395, and May T., 1899, No. 318.

M. A. Spieker and John McGurl, for plaintiff.

A. W. Schalck and E. P. Leuschner, for defendant.

SHAY, J., Feb. 18, 1901.—Two judgments entered in the Circuit Court of Ann Arundel county, Maryland, in which Edwin M. Wilmer is plaintiff and Lawrence F. Lewis and Jane H. Lewis are defendants, were entered on exemplified or authenticated records to No. 395, November Term, 1898, and No. 318, May Term, 1899, in the prothonotary's office in Schuylkill county, and on one of these execution has been issued.

Defendants obtained rules to show cause why the above judgments should not be stricken from the records, the petition for the rule setting forth, *inter alia* : "That the entry of judgment in this court by the prothonotary of this court, on the mere filing of such copy of the record of the Baltimore case, being a foreign judgment and a foreign record, was wholly unauthorized, and that the so pretended judgment is wholly illegal and void. That there is no statute or other authority that authorizes the prothonotary of this court to enter any such judgment, and that the record in question is, at most, only an evidence of debt upon which suit must be brought, if recovery is sought thereon in the Commonwealth of Pennsylvania, by due process of law, and the defendant afforded an opportunity to make defence thereto ; but that the entry of judgment upon such a record, without any suit or other proceedings had in the premises, is absolutely null and void."

In both rules petitions are substantially the same. The plaintiff filed answers to the rules, in which he claims that the said judgments were properly exemplified and authenticated in accord with the Act of Congress of May 26, 1790, and that, under the constitution of the United States and the Act of Congress,

the entry of said judgments were regularly made and the judgments should stand.

The question raised here for our determination is the interpretation of art. iv, § 1, of the constitution of the United States, and the Act of Congress of May 26, 1790, par. 905 of the Revised Statutes.

The constitution of the United States provides in art. iv, § 1: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In pursuance of this clause in the constitution, Congress passed the Act of May 26, 1790, which provides: "The records and judicial proceedings of the courts of any State or Territory shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken."

There are numerous decisions, not only in the State courts, but also in the Supreme Court of the United States, interpreting this clause in the constitution and the Act of Congress passed in pursuance thereof, and we deem it necessary to cite but a few of the many cases therein contained.

In the case of *Benton v. Burgot*, 10 S. & R. 240, an action of *assumpsit* on a foreign judgment, our Supreme Court says: "The character of a foreign judgment is fixed. A foreign judgment never has been considered as a record. It is *prima facie* evidence of the justice of the demand in an action of *assumpsit*." *Evans v. Tatem*, 9 S. & R. 252; *Jones v. Quaker City Mutual Fire Insur. Co.*, 9 District Reps. 213. In *Reber v. Wright*, 68 Pa. 476, Justice Sharswood says: "No sovereignty can extend its process beyond its own territorial limits to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals."

In *Guthrie v. Lowry*, 84 Pa. 533, the Supreme Court say: "Whatever doubts may have been at one time entertained and expressed, it is now an incontrovertible position that, in an action upon a judgment of the court of a sister State, the record may be contradicted by evidence of facts impeaching the jurisdiction of the court by which the judgment was rendered."

Justice Mitchell holds the same opinion in the case of *Price v. Schaeffer*, 161 Pa. 535: "As the judgment of the courts of one State are judicial obligations of record there, so they are, under the provisions of the constitution, in every other, and are consequently conclusive in *pleading and evidence*." *Baxley v. Linah*, 16 Pa. 241.

In *Gilfry v. Saarbach*, 12 Phila. 476, *Wetherill v. Stillman*, 65 Pa. 114, *Rowley v. Carron*, 117 Pa. 52, and all the cases we can find on the subject in Pennsylvania, suit is brought in the courts of our State, and the record of the judgment of the sister State offered in evidence, and a new or second judgment recovered in this State.

Furthermore, section 9 of the Act of April 14, 1851, P. L. 614, directs: "That it shall be competent and lawful for a defendant in any action of debt upon a judgment of a court of another State, for maintaining a plea in bar to said action, to prove the service of the notice of process by which the original action was commenced, was made on him in this State." This necessarily assumes that the only remedy is an action upon the foreign judgment in this State.

Wilmer v. Lewis.

A foreign judgment may undoubtedly furnish a good cause of action, for it is only by an action on such a judgment that it can be enforced in another jurisdiction ; a judgment having, as such, no extra-territorial force or effect : 13 Am. & Eng. Ency. of Law (2nd ed.), 1024 ; 11 Encyclopædia of Pl. & Prac., 1100.

In *Savings Institution v. Gerber*, 34 N. J. Eq. Rep. 130, the court say : "Judgments of courts of record in one State are entitled to recognition by the courts of sister States as evidence of a debt, but they have no extra-territorial force as judgments. No court can enforce its process or orders beyond the limits of the State which ordained and established it."

To the same effect is the case of *Bullock v. Bullock*, 51 N. J. Eq. Rep. 444, and on page 450, *ibid*, the court say : "A new suit must be instituted in the sister State in which the judgment is sought to be enforced." See also *Bullock v. Bullock*, 52 N. J. Eq. Rep. 561.

There are numerous decisions in the courts of other States to the same effect. They are all uniform upon the subject, and we do not think it necessary to cite them, but will pass on to the *dicta* of the Supreme Court of the United States upon this subject, which is the ultimate authority on all questions depending on the constitution and statutes of the United States.

As early as 1839, Mr. Justice Wayne, of the Supreme Court of the United States, says, in the case of *McElmoyle v. Cohen*, 13 Peters, 312 : "Although a judgment in the court of a State is not to be regarded in the courts of her sister States as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action of debt upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that, by the 1st section of art. iv of the constitution, and by the Act of May 28, 1790, § 1, the judgment is conclusive on the merits, to which full faith and credit shall be given when authenticated as the Act of Congress has prescribed.

"When the constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and provided that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another State. The authenticity of the judgment, and its effects, depends upon the law made in pursuance of the constitution ; the faith and credit due to it as the judicial proceeding of a State is given by the constitution, independently of all legislation.

"By the law of Congress of May 28, 1790, the judgment is made a debt of record not examinable upon its merits ; but it does not carry with it into another State the efficacy of the judgment upon property, or upon persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there, and can only be executed in the latter as its laws may permit.

"There is no constitutional inhibition on the States, nor any clause in the constitution, from which it can be even plausibly inferred that the States may not legislate upon the remedy on suits on the judgments of other States, exclusive of all interference with their merits."

This is the leading case upon the subject in the Supreme Court of the United States, and has been followed in all the subsequent cases. It is also cited by the various State courts in passing upon the question now before us. To the same effect is the case of *Bank v. Dalton*, 9 Howard, 528.

In *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 292, it is held by Mr. Justice Gray : "No execution can issue upon such judgments without a new suit in the tri-

Wilmer v. Lewis.

bunals of other States:" See also *Cole v. Cunningham*, 133 U. S. 112; *Huntington v. Attrill*, 146 U. S. 683.

In *Hilton v. Guyot*, 159 U. S. 230, Chief Justice Fuller says: "Judgments are executory while unpaid, but in this country execution is not given on a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose."

From the above-cited cases, the conclusion must be that, in order to enforce the execution of a judgment obtained in the courts of a sister State, an action must first be brought and a new judgment recovered in the courts of the State wherein execution is sought to be enforced. The entry of the authenticated transcripts of judgments from the courts of Ann Arundel county, Maryland, as judgments in the Court of Common Pleas of Schuylkill county, Pennsylvania, is unwarranted in law, the judgments so entered are void "*ab initio*," and the rules of the defendants must be made absolute.

It is contended by counsel for the plaintiff, in their argument, that court, in striking off judgment, can impose conditions and permit lien of levy to remain. In support of their contentions, they cite *Grazebrook v. McCreddie*, 9 Wendell, 437; *Ellsworth v. Campbell*, 31 Barb. 137. From a perusal of these cases, we do not think the contention of the plaintiff is borne out. A judgment void from the beginning has no lien which can be preserved. We think the court would be in error in attempting to preserve a lien in a case where none existed. For the reasons above given, the rules of the defendant are made absolute.

And now, Feb. 18, 1901, the rules entered in the above-stated judgments are made absolute, and the judgments of Edwin M. Wilmer v. Jane H. Lewis and Lawrence F. Lewis, entered to No. 395, November Term, 1898, and No. 318, May Term, 1899, are stricken from the record.

From J. O. Ulrich, Tamaqua, Pa.

Broat v. Knight.

Costs—Security—Defendant non-resident.

When the defendant is a non-resident, a non-resident plaintiff will not be required to give security for costs.

Rule for security for costs. C. P. Wayne Co., May T., 1899, No. 307.

P. H. Iloff, for rule; *A. T. Searle* and *L. M. Atkinson*, contra.

PURDY, P. J., Feb. 4, 1901.—This is a rule by the defendant for security for costs. The parties are both residents of the State of New York, and the question is, whether a non-resident defendant may have the benefit of our rule of court, which is as follows: "In cases where the plaintiff resides out of the State, the defendant, upon motion and an affidavit of a just defence against the whole demand, shall have a rule on the plaintiff to give security for costs at or before some period to be named in the rule, and for want of such security, upon motion, judgment of non-suit shall be entered," etc.

The defendant makes an affidavit of a just defence to the plaintiff's whole demand, and asks that the plaintiff be required to give security for costs. The object of the rule is to protect defendants against the necessity of following unsuccessful plaintiffs into other States to recover costs. But where the defendant is a non-resident, we can see no reason for the application of the court rule. If the plaintiff resided here, the rule would not apply; and, if he is unsuccessful in his suit, it would seem to be no more expensive or inconvenient for the defendant to pursue him there than here. This same ruling was made in *Tyler v. Bannon*, 30 W. N. C. 372.

Now, Feb. 4, 1901, the rule is discharged.

From F. P. Kimble, Honesdale, Pa.

10 DIST. R.

Simpler's Petition.

Commissioners of other States—Process in aid of subpoena.

Where it appears that a citizen of Pennsylvania was qualified by a court of another State, for the purposes of that court, to examine under oath witnesses produced before him and to note proofs, a court of Pennsylvania cannot, upon the application of one of the parties to the litigation, whom the court cannot control in any manner, commit for contempt of the commissioner another citizen of Pennsylvania who declines to submit himself to an examination unrestricted in its scope and without any judicial protection, and also to produce the private books of account of a national bank, of which he is merely a clerk, for the experimental scrutiny of one who is either a stranger or an adversary, between whom and the bank there exists no relation.

Acts of March 29, 1860, and April 14, 1846.

No such proceeding is authorized by the Acts of March 29, 1860, P. L. 341, and April 14, 1846, P. L. 329.

Rule for attachment. C. P. No. 2, Phila. Co., Dec. T., 1900, No. 1071.

B. Gordon Bromley, for rule; *R. C. Dale*, contra.

WILTBANK, J., Feb. 26, 1901.—On Jan. 18, 1901, Claude A. Simpler was appointed a commissioner by the Supreme Court of the county of Niagara, State of New York, to examine witnesses in a certain litigation pending in that court, wherein the Niagara Falls Street Railway Company was plaintiff, and the Niagara Falls and Suspension Bridge Railway Company et al. were defendants, on the part of the said defendant railway company. As appears from the petition filed in this court, the power of the commissioner was to examine on oath any person or persons who might be produced by either party to the action on or before Feb. 15, 1901, which time has since been enlarged, upon oral questions to be put to them when produced, touching the issues in the action, and he was to take down the questions and answers, word for word, and certify the deposition of each witness so examined, and return the same to the clerk of the county of Niagara, at Lockport, New York.

On Jan. 23, 1901, a subpoena issued from the Court of Common Pleas No. 4 of this county, directed to one F. W. Spoehr, as book-keeper in the employ of the Quaker City National Bank of this city, commanding him to appear in person before the commissioner at his office on Jan. 26, 1901, at 10 o'clock, then and there to testify to all and singular those things which he should know in the action referred to, and to bring with him all books of that bank showing the account of the Niagara Falls Street Railway Company. The said F. W. Spoehr failed to appear according to the direction of the subpoena and to produce the books referred to.

Upon which state of facts this court has been moved to direct that a writ of attachment issue against the said F. W. Spoehr, compelling him to appear before the commissioner, and to bring with him the books showing the account of the Niagara Falls Street Railway Company, as in the subpoena set forth. The technical objection, if any there be, that this court is asked to take cognizance of a proceeding upon a subpoena issuing from the Court of Common Pleas No. 4, has been waived, and it has been submitted that the filing of the petition as of a term and number duly ascertained by the rule of court determines to what judges the application should be made.

Notice having been given of the application, it has been resisted on the ground that this court has not jurisdiction in the premises, and that the commissioner duly qualified by the Supreme Court of the county of Niagara, in New York, may not, himself, issue a subpoena or invoke the aid of this court to enforce both the attendance of witnesses to be compelled to answer any questions put to them, and the production of books of account which are records of private commercial transactions, not legally subject to the inspection of strangers

intending to avail themselves of them as evidence, or not, only as the result of their inspection may incline them.

Were this the case of letters rogatory, there could arise no doubt as to the power of the court to compel the attendance of witnesses. The circumstances of the attendance, the scope of the examination and the nature of the books and papers to be produced, would be settled by the court upon proper representation of the parties and due consideration of the merits. This would be because, by virtue of the letters, the court itself would be addressed and would be put in possession of the matter sufficiently to be able to determine all disputes as to contumacy. It would seem that this is not the case of a commission issued by a court of another State to a citizen of this State independently of any court here, directing him to proceed as the petitioner has been directed, and not authorizing him expressly to issue subpoenas. No part of the record, showing the litigation between the two corporations named, is before this court. The nature of the issue is, therefore, unknown to us, and all dispute as to competency of witnesses and proof, and as to relevancy of proof, must be beyond settlement. No decision of this court upon the facts, or upon the method of establishing fact, would be binding upon the parties, nor can it be assumed that it would be received as of any effect or obligation by the Supreme Court of the State of New York. It would seem, therefore, that the inquiry resolves itself into but one proposition: It being made to appear to us that a citizen of our State has been qualified by a court of another State, and for the purposes of that court, to examine under oath witnesses produced before him and to note proofs, can we, upon the application of one of the parties to the litigation, whom we may not control in any manner, commit for contempt of the commissioner another citizen of this State who declines to submit himself to an examination unrestricted in its scope and without any judicial protection, and also to produce the private books of account of a national bank, of which he is merely a clerk, for the experimental scrutiny of one who is either a stranger or an adversary, between whom and the bank there exists no relation?

The Act of March 29, 1860, P. L. 341, provides that: "Any commissioner or commissioners appointed by any court of the United States, or of any State, district or territory in the United States, to examine or take testimony of any witnesses within this Commonwealth, shall be vested with the powers and authorities which are by law vested in commissioners appointed for a like purpose by the District Court of Philadelphia under the laws of this Commonwealth."

The Act of April 14, 1846, P. L. 329, relates to commissioners of the District Court of Philadelphia, and provides as follows: "The commissioners thus appointed shall have authority to administer oaths and affirmations to the witnesses where depositions may be taken under the provisions of this Act, and shall receive such compensation for services as the court may direct."

The decisions under this legislation are not harmonious. In *Mencke v. Strause*, 17 Phila. 104, this court ordered that a commissioner have leave to issue an attachment against non-attending witnesses. He had been appointed by the Circuit Court of Cook county, in the State of Illinois, and the only question raised was upon the sufficiency of the certificate of the seal of that court. In *Robb's Petition*, 1 District Reps. 367, it was adjudged that the commissioners have leave to issue an attachment in case of contumacy, on the ground that their application must be regarded as emanating from the court that appointed them, the Circuit Court of Baltimore, and that it was in comity due to that court to aid in the procuring of testimony which it required in order to administer justice, and on the further ground that the Act of March 29, 1860, referred not only to standing commissioners of the District Court of Philadelphia created by 10 DIST. R.

Simpler's Petition.

statute, but also to commissioners appointed by that court for special causes, so that the power of both classes must be looked to, and if the statutes relating to the former did not authorize attachments, the practice in the case of the latter did. See, also, same case, 1 District Reps. 640. In *Kotz v. Eilenberger*, 9 Pa. C. C. Reps. 340, an order for an attachment in like case was refused on the ground that a witness was not in contempt of court who failed to obey a subpoena issued by a commissioner of the Supreme Court of Westchester county, State of New York, and that the commissioner himself had no power to attach for contempt, inasmuch as that had not been conferred by statute upon like officers of the District Court of Philadelphia.

We have no doubt that a judicial inquiry in another State of the Union may be advanced in this jurisdiction upon recognized principles of comity, where it is clear that the officer of the foreign State has been duly qualified, and this is made to appear to us whether by letters rogatory or by commission, and where also the manner of treating the witness and the subject of the issue are proper. Under the statutes, it rests in the discretion of the court, upon application, to enforce obedience to a subpoena issuing by virtue of a commission or by virtue of letters rogatory. It was held by Judge King, in the case of *Captain McKenzie*, 2 Parson's Equity Cases, 227, where letters rogatory were on file, that "it is undoubtedly true that this application is made to the sound discretion of the court, yet, like any other judicial discretion, it is not to be exercised arbitrarily. I admit we are not bound to compel these witnesses to testify, but in executing this commission, it is a courtesy proper to be extended by all judicial tribunals, one to the other, for the purpose of aiding in the administration of justice, and peculiarly to be regarded when such an application is made by the tribunals of a sister State. The several States could not be regarded towards each other in this particular as foreign States—the proper view is to regard the American people as one great whole, and to extend to the citizens of each State, as far as practicable, all the advantages which could be given to our own citizens under our own laws."

But we have always been cautious before requiring, under our own laws, a witness to appear as in the case at bar is demanded. We do not regard the circumstance as conclusive that there are no written interrogatories, and thus the examination may be extended, irrelevant and perhaps vexatious, but, assuredly, in some instances of abuse, it would be no relief to a witness to be told that he might appeal to the Supreme Court of New York if he deemed himself the victim; and this consideration must present itself upon the present appeal to our discretion. "One man may not subject another to interrogatories affecting his civil rights and his liberty, armed with the power to compel replies to questions arbitrarily framed and bound by no restriction. Such questions may only be put by the right of sovereignty, and then only in judicial form:" *Samler v. Meyers*, 7 District Reps. 146. "In the manner the examination is authorized, a man may be pushed in many ways, by a series of questions subject to no restraint or disallowance, perhaps largely experimental, and designed to compel replies that may be used indirectly, and that would not be forthcoming if the proceeding was before a judge:" *Samler v. Meyers*, *supra*.

The case may be considered upon another ground. The object of the subpoena is evidently the production of books of account of a national bank, and this a commissioner of the District Court, whether by virtue of the Acts of Assembly or by special appointment *pro hac vice*, unaided by the court, could not require, because there is no statutory power to that end. If the books of the bank are demanded as, in effect, the books of the adverse party, because it is claimed that they show his account, and it is this account alone to which the defendants desire access, the authorities are clear. In *Prestien v. Sarmiento*, 4 W. N. C. 89,

Simpler's Petition.

there was an application for an attachment in this court. The plaintiffs had appeared before a notary under rule to take depositions in accordance with the direction of a writ of subpoena with a clause of *duces tecum* therein, which writ required them to produce certain of their books of account. Plaintiffs declined to produce their books, on the ground that they were the private property of the firm, and that a writ of subpoena *duces tecum* did not properly lie against them. It was argued that the books and papers of a party can only be examined by an adverse party by virtue of the provisions of the Act of 1798, or in proceedings properly instituted for discovery, and it was adjudged that it had never been the practice to compel their production in preliminary proceedings before a notary or commissioner to take depositions. "If, in a special case, justice requires that a party should have access to books and papers before trial, it should be by bill of discovery, in which the rights of both parties may be properly guarded."

In *Thomas v. Smith*, decided by the District Court Oct. 27, 1849, and reported in manuscript, that court said: "Where books and papers are produced before the court and jury in a public court, there is an evident restraint upon making a bad use of them. Were we to establish the precedent asked for, every defendant who was unwilling to pay the plaintiff's demand would resort to this mode for the purpose of fishing up a defence or attack upon the plaintiff from his books and papers. There are few merchants who would be willing, with such a power hanging over them, to have all their letter-books and account-books taken to the office of a justice of the peace and then overhauled, studied and copied by their adversary or his lawyer. I can only conceive of one case in which the court might safely make a rule to produce a paper in which the parties had not a common interest, before a magistrate or commissioner, and that would be in the case of a deed or other paper, to which the person proposed to be examined was a subscribing witness, and necessary to prove it."

If, on the other hand, we regard the books as the record of the employer of a witness, and not of a party to the litigation, the objection is weighty, that we have no power in the constitution of this court to direct that witness against his protest (and the presumed protest of his master) to submit his principal's record to an officer not answerable to us, and who, himself, has not been commissioned to demand it, to be used without protection in an examination which we cannot control. The owner of the books may well protest against such a course. As the defendant may, by calling the plaintiff to testify, or by bill of discovery in a proper case, require the plaintiff to disclose his account with the bank, our ruling cannot affect the due course of procedure in the court of another State.

The prayer of the petition is, therefore, refused.

Forepaugh's Estate.

Legacies—Abatement—Gifts in lieu of dower.

A gift over on death of testator's widow, to whom an interest for life in the fund had been given by the will in lieu of dower, is subject to abatement on her decease.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1882, No. 459.

W. Y. Tripple and Alfred Moore, for exceptants; *Richard C. Dale*, contra.

ASHMAN, J., Feb. 2, 1901.—The testator bequeathed to his wife for life the interest of \$25,000, with disposition over of the principal amongst his surviving brothers and sisters. He also gave to his adopted daughter the interest of \$10,000 for her life, and at her death the principal to her children, and if she should leave no child, then equally to his said brothers and sisters. The total personal estate amounted to \$16,777.71, and that sum was awarded in trust for the widow, her legacy, because given in lieu of dower, not being called upon to
10 DIST. R.

Forepaugh's Estate.

abate: Haddock's Estate, 16 W. N. C. 186. On the death of the widow, the adopted daughter claimed that 10-35ths of the fund, representing the ratio which the fund for her use bore to that for the widow, should be awarded to her for life.

There can be no doubt, we think, of the justice of this demand. The privilege accorded to the widow, who, by virtue of her dower, is regarded as a purchaser, was purely personal, and did not extend to the brothers and sisters, who are volunteers. The privilege died with the person whom it was intended to benefit, and as between the remaining parties, the legacies abate proportionately, just as they would have abated if the bequest of \$25,000 had been to any other than a purchaser.

The exceptions are sustained, and the adjudication and awards are amended accordingly. HANNA, P. J., dissents.

Bennett's Estate.

Will—Testamentary capacity—Insane delusions.

In determining the question as to whether or not a will was executed under the influence of an insane delusion, the test is whether the testator imagined or conceived something to exist which did not in fact exist, and which no rational person, in the absence of evidence, would have believed to exist, and not the soundness of his point of view.

Hence, where a testator cut off his wife and children from all share in his estate, in the belief in his wife's infidelity, based upon confessions, oral and written, made to him by her and repeated to others, and other collateral circumstances almost as convincing, the question is not whether the confessions were true or false, or whether the circumstances were or were not misleading, but whether they were of such a character as might fairly induce the belief of guilt in a rational mind, and, if so, the belief, even if erroneous, is not an insane delusion, and the testator's capacity will be sustained.

Appeal from register. O. C. Phila. Co., April T., 1899, No. 18.

F. S. Cantrell, F. S. Cantrell, Jr., and George P. Rich, for appellant.

William C. Ferguson and John G. Johnson, for appellee.

ASHMAN, J., Feb. 2, 1901.—The testator filled a large place in the public thought as a successful business man and as a philanthropist. He had passed through all the grades of labor, beginning at the humblest, and he died a millionaire. He was, indeed, among the first of those merchants who projected the bolder methods of commercial enterprise which have raised trading to a science. The qualities of mind, without which the history of his career would be a fable—shrewdness, tenacity of purpose, decision and foresight—are fully conceded to him by both parties to this contest over the will. We do not understand it to be denied that when he wrote that instrument his mental force was unabated, and, hence, that he was able to make an intelligent estimate of his resources, and an equally intelligent selection of the persons and objects to which they should be applied. If a doubt could exist in any quarter respecting this, it would be dispelled by the testimony which lies before us as to the manner of the making of the will, and especially by the provisions of the will itself. A slight effort, too slight for serious notice, was made to show some traces of eccentricity in the testator; he had a violent temper, and, perhaps, as violent prejudices, and he sometimes, if he is fairly reported, used expressions which would be displeasing to a professor of deportment. But the real ground upon which the contestant planted a hope was that, sane as he was upon all other points, the testator was the victim of an insane delusion respecting his wife and her offspring. It must be admitted that a phenomenon like this, whose secret medical science has never yet fathomed, has had an occasional existence, and that through some slight lesion in a brain otherwise normally healthy, a certain

grotesqueness has been made to appear in the conduct of the wisest men. We know that Dr. Johnson believed in the Cock Lane ghost, and that Martin Luther flung an inkstand at what he supposed was the Devil. But all delusions are not insane delusions. A man may, from information given him, believe that his son is dead, when, in point of fact, the son is alive. The father's belief is a delusion; and if, when his son appears to him in person and explains that the information was false, the father persists in thinking him dead, his belief becomes an insane delusion. The difference between the two species is that one is the product of the reason, and the other a figment of the imagination. The belief of the testator rested upon very practical realities—upon confessions, oral and written, made to him and repeated to others, and upon other circumstances which we need not narrate, but which were almost as convincing as confessions. We do not say whether, in our judgment, the confessions were true or false, or whether the circumstances were or were not misleading; but we do say that both were of a character which might fairly persuade a sensible man to the belief which they induced in the testator. He acted under this conviction just as any sane man would have acted; he became for a time indifferent as to his personal appearance, and moody and reserved in his manner; and these very natural expressions of rational grief are sought to be tortured into exhibitions of madness. One of the hypothetical questions addressed to the medical expert asserted that the decedent "heard voices constantly talking about the paternity of his child." The expert replied that he regarded the incident as very significant, because, in his opinion, "they were not said by real people, but were the child of the decedent's imagination." What the decedent actually said, however, was that he overheard, by accident, insinuations reflecting on his wife, and that afterwards so many persons made remarks to the same effect that the insinuations seemed to be common talk. To confound, as the framer of the question did, common talk with the voices of disembodied spirits, is to approach very near to an insane delusion.

The president judge, before whom the appeal from the register was originally brought, and who heard the witnesses, has so clearly presented the leading facts of the case, and has so ably analyzed the authorities which bear upon it, that any further discussion will be superfluous. The gist of the decisions upon the point which is now involved is contained in this sentence from the opinion in *Murdoch's Appeal*, 185 Pa. 203: "It is never a question of soundness of view, but the proper inquiry always is whether the party imagined or conceived something to exist which did not in fact exist, and which no rational persons, in the absence of evidence, would have believed to exist."

The appeal is dismissed.

Cutter & Bro. v. Magaw et al.

Mechanic's claim—Owner or reputed owner—Motion to strike off—Practice, C. P.

The court will not, on motion, strike off a mechanic's lien at the instance of a person claiming to be the owner, as against the reputed owner who is in possession. The actual ownership of a property cannot be determined by such a method.

Rule to show cause why mechanic's lien should not be stricken off. *C. P. Crawford Co.*, Feb. T., 1900, No. 8, M. L. D.

James P. Colter (with him *David T. McKay*), for rule; *Otto Kohler*, contra.

THOMAS, P. J., March 12, 1900.—We are asked by W. H. Magaw, who is not a party to the record in this case, to strike off this lien, for the reason that the name of the real owner of the land is not set forth in the lien or claim filed,
10 DIST. R.

Cutter & Bro. v. Magaw et al.

he alleging that he is said owner, and that the lien is filed against Frank Magaw, owner or reputed owner, and J. W. Beers, contractor.

From the testimony taken in the case, it appears that W. H. Magaw is the owner in fee of said land, and that Frank Magaw lives in the house and occupies the premises against which the lien was, or was attempted to be, filed.

It is very doubtful, in our mind, if W. H. Magaw has any standing whatever to make this application. The power of the court over a mechanic's lien is very similar to that over a confessed judgment, and in such cases they are never interfered with at the instance of a stranger or third party, excepting when the same are collusive or fraudulent as to said third party: Drexel's Appeal, 6 Pa. 272.

Petitioner asks us to interfere in this case, however, because of the fact, as he alleges, this lien casts a cloud upon his title. Undoubtedly the court has equitable power to take such action as would remove a cloud from the title to real estate, but we are aware of no instance where the court has so acted where the claimant was not in actual possession of the property, and from the testimony in the case, it is not made clear by what right, title or authority Frank Magaw is in possession of these premises, or as to whether said possession is that of Frank or W. H. Magaw.

The court undoubtedly has a right to exercise its summary power of striking from the record that which is irregular or void, and especially where it might cast a suspicion on the title to property; but this claim, upon its face, is not irregular.

The real contest upon this rule has been as to who is the actual owner of the property liened. This, we think, is not within the province of the court to determine. We cannot see any power in this court to determine the title to this property adversely to Frank Magaw in this proceeding when he has had no day in court. He would certainly not be bound by any such adjudication, nor is it possible for the court to permit a stranger to the record to come into court, have the court find as a matter of fact that said stranger has title to the property in question, and because of that fact found by the court, without even the consent of the defendant, to strike off a lien.

And now, March 12, 1900, the rule is discharged.

Lehman's Administrator v. Winters et al.

Justice of the peace—Transcript—Amendment—Affidavit not entered at large on docket.

The transcript of the docket of a Justice of the peace cannot be amended, after the same has been filed in the Court of Common Pleas, by adding thereto an affidavit which was not entered at large by the Justice on his docket, but which was lying loose in the docket at the place of the record of the case.

Affidavit under Act of July 7, 1879—When defective.

An affidavit made before a Justice of the peace under the Act of July 7, 1879, P. L. 194, at the time of the issuing of the summons, which does not contain a copy of the book entries, and a copy of which was not served with the summons in the case, is insufficient to permit the entry of judgment by default, in case of the failure of the defendant to appear at the time of hearing or of affidavit of defence.

Rule to show cause why court should not order amended transcript filed as part of the record. C. P. York Co., Oct. T., 1900, No. 51.

B. R. Paxton, for rule; Walter C. Douglass, contra.

BITTENDER, P. J., Dec. 21, 1900.—This rule was granted on the joint petition of Jacob P. Levergood, Esq., the successor of Frank J. Magee, deceased, who

was the justice before whom the judgment in question was recovered, and the trust company, the administrator of the original plaintiff's estate. It is alleged, under oath, in said application that a material part of the record on the docket of the deceased justice was inadvertently omitted from the transcript delivered to the administrator and afterwards filed; and the court is prayed to allow the same to be added to the transcript filed, so the same may read as follows:

"Summons issued Jan. 6, 1885. R. W. Drenning, Constable, Wrightsville borough. Returnable Jan. 13, between 1 and 2 o'clock P. M. Returned, on oath, served Jan. 6, 1885, by producing the original summons to defendant and making known to them the contents thereof, Jan. 12, 1885. Both parties appear. George A. Lehman, for the plaintiff (sworn), produces book account showing balance due Daniel T. Lehman, amounting to \$243.47, against defendants, and that there is no set-off. Defendants make no defence. Same day, judgment is publicly given in favor of the plaintiff and against the defendants for \$243.47, with interest and cost of suit.

"York county, ss.:

"Before me, the subscriber, a justice of the peace in and for the said county, personally appeared George H. Lehman, who, being duly affirmed according to law, doth depose and say, that George Winters and Emma Winters, his wife, is indebted to Daniel T. Lehman for necessaries of life in the sum of \$253.47; that said necessaries of life were furnished and delivered to said Emma Winters at her instance and direction, and that said George Winters and Emma Winters have no set-off to said claim, and that they are justly indebted to said Daniel T. Lehman in the sum of \$253.47, over and above all discounts and payments they may have made.

Signed, GEORGE H. LEHMAN

"Affirmed and subscribed, this 6th day of January, 1885.

FRANK J. MAGEE, J. P.

"I do certify that the above is a true transcript of a judgment entered by Frank J. Magee, now deceased, whose successor I am and whose docket is in my possession, at the suit of Daniel T. Lehman against George Winters and Emma Winters.

"Witness my hand and official seal, this 13th day of November, 1900.

[Seal]

JACOB P. LEVERGOOD, J. P."

By comparing the original transcript with the transcript amended as proposed, we find the amendment to be the addition of the affidavit made by Daniel T. Lehman, the original plaintiff, on the day of the institution of the suit, viz., Jan. 6, 1885. On inspection of the docket containing the record of the judgment, we find that said affidavit is not incorporated in the judgment and record as represented in the petition, but that it is a loose paper, lying in the docket at the place of said record in the case, not even attached to the record. Where it was at the time of the giving of the transcript on record by the justice does not appear. How the justice, praying for leave to amend, could make the affidavit and certify the proposed amended transcript at variance with the record, we are unable to understand. We are sufficiently cognizant of the learning and ability and rectitude of the deceased justice to know he would not incorporate such an affidavit into his record, after concluding the same by the formal entry of judgment. We are indisposed to tarnish his reputation as a most faithful and competent officer by allowing this amendment, showing such a record, now.

The date and contents of the affidavit which it is proposed by the amendment to make part of the record show it to have been made by the plaintiff at the institution of the action, under the 2nd section of the Act of July 7, 1879, P. L. 194, in part as follows: "In all actions brought before any Justice of the 10 DIST. R.

peace, magistrate or alderman, on any contract for the payment of money, either expressed or implied, if the plaintiff shall file at any time before the issuing of the summons in any such case an affidavit, stating the amount he verily believes to be due from the defendant, together with a copy of the book entries or instrument of writing upon which the action is brought, or where the claims are not evidenced by writing, if the plaintiff shall file, as aforesaid, an affidavit setting forth a full and detailed statement of the same, it shall be the duty of the justice, alderman or magistrate to make a copy of such affidavit, duly certify the same, and deliver it to the constable to whom the summons is issued, which certified copy shall be served at the time and in the manner that service is made of the summons in the case; and the justice, magistrate or alderman shall render judgment in favor of the plaintiff for the amount of his claim, unless the defendant, at or before the time at which the summons is made returnable, shall have filed with the justice, magistrate or alderman an affidavit of defence setting forth fully the nature and character of the same."

The affidavit is not even sufficient, under the Act, to have secured judgment by default, in case of failure of defendant to appear at the time of hearing or of affidavit of defence. This is a claim for the value of merchandise on book account, as appears from the record of the judgment, and yet the affidavit contained no copy of book entries as required, nor does it appear that the justice made "a copy of the same, duly certified, and delivered it to the constable to whom the summons was issued, and that said certified copy was served at the time in the manner that service was made in the summons in the case." Insufficient as it was, it cut no figure in the case. Nothing as to the making, filing or service of the affidavit appears on the docket, and that it was not regarded as any part of the evidence is manifest from the record, where it stated that the plaintiff in the action appeared at the hearing on Jan. 12, 1885, "with his books of account showing balance due," &c., and was sworn, after which judgment was entered in favor of the plaintiff against the defendants.

This *ex parte* affidavit, made at the time of the issuing of the summons, could not be evidence in the case, for the reason already stated, and was not so treated by the justice, as the record shows, but the judgment was founded on the testimony of the plaintiff and his proven book of original entries. Even if the said affidavit had been erroneously treated and admitted as evidence, this amendment could not be allowed, for the evidence is not entered upon the docket as part of the record. This rule of law is clearly established in the review of cases by the appellate courts. Justice Sterrett, in *Wilmington Steamship Co. v. Hass*, 151 Pa. 113, says that "nothing is better settled than that a writ of *certiorari* brings up nothing but the record proper. The evidence, if any has been taken, forms no part of such record, and cannot be properly considered by the court." This principle is too familiar to require the citation of authority: *Buchanan v. Baxter*, 67 Pa. 348.

The record of a justice is an inquest of facts resulting in a judgment, and the testimony is not set out in the finding: *Bedford v. Kelly*, 61 Pa. 491. That was a landlord and tenant case, but the principle is applicable here. It must appear from the record that evidence was heard by the magistrate before the entry of judgment, unless judgment is entered by default under the Act of 1879, herein cited, when judgment is entered by default. In such case the copy of the affidavit must be returned by the constable, duly served, a statement in the record of the issuing, service and return of service on defendant made on the record, as well as the entry of judgment by default against the defendant, for failure to file an affidavit, before the hearing as prescribed by the Act.

After this long interval, after the death of the justice by whom the judgment was entered, when it appears from the record that the affidavit of claim in

Lehman's Administrator v. Winters et al.

question is defective in not being accompanied by a copy of the book entries of items of goods claimed for; when it does not appear that a certified copy of the same was served on defendant at the time the summons was served; and further, it does not appear that the same was even a part of the evidence or submitted as such as a foundation for the judgment, or that the defendant, Emma Winters, had any notice of the same to enable her to make a defence or take an appeal (see *Griffin v. Davis*, 6 Pa. Superior Ct. 481), even if the amendment were allowable, it would be unfair and unjust to permit the amendment to be made. The judgment was clearly invalid and not enforceable against Emma Winters and her separate estate, or it would not have been allowed to lie dormant for over fifteen years before proceeding with execution.

The Act of 1810 requires that all proceedings had before a justice shall be entered at large by him on his docket, and that docket is the record recognized by the law in case of appeal and in the filing of transcripts in the Common Pleas.

The 10th section of the Act of March 20, 1810, 5 Sm. Laws, 166, provides that "the prothonotaries of the respective counties shall enter on their dockets transcripts of judgments obtained before justices of the peace of their respective counties without the agency of an attorney," &c. It is transcripts of the *judgments* that are to be entered, and not of matters not even on the record and much less part of the judgment.

For the reasons stated, the amendment of the transcript must be refused.

The rule is discharged, at the cost of the petitioner

From Richard E. Cochran York, Pa.

Haas's Executors v. Fisher.

Sheriff's sales—Advertisement—Acts of March 27, 1824, sec. 1, and June 16, 1836, sec. 63.

The Acts of March 27, 1824, § 1, P. L. 119, and June 16, 1836, § 63, P. L. 755, in providing that sheriff's sales shall be advertised for "*three successive weeks*" deal with weekly periods of time, *i. e.*, calendar weeks or divisions of time into periods of seven days each, extending from Sunday to Saturday, inclusive, and a sale cannot be had until they have expired. Hence, a sale after the last advertisement, but within the third calendar week, is irregular and will be set aside.

Petition to set aside sheriff's sale. C. P. Clearfield Co., Feb. T., 1900, No. 189.

McEnally & McCurdy, for petitioners; *Murray & Smith*, contra.

GORDON, P. J., Jan. 16, 1901.—The sheriff's sale in question is sought to be set aside because not advertised as required by law. The advertisement was in two newspapers, *viz.*, in *Raftsmen's Journal* in the issues of Nov. 14, 21 and 28, 1900, and in *The Public Spirit* in the issues of Nov. 15, 22 and 29, 1900, the last issue not, however, appearing till Nov. 30. The day of the sale was Nov. 30, 1900. It is charged this advertisement is irregular, because it was not "during three successive weeks previous to the sale," the last issues of the newspapers being during the same week as the sale.

In my opinion, the petitioners' contention is correct. Advertisements of sheriff's sales of real estate are regulated and governed by two Acts of Assembly. The Act of March 27, 1824, P. L. 119, provides for advertisements "once a week for three successive weeks, in two or more newspapers." The Act of June 16, 1836, P. L. 755, in its 63rd section, provides for advertisements "once a week

during three successive weeks previous to sale." Petitioners' counsel contends, and properly, as I view the matter, that this requires the advertisements to be once in each of three successive weeks "previous to the sale," that is to say, three weeks prior to the week in which the sale takes place. It means three calendar weeks or divisions of time into periods of seven days each, extending from Sunday to Saturday, inclusive: *Ronkendorff v. Taylor*, 4 Peters, 361; *Williams v. Moore*, Dist. Ct. Phila., cited in 1 *Troubat & Haly's Prac.*, § 1250. The Act contemplates the advertisements during three of these periods, and the sale in a later one. Had it provided for an advertisement of sale during one week, surely it could not be pretended that the sale could take place during the same week, forsooth on the succeeding day. This would not be one week's advertisement. And for the same reason, an advertisement during three successive weeks is not made when the day of sale, as in the pending case, is during the last week, and the day after the advertisement appears. So far as reported cases can be found, strange to say, this precise question seems never to have been decided in this State. Numerous common pleas cases are reported on both sides of the question whether the advertisement must be for the period of three weeks—twenty-one days—or in or during three weeks, and not whether they should be weeks prior to the sale. In *Hollister v. Vanderlin*, 165 Pa. 248, relied upon by attorneys for the respondent and sheriff, Mr. Justice Mitchell says: "The further objection is made to the advertisement of the sale that it was not made three full weeks before the day fixed for the sale. The language of the Act of June 16, 1836, § 63, P. L. 755, is, that the officer making the sale shall give notice by advertisement 'once a week during three successive weeks.' Does this require that the first notice shall be three full weeks, or twenty-one days, before the day of sale? It does not appear that this point has ever been expressly decided by this court, and the decisions of the Courts of Common Pleas are not uniform upon it. The general practice, however, has been against such requirement, and to regard the statute as referring to calendar weeks, or specified periods of time, and an advertisement in each of three successive periods of the kind, although the advertisements may not have been all on the same day of the week, and there may not have been twenty-one full days between the first and the date of the sale. This is the rule laid down in the books of practice (1 *Troubat and Haly's Prac.*, § 1250), and has been recognized by this court inferentially, at least, in *re North Whitehall Township*, 47 Pa. 156, where a notice directed to be given three weeks before the time of meeting was held to mean twenty-one full days, and was expressly distinguished by Strong, J., from a notice 'during three successive weeks,' or one for 'a given number of insertions in successive weeks.'" There "the sheriff's sale was advertised for Aug. 28, 1893, in newspapers issued Aug. 11, 18 and 25, 1893." It does not appear in the report, but the almanac shows, that Aug. 25 and 28, in 1893, were not in the same week. The ruling is, that while the advertisements must be once a week for three consecutive calendar weeks, they may be had on any day of each week, and need not be for twenty-one days. But whether the sale could be held during the last calendar week, which is the question here, was not passed upon. The facts did not make that question an issue, and, as I view the matter, that case does not parallel the pending one by its facts, nor rule it by its declaration of the law.

It is claimed, however, by respondent's counsel, that even if the construction contended for be correct, that the Act of 1836 does not govern. That the sheriff's sale being by virtue of a *levari facias* on a judgment on a mortgage, the proceeding is under the Act of 1824, whose language differs from that of the Act of 1836. That it simply requires that the advertisement shall be "once a week for three successive weeks," and not that they be the three weeks "previous to the sale." Further, it is claimed that the Act of 1824 is still in force as to writs of

levari facias, and is not superseded and supplied by the Act of 1836, which proposition I affirm. It has been considered superseded, and, on that account, until recently, was omitted from the digests of our State laws. Yet an examination of the Act of 1836 demonstrates that the advertisement required by its 63rd section is confined to the cases of sales on writs of *vend. ex.* after inquisition, and not to sales on *levari facias*. The Act is comprehensive and relates to executions of all kinds, but the provision for advertisement is limited and confined as stated. Such being the case, the Act of 1824, so far as not supplied by the Act of 1836, is still in force, and to its provisions access must be had for the conduct of the sheriff's sale on writs of *levari facias*.

But admitting this to be the case, in my opinion, the advertisement here is still defective. As I view it, the provision for advertisement is the same in both Acts. It is true, the words "previous to such sale" are not contained in the Act of 1824 as in the Act of 1836, but these words are surplusage. The advertisements must, of course, be previous to the sale. The only other difference is that the word "for" is used in one Act, and "during" in the other, but as they both refer to the periods of time in which the advertisements must appear, they have, as used, practically the same meaning. Both Acts require weekly advertisements; that is, advertisements once in each of three successive weeks prior to the sale, but they may be in any of the days thereof. The first must be in the third week prior to the sale, but need not be three weeks prior thereto. With the first on Saturday, and the day of the sale Monday of the third week thereafter, only sixteen days would be required. As the Acts deal with weekly periods of time for the advertisements, the sale cannot be until after they have expired.

If the foregoing views be correct, the conclusion will follow that the advertisement is defective, and that the sheriff's sale must be set aside.

I have given my views thus at length, not merely to decide the pending case, but, by request of attorneys, to settle the practice in this court, which, for many years, has been as followed by the sheriff in this case.

The rule is made absolute, and exception noted to the respondents.

From Benjamin F. Chase, Clearfield, Pa.

Wise v. Wright.

Justice of the peace—Jurisdiction—Depositions—Account-render.

Where depositions in the case show that the cause of action grew out of a settlement of partnership accounts, a judgment entered therein by a justice of the peace will be set aside for want of jurisdiction.

Certiorari. C. P. Blair Co., Oct. T., 1900, No. 89.

A. S. Fisher, for plaintiff; A. P. McLeod, for defendant.

BELL, P. J., Jan. 14, 1901.—It is allowable, by means of depositions, to show want of jurisdiction on part of the magistrate: *McNaught v. Swing*, 1 Ches. Co. Reps. 468, and cases therein cited. The depositions in this case show that the cause of action was, or grew out of, a settlement of partnership accounts. But *assumpsit* does not lie for such a cause of action. "Bill in equity or an action of account-render is the only remedy:" *McFadden v. Hunt*, 5 W. & S. 468. And "a justice of the peace has no jurisdiction of account-render:" *Steffen v. Hartzell*, 5 Wharton, 447.

For such want of jurisdiction, the proceedings are set aside and judgment reversed.

From Robert W. Smith, Hollidaysburg, Pa.

10 DIST. R.

Ryan et al. v. Ashbridge, Mayor; Haddock, Director of Public Works, and McNichol.

Municipal contract—Bidding—Duty of municipal officer—Act of May 23, 1874.

"The system of competitive bidding as known to the law in all cases of negotiation for contract by publication of proposals and invitation of bids, and as contemplated by the Act of Assembly of May 23, 1874, § 4, P. L. 233, involves two essential features, and these are, first, an equality on the part of bidders in respect of every particular of the transaction; the work and materials needed, the extent of the former and the quantity, quality and description of the latter; the time when the contract is to be performed, with the incidents of security for performance, and the like; and second, the common protection of all from bidding not open to all, by which bidding special terms are made with one, or modifications of bids are permitted after the date fixed beyond which, for the ascertainment of the result of the competition, the bids must be regarded as unalterable." Per WILTBANK, J.

"A municipal officer, after he has opened and computed the bids, must sedulously avoid saying or doing anything that ordinary ingenuity may interpret as a hint to a bidder that he has lost the contract unless he lowers his bid, whether by abatement of price or addition of new items. If a man of ordinary intelligence will understand his word or act as such a hint, even the absence of intent in the utterer or doer will not make it lawful. Every man is to be held in law as intending the usual and natural consequence of his acts." Per SULZBERGER, J.

Hence, where the Director of Public Works of Philadelphia, after the expiration of the time fixed by advertisement for receiving sealed proposals for the performance of a municipal contract, wrote to one of the bidders a letter, requesting information as to what work was included in the bid, the language of which was so couched as to suggest to a man of ordinary business intelligence that he would lose in the competition unless important additions were made to his bid, to which the bidder replied by letter that his bid included, with certain specified exceptions, an undertaking to do all work necessary to complete the contract for a lump sum, which was less than the price bid by competitors, and the Director thereafter awarded such bidder the contract, held, that the contract had been awarded, not upon the bid submitted in accordance with the advertisement, but upon the offer to complete the work for the lump sum contained in the bidder's reply to the Director's letter, which was in effect a secret bid, put in after the date fixed by the advertisement for the closing of bids: that the award was unauthorized and void, and a court of equity would restrain the Mayor and Director from executing the contract pursuant thereto, upon a bill filed by a taxpayer.

Motion to continue special injunction. C. P. No. 2, Phila. Co., Dec. T., 1900, No. 1185, in Equity.

J. H. Barnes, A. H. Wintersteen, Geo. T. Bispham, and John G. Johnson,
for plaintiffs.

E. O. Michener, Alex. Simpson, Jr., and Jas. Alcorn, Assistant City Solicitor,
for defendants.

SULZBERGER, J., March 14, 1901.—The bill, as amended, is a taxpayers' bill, praying for an injunction against the execution of a contract between the city and the defendant, McNichol.

By ordinances approved Jan. 12, 1900, the councils of the city of Philadelphia appropriated a large sum of money for the extension, improvement and filtration of the city's water supply.

By section 6 of the Act of May 23, 1874, P. L. 233, it is provided that all work and materials required by the city shall be performed under contract, to be given to the lowest responsible bidder.

In pursuance of the statute and ordinances, the Director of Public Works, on Jan. 24, 1901, duly advertised for sealed proposals to be received until 12 o'clock noon, on Monday, Feb. 11, 1901, for, among others, "Contract No. 9." He also prepared, for the use of bidders, a printed form of proposal and specifications for cast-iron water-pipe, special castings, stop-valves, pipe-laying, etc., appurtenant to the improvement, extension and filtration of the water supply, authorized by ordinances of councils, approved Jan. 12, 1900."

These forms were printed in a pamphlet of 131 pages. Pages 3 to 6, inclusive, contained "notice to bidders," pages 7 and 8, "special notice;" pages 9-18:

Proposal No. 1—Proposal for cast-iron water-pipe and special castings, excavating water-pipe trenches and pipe-laying for pipe-lines A-J, inclusive, and pipe about the Lower Roxborough reservoir, forming part of Contract No. 9; pages 19-27: Proposal No. 2—Proposal for cast-iron water-pipe and special castings, excavating water-pipe trenches and pipe-laying for pipe-lines A-D, inclusive, and pipe about the Lower Roxborough reservoir, forming part of Contract No. 9; pages 28-36: Proposal No. 3—Proposal for cast-iron water-pipe and special castings, excavating water-pipe trenches and pipe-laying for pipe-lines E-J, inclusive, forming part of Contract No. 9; pages 37-42: Proposal for cast-iron water-pipe and special castings and flange-pipe and flange special castings for the Lower Roxborough filters, and for hydrant connections and miscellaneous pipe, forming part of Contract No. 9; pages 43-53: Proposal for stop-valves, indicator stands, extension stems, stop-boxes, frames and covers, forming part of Contract No. 9; pages 54-71, contained a schedule showing the estimated quantities of materials to be used for the several lines; page 71 contained a schedule showing approximate quantities of excavation required, and stating that "the following approximate quantities will be used only for the purpose of comparing bids;" pages 72-82 contained specifications for cast-iron water-pipe and special castings; pages 83-95, specification for excavating water-pipe trenches; pages 96-103, specification for pipe-laying; pages 103-115, specification for stop-valves, check-valves, indicator stands and extension stems, stop-boxes, frames and covers; pages 116-124, general provisions; pages 124-131, general index to specifications.

On Feb. 11, 1901, four bids were received, concerning two of which there appears to be no dispute that they were higher than either of the other two. The controversy arises on the bids of Ryan & Kelly and Daniel J. McNichol only.

Both of these bidders used the department's printed forms in presenting their proposals, and as the question of responsibility does not arise with respect to either of them, both of them being conceded to be proper parties for doing the work, the question was argued as to which was the lowest bidder, the plaintiffs contending that Ryan & Kelly were lowest, and the Director having decided that McNichol was the lowest.

In order to understand the question, it is necessary to examine closely the form of proposal described by the department for the use of bidders. The use of this form was, properly, compulsory on bidders. In the notice to bidders, on page 3, it is directed that "proposals for the work bid for must be made upon the printed form," . . . and, further, that "proposals which contain any omissions, erasures, alterations, additions not called for, conditional bids or irregularities of any kind, may be rejected as informal." "They must be for all the items bid for, and for each item complete."

"The Director of the Department of Public Works reserves the right to award contracts for the furnishing of cast-iron water-pipe, special castings, trenching for pipe-laying, pipe-laying and all appurtenances connected with the lines of pipe A-J, inclusive, herein mentioned, to one bidder, provided it shall, in his judgment, be to the best interests of the city of Philadelphia so to do, or he may divide the contract for all or any part of the work mentioned in the specification among several bidders." . . .

Each bidder under Proposal No. 1 was required to file with his bid a certified check for \$29,000; each bidder under Proposal No. 2 a check for \$18,000; under Proposal No. 3 a check for \$11,000; under the proposal on page 37 a check for \$2000; and under the proposal on page 43 a check for \$1000. Proposals Nos. 2 and 3 are the constituent factors, and, therefore, the equivalent of Proposal No. 1. A bidder for all the work was, therefore, required to deposit checks as follows: \$18,000, plus \$11,000, plus \$2000, plus \$1000, or \$32,000.

10 DIST. R.

The special notice, page 7, provided that "while unit prices will be received for each detail mentioned in the proposals, the bids will be compared upon the aggregate for each and all lines of pipe described in the schedules and embraced in the respective proposals, but separate bids for cast-iron water-pipe, special casting and flange-pipe and specials for the Lower Roxborough filters, for hydrant connections and miscellaneous pipe, and for stop and check-valves and stop-boxes and frame and cover castings will be received. Bids not in conformity with these requirements will be rejected as informal.

The Director of the Department of Public Works reserves the right to award a contract for pipe-lines A-J, inclusive, and about the Lower Roxborough reservoir, as an entirety to one bidder, or to award separate contracts as follows :

1. For pipe-lines A-D, inclusive, and about the Lower Roxborough reservoir as an entirety.

2. For pipe-lines E-J, inclusive, as an entirety.

No bid for stop and check-valves will be considered formal which does not contain prices on each size and style of stop and check-valve set forth in the schedule and blank proposals, but bidders on stop and check-valves are not required to submit bids for stop-box, frame and cover castings.

The form of Proposal No. 1, pipe-lines A-J and pipe about the Lower Roxborough reservoir, contains 27 items, 15 of which describe different sizes and classes of water-pipe and other material, and leaving for each item a blank, to be filled by the bidder, for the price of the same per ton of 2000 lbs. Items 16-20 describe various depths of earth excavation for water-pipe trenches, and leaving for each item a blank, to be filled in by the bidder, for the price of the same per cubic yard. Item 21 has a similar blank for rock excavation. Item 22 for brick per 1000. Item 23 for rubble masonry per cubic yard. Items 25 and 26 for timber per 1000. Item 27 for wrought-iron material per pound. Then follows the form of the proposal naming the surety to be offered and specifying the time within which each line of pipe shall be completed not exceeding a maximum time specified in the form. The forms of Proposals Nos. 2 and 3, when aggregated, are substantially a mere duplicate of Proposal No. 1. The proposal on pages 37 and 43 have the same general characteristics as the others.

The bid of Daniel McNichol, as put in evidence at the hearing, was as follows :

In Proposal No. 1, the blank items of price were duly filled up by the bidder as follows, per unit price :

1.....	\$32.42	10.....	\$34.08	19.....	\$2.14
2.....	32.69	11.....	56.44	20.....	2.50
3.....	32.96	12.....	57.51	21.....	3.40
4.....	33.22	13.....	117.70	22.....	12.00
5.....	33.49	14.....	56.44	23.....	8.50
6.....	34.03	15.....	57.51	24.....	6.00
7.....	34.03	16.....	.86	25.....	60.00
8.....	34.03	17.....	1.09	26.....	33.00
9.....	34.08	18.....	1.49	27.....	.10

The blanks in Proposals Nos. 2 and 3 (which in the aggregate cover the same matters as Proposal No. 1) were not filled up.

The proposal on page 37, which, for brevity's sake, we shall here call Proposal No. 4, although it is not so numbered in the form, was filled by the bidder, as to the blanks for price therein, as follows :

1.....	\$25.00	6.....	\$26.00	11.....	\$48.00
2.....	25.00	7.....	26.00	12.....	103.00
3.....	26.00	8.....	26.00	13.....	48.00
4.....	26.00	9.....	26.00	14.....	48.00
5.....	26.00	10.....	48.00	15.....	38.00

DISTRICT REPORTS.

Ryan et al. v. Ashbridge et al.

The blanks in the proposal on page 43, which, for brevity's sake, we shall here call Proposal No. 5, although it is not so numbered in the form, were not filled up.

The bidder, McNichol, signed the Proposal Nos. 1 and 4, the blanks of which he had filled up, and did not sign Proposals Nos. 2, 3 and 5, the blanks of which he had not filled up.

With the bid he filed, according to the requirements of the notice, a check for \$29,000 to accompany Proposal No. 1. No check was filed for Proposal No. 4, for which he had put in his separate bid. No check was filed for Proposal No. 5, for which he had not put in his separate bid.

Proposal No. 1, besides being signed at the end thereof on page 18, had at the foot of page 15, in a place not designated or intended for the purpose, the following writing by the bidder :

I will furnish and do all the work complete as described under Proposal No. 1 and proposal for the Lower Roxborough filter (page 37), for the sum of six hundred and sixty-nine thousand six hundred and thirty-three (\$669,633) dollars.

DANIEL J. McNICHOL.

On this same page 15 there was pasted a letter written under the printed letter-head of the said McNichol. It is in the words and figures following :

Telephone 3-29-17.

(Surveys.)

DANIEL J. McNICHOL, Contractor,
Rooms Nos. 704-05 Betz Building.

PHILADELPHIA, February 18, 1901.

Hon. WILLIAM C. HADDOCK,
Director of Public Works.

{ Department of Public Works. }
Received Feb. 18, 1901.
Philadelphia. }

Dear sir: My bid of six hundred and sixty-nine thousand six hundred and thirty-three dollars (\$669,633) includes furnishing of all labor and material, including all stop-valves and work at intersections in connection with it, except the stop-boxes, which are to be furnished by a local foundry and bid for separately.

Recapitulation, it includes everything embraced in the specifications and Contract No. 9, except the stop-boxes mentioned above.

Very truly yours,

DANIEL J. McNICHOL.

The bid of Ryan & Kelly, as put in evidence at the hearing, was as follows :

In Proposal No. 1, the blank items of price were duly filled up by the bidder as follows, per unit price :

1.....	\$29.50	10.....	\$31.00	19.....	\$4.00
2.....	31.50	11.....	57.00	20.....	6.00
3.....	30.50	12.....	60.50	21.....	8.25
4.....	31.00	13.....	120.00	22.....	20.00
5.....	30.61	14.....	60.00	23.....	6.50
6.....	30.07	15.....	65.00	24.....	6.50
7.....	30.96	16.....	.85	25.....	45.00
8.....	31.79	17.....	1.50	26.....	40.00
9.....	33.00	18.....	2.00	27.....	.06

The blanks in Proposals Nos. 2 and 3 (which in the aggregate cover the same matters as Proposal No. 1) were filled up so as substantially to produce, when aggregated, the same result as the several items bid under Proposal No. 1.

The proposal on page 37 (herein called Proposal No. 4) was filled by the bidder, as to the price blanks therein, as follows :

1.....	\$27.00	6.....	\$27.00	11.....	\$50.25
2.....	27.00	7.....	27.00	12.....	110.00
3.....	27.00	8.....	27.00	13.....	50.00
4.....	27.00	9.....	27.00	14.....	50.00
5.....	27.00	10.....	50.25	15.....	45.00

10 Dist. R.

DISTRICT REPORTS.

157

Ryan et al. v. Ashbridge et al.

The blanks in the proposal on page 43 (herein called Proposal No. 5) were filled by the bidder, as to price blanks therein, as follows:

1a { \$920—without by-pass. 973—with.	2c { \$485—without. 525—with.	4b { \$180—without. 200—with.
1b { \$920—without. 975—with.	3a { \$370—without. 415—with.	4c { \$155—without. 175—with.
1c { \$870—without. 920—with.	3b { \$375—without. 420—with.	5a 125
2a { \$515—without. 555—with.	3c { \$350—without. 385—with.	5b 180
2b { \$520—without. 560—with.	4a { \$180—without. 200—with.	5c 105
6..... \$65.00	18..... \$110.00	20..... \$15.00
7..... 40.00	14..... 70.00	21..... 14.00
8..... 30.00	15..... 45.00	22..... 12.50
9..... 20.00	16..... 15.00	23..... .09
10..... 12.00	17..... 10.00	24..... 180.00
11..... 285.00	18..... 20.00	25..... 42.00
12..... 160.00	19..... 18.00	26..... .08

The bidder, Ryan & Kelly, duly signed Proposals Nos. 1, 2, 3, 4 and 5. With the bid were filed, according to the requirements of the notice, checks for \$18,000 and for \$11,000 to accompany Proposals No. 2 and 3, which would also satisfy the requirements as to Proposal No. 1; check for \$2000 to accompany Proposal No. 4, and check for \$1000 to accompany Proposal No. 5.

When, on Feb. 11, the bids were received, they were publicly read and scheduled. Before a comparison of the bids could be made, it was necessary to apply to this schedule the estimated quantities of work and materials called for by the specifications.

This proceeding appears to have been delayed for eight days until Feb. 19. During this period, precisely when is not ascertainable from the testimony, though it appears to have been in the first few days thereof, the Director learned that an error had been made in the estimated quantity of earth excavation and rock excavation required for the work. The approximate quantities communicated to bidders as the standard for comparison of bids (page 71 of proposals) was, earth excavation, 74,084 cubic yards; rock excavation, 8758 cubic yards. The revised figures, learned by him after the bids were opened, were, rock excavation, about 31,000 cubic yards. This increased the rock excavation over the estimate by something over 22,000 cubic yards, and decreased the earth excavation by about the same quantity.

The bids for these two kinds of excavation were as follows:

	Rock.	Earth.
McNichol	\$3.40	\$0.86 per cubic yard.
Kelly & Ryan.....	3.25	.85 per cubic yard.

It was, in our judgment, after the Director obtained the revised figures that he took the next step on Feb. 18, 1901. On that day he wrote the following letter:

February 18, 1901.

Mr. DANIEL J. McNICHOL, 704 Betz Building.

Dear sir: Your bid on Proposal No. 1, known in the department as Contract No. 9, was \$44,438.80, and on Proposal No. 4 in the same contract your bid was \$8144.85, a total of \$52,583.45. At the same time you make a bid in a lump sum of \$660,633, being a higher sum than that bid by you in Proposal Nos. 1 and 4 in detail.

What is this extra amount intended to cover? What labor or material do you propose to supply for this additional amount over the sum of your detailed bids?

Yours respectfully,

WILLIAM C. HADDOCK, Director.

To which letter McNichol replied on the same day. His letter is given in full above, but, for comparison, is here reproduced:

DISTRICT REPORTS.

Ryan et al. v. Ashbridge et al.

Telephone 3-29-17.

(Surveys.)

DANIEL J. McNICHOL, Contractor,
Rooms Nos. 704-05 Betz Building.

PHILADELPHIA, February 18, 1901.

Hon. WILLIAM C. HADDOCK,
Director of Public Works.{ Department of Public Works.
Received Feb. 18, 1901.
Philadelphia. }

Dear sir: My bid of six hundred and sixty-nine thousand six hundred and thirty-three dollars (\$669,883) includes furnishing of all labor and material, including all stop-valves and work at intersections in connection with it, except the stop-boxes, which are to be furnished by a local foundry and bid for separately.

Recapitulation, it includes everything embraced in the specifications and Contract No. 9, except the stop-boxes mentioned above.

Very truly yours,

DANIEL J. McNICHOL.

On the next day, Feb. 19, the Director made what is called a re-statement of the two bids. The paper is as follows:

PHILADELPHIA, February 19, 1901.

Re-statement of Ryan & Kelly and Daniel J. McNichol. Bids on Contract No. 9.

Ryan & Kelly:

Bid on Proposal No. 1.....	\$901,050.64
Extra on rock excavation, 21,861 cubic yards, at (3.25—85) \$2.40 per cubic yard.....	51,266.40
Stop-valves (Eddy Valve Co. bid).....	25,316.80
Bid on Proposal No. 4.....	8,782.25
Additional intersections, estimated.....	6,000.00
Total.....	\$992,365.59

Daniel McNichol:

Proposal on Contract No. 9, completed as an entirety, excepting Item No. 6,	
Proposal No. 5.....	669,883.00
Difference of latter bid.....	\$22,732.59

On Feb. 23 the Director awarded the contract to McNichol.

The question argued before us was, whether McNichol, to whom the contract was awarded, was the lowest bidder, but this is obviously dependent on the underlying question, whether he was, on Feb. 11, 1901, at noon, a bidder for the work and materials for which the contract has been awarded to him.

The bids are in writing, and there is not the slightest ambiguity in their terms.

The city wanted to get proposals for Nos. 1 (or alternatively Nos. 2 and 3), 4 and 5. McNichol's bid was distinctly and unmistakably for Nos. 1 and 4 alone, and by the express mention of them, Proposal No. 5 was, of course, excluded.

The language of this bid was not adopted by McNichol from the prescribed form. Had that been the case, there might be room for the argument that he had been misled by another's choice of words. Here, however, he writes his own words, and limits his bid in such apt and precise terms that no doubt can possibly arise.

Under such circumstances, the court cannot refuse to construe the paper. The large discretion allowed to municipal authorities in awarding contracts is confined to the decision of questions of fact relating to their business, but cannot be held to include also questions of law which are always cognizable by courts.

As matter of law, we must hold that McNichol and his sureties could not be bound under his bid to do the work under Proposal No. 5, and this only because the Proposal No. 5 is not to be found in the bid.

That this was the view of the Director himself appears from his letter to McNichol of Feb. 18. Its apparent object was to procure an explanation of the bid. This was in effect an adjudication by the Director that the bid as it stood was inadequate and could not be accepted. But if the inadequacy of the bid is

established, the explanation or amendment is not the same bid, but another bid taken without advertisement or notice from one man alone without an opportunity for others to put in explanations or amendments of their bids. Were this to be adopted as a rule of conduct, the whole system of public bidding would be destroyed. And the mere fact that the object of the officer may be to benefit the municipality does not lessen the mischief.

The Director's letter, however, must be explained by its terms. What he had in his mind is ascertainable only by reading the words, and if these say something contrary to his intent, the fact may be unfortunate, but the force of the words is not decreased or abated. This letter is not a mere request to explain an ambiguity. It is more. It contains, first, a statement that McNichol's bid on Proposal No. 1 was \$644,438.80; second, a statement that his bid on Proposal No. 4 was \$8144.65, the total of the two being \$652,583.45; third, a statement that he had made a bid in a lump sum of \$669,633; fourth, an inquiry "what is this extra amount intended to cover? What labor or material do you propose to supply for this additional amount over the sum of your detailed bids?"

The first and second statements are not accurate. McNichol had made bids per ton, but had not in those bids fixed the quantities which were to be delivered at those prices. Under those bids, the quantity was to be subsequently ascertained according to the needs of the work. The figures used by the Director had not emanated from McNichol. They were elaborately worked out by the Director himself in a comparative table which was in evidence.

That table shows the following facts: The bid of McNichol on Proposal No. 1 was applied to the estimated quantities of work and material required by the city. Each item was separately computed and all of them added up. The sum was \$644,438.80. The same course was pursued with Ryan & Kelly's bid, and the sum was \$601,050.64.

As to Proposal No. 4, the same course was adopted, with the result that McNichol's bid was \$8144.65, and Ryan & Kelly's bid was \$8732.25.

As to Proposal No. 5, the Director found no bid from McNichol and scheduled none; Ryan & Kelly's bid was \$31,742.50. On this proposal No. 5, the lowest bidder was the Eddy Valve Company, whose bid was \$25,316.30.

In aggregating the amount of the proposals, the Director, rightly following the terms of his advertisement (page 71), computed for excavations 74,084 cubic yards of earth and 8758 cubic yards of rock, and it was by this process that the results, both as to McNichol and Kelly & Ryan, were obtained.

Before writing his letter to McNichol, the Director had learned that the estimate of rock excavation had been understated by the considerable sum of 21,361 cubic yards, and that therefore both bids were to be recomputed.

The results of such recomputation would have been as follows:

McNichol's bid on Proposal No. 1.....	\$644,438.80
Extra excavation at the rate of the bid.....	54,256.94
	\$698,695.74
McNichol's bid on Proposal No. 4.....	8,144.65
	\$707,840.39
Kelly & Ryan's bid on Proposal No. 1.....	\$601,050.64
Extra excavation at the rate of the bid.....	51,266.40
	\$652,317.04
Kelly & Ryan's bid on Proposal No. 4.....	8,732.25
	\$661,049.29

DISTRICT REPORTS.

Ryan et al. v. Ashbridge et al.

Kelly & Ryan had also put in a bid on Proposal No. 5 for \$31,742.50, this covering the whole work under Contract No. 9. Had this been added to the recomputed figures, the whole would have amounted to \$692,791.79, and had the Director added to McNichol's Proposals Nos. 1 and 4 the lowest bidder's (Eddy's) Proposal No. 5, McNichol's bid would have stood thus:

Amount as above stated.....	\$707,840.39
Eddy's bid.....	25,316.30
Total.....	\$733,156.69

A difference in favor of Kelly & Ryan's bid of \$40,364.90.

Doubtless, so large a difference might give rise to the idea that there was an error in the bid, but it could not reasonably impel the Director to write the letter of Feb. 18. The first statement in that letter that McNichol's bid on Proposal No. 1 was \$644,438.80 was incorrect. It was, in point of fact, according to the information in the Director's possession, \$698,695.74. The next statement that the total of Nos. 1 and 4 was \$652,583.45 was incorrect. It was, in fact, \$707,840.39. The third statement that he had made a lump bid of \$669,633, and asking "what is this extra amount intended to cover? What labor or material do you propose to supply for this additional amount over the sum of your detailed bids?" was equally incorrect.

The Director knew that the separate proposals provided for rock excavation at a certain rate per cubic yard, without definite ascertainment of the quantity thereof to be finally done. He knew that the lump bid took the risk that the quantity might be larger than the estimate on page 71, and he also knew, prior to the writing of his letter, that it was so much larger that it added more than \$54,000 to McNichol's separate bid. Knowing this, he ignored it, and made a representation, quite incorrect, that in effect he was at a loss to explain the alleged discrepancy in the bids. Whatever may have been the Director's intent in so writing, a contractor reading the letter would, unless he were exceptionally simple-minded, infer that if he would not add the only missing item to his proposal, he had lost in the competition.

A municipal officer, after he has opened and computed the bids, must sedulously avoid saying or doing anything that ordinary ingenuity may interpret as a hint to a bidder that he has lost the contract unless he lowers his bid, whether by abatement of price or addition of new items. If a man of ordinary intelligence will understand his word or act as such a hint, even the absence of intent in the utterer or doer will not make it lawful. Every man is to be held in law as intending the usual and natural consequence of his acts.

After the Director had received McNichol's letter of Feb. 18, the next proceeding was to make a re-statement on Feb. 19 of the bids of Ryan & Kelly and Daniel J. McNichol. This re-statement was followed by his award of the contract to McNichol. Its whole basis is the revised McNichol bid of Feb. 18.

We are of opinion that the contract could only be awarded to bidders of the date of Feb. 11, at noon, as advertised, and that bids subsequently put in had no standing. Entertaining no doubt that the bid which was accepted was not put in till Feb. 18, we consider the award of the contract to McNichol unauthorized and void.

And now, March 14, 1901, the special injunction heretofore granted in this cause is continued till further order.

WILT BANK, J., concurring, March 14, 1901.—The system of competitive bidding as known to the law in all cases of negotiation for contract by publication of proposals and invitation of bids, and as contemplated by the Act of Assembly 10 Dist. R.

Ryan et al. v. Ashbridge et al.

of May 23, 1874, § 6, P. L. 283, involves two essential features, and these are, first, an equality on the part of bidders in respect of every particular of the transaction; the work and materials needed, the extent of the former and the quantity, quality and description of the latter; the time when the contract is to be performed, with the incidents of security for performance, and the like; and, second, the common protection of all from bidding not open to all, by which bidding special terms are made with one, or modifications of bids are permitted after the date fixed beyond which, for the ascertainment of the result of the competition, the bids must be regarded as unalterable: *Mazet v. Pittsburgh*, 137 Pa. 548; *Addis v. Pittsburgh*, 85 Pa. 379. When this is not the description of any case of competitive bidding, the question is not what was the lowest responsible bid under the statute, but it is rather, what was the effect of a public officer accepting a bid as if it had, with all others, been presented upon an open footing of equality by the aid of a common standard, and with due regard to the essential features above described? May the public moneys be lawfully expended in consequence? In a controversy upon such a question we do not find the solution of the difficulty in the admitted exercise of the discretion of a public officer, and the man whom he has declared to be the lowest responsible bidder is not protected by that fact so as to prevent a decree upon the broader ground, whilst all bidders, as well as other citizens and taxpayers, must be heard to maintain that there has been no bidding at all as contemplated by the law which governs us.

The facts which we have found show that there has not been competitive bidding in this case. The equality of competition did not arise. This must be determined by the circumstances of the bidding of the contractor who was successful, because, as to those contractors who failed in their proposals, there would be nothing gained by an investigation of the causes of their failure. We cannot set aside one bid and establish another. The successful contractor is shown by the proofs to have tendered an incomplete bid, and this requires us to find its acceptance irregular; and he is shown, further, to have amended and supplemented his bid after the date when the bids became unalterable, an added irregularity; and finally, he is shown to have procured the award, not upon any bid, but as the result of the letters of Feb. 18, 1901, whereby an incomplete proposal, taken in connection with the letters, made the first definitive bid on his part. The life of this bid depended upon the private correspondence, and hence we are obliged to find that, no matter what the nature of the previous irregularities, and whether curable or not, this last-mentioned irregularity was insuperable.

The incompleteness of the bid lay in the facts that it was not fully itemized as required by the specifications of the department of public works; that, with respect to the proposals for stop-valves, check-valves, it comprised no nomination of security; that it stated no time within which the several parts of the work were to be completed; that it was not accompanied by certified cheques to the extent required; that it was in the nature of a lumping bid, and that it involved an added sentence to the printed form against the stipulation of the department that alterations and additions not called for, conditional bids or irregularities of any kind might be rejected. It was thus irregular and incomplete. This document could not lawfully be amended or supplemented after Feb. 11, 1901, the date of the opening of the proposals by the department: *Campbell v. The City*, 10 W. N. C. 221; and as it stood at that date, it was incapable of such interpretation as could form a contract between the city and the contractor, pursuant to the proposals and specifications advertised by the former for public competition. The amendment or supplement to the bid comprised the statement that the lump sum of \$669,633 covered all the work and

Ryan et al. v. Ashbridge et al.

materials required, excepting only the stop-boxes, which were to be furnished by local manufacturers, and it also contemplated some rock excavation, whatever its extent might prove to be, although at the date of the opening this extent was unknown. The letters of Feb. 18, 1901, formulated this, and that written by the contractor was, thereupon, attached to his bid as a necessary part thereof. Still one particular remained unsettled. The time when the work was to be completed was not mentioned by the contractor at any stage. It appears, as first mentioned by the Director of Public Works, in his written instructions to the city solicitor of Feb. 23, 1901. Thus one of the items of the competitive bidding was never publicly supplied by the bidder, and whilst we do not pronounce this omission to be of serious consequence, we refer to it as, in some degree, showing irregularity and incompleteness.

We have not discussed the case as a contest between bidders for the work, and we do not come to a conclusion in contemplation of any rights some of these may claim to have, or of any injury they may conceive themselves to have sustained; and, for the purpose of vindicating our interlocutory decree, we have deemed it unnecessary to do more than concisely state the ground of our action.

Reed's Estate.

Wills—Construction—Vested and contingent interests—Gifts to classes.

Whether an interest in personality is vested or contingent depends upon whether the words denoting contingency are attached to the gift so as in effect to be a part of it, or relate merely to the time of payment. If the former, the interest is contingent; if the latter, it is vested.

Gifts to classes.

When a testator creates a gift over to his own children as a class, the presumption arises that, as such class is necessarily complete at his death, he meant that all should take at once, subject to certain conditions as to age which might postpone, but could not prevent, the ultimate enjoyment, and the interest of each member of the class is vested. But when the gift is to the children of another than the testator, such presumption does not obtain, and an element of uncertainty is introduced which may render the interest of each member of the class contingent.

Definite and indefinite failure of issue.

A gift over, in default of issue, to the right heirs of the life-tenant creates a definite failure of issue.

Testator gave \$50,000 "in trust to pay to my said sister the fixed annual sum of \$2400 for and during the term of her natural life. . . . At her decease, then in trust to divide the trust-estate in three equal portions, which are to be held in trust respectively for her three children, H. B., L. S. and H. J., and their respective heirs, as follows: In trust to pay them respectively the net income of their several shares for and during their respective lives. At the decease of any child, then in trust to transfer the principal of his or her share to the lawful issue of such deceased child (if more than one, in equal shares), and in default of any such issue, to the right heirs of such deceased child. If either of the said children of my sister die in their mother's lifetime, leaving lawful issue, then, upon their mother's decease, such issue shall represent and take their deceased parent's share (which, in case such parent had survived the mother, would have been set apart in trust). In default of any such issue, then in trust to transfer said third part of such trust fund to the right heirs of such deceased child." *Held*, that the interest of S. B., who was a son of H. B., and who died during the lifetime of his grandmother, was contingent.

Testator also gave \$30,000 in trust "as a special or separate trust for the equal benefit of my nephew, H. J., and my nieces, H. B. and L. S., the income to be paid to them during their natural lives, and at the deaths of each or either of them, the portion or part of the principal shall be paid to their heirs or legal representatives." *Held*, that the bequest was to the heirs who should survive the tenant for life.

Petition for an account. O. C. Phila. Co., April T., 1890, No. 141.

H. J. Hancock, for petitioner.

R. L. Ashhurst and Roger Ashhurst, for respondent.

10 DIST. R.

Reed's Estate.

ASHMAN, J., March 2, 1901.—By the second clause of his will the testator provided as follows: "Whereas, I am the depositary of the sum of \$10,000, the residue of a trust fund placed in my hands under a parol trust for such use, investment or other disposition as I might see fit, the income therefrom to be paid to my sister, Mrs. Maria Louisa Jackson, for and during the term of her life, and at her decease to her children for life, and when they died, the principal to be divided among their children or to their heirs. Now, to make provision for this sum and to carry out the trust and for other purposes, I give and bequeath to the Philadelphia Trust, Safe Deposit and Insurance Company, of the city of Philadelphia, and to their successors, \$50,000 in such securities as I may die possessed of . . . in trust to pay to my said sister, Mrs. Maria Louisa Jackson, the fixed annual sum of \$2400 for and during the term of her natural life. . . . At the decease of my said sister, Maria Louisa Jackson, then in trust to divide the trust-estate in three equal portions, which are to be held in trust respectively for her three children, Helen L. Ballou, Lucy R. Sanderson and Horace Jackson and their respective heirs as follows: in trust to pay them respectively the net income of their several shares for and during their respective lives. At the decease of any child, then in trust to transfer the principal of his or her share to the lawful issue of such deceased child (if more than one in equal shares), and in default of any such issue to the right heirs of such deceased child. If either of the said children of Maria Louisa Jackson die in their mother's lifetime, leaving lawful issue, then, upon their mother's decease, such issue shall represent and take their deceased parent's share (which in case such parent had survived the mother would have been set apart in trust). In default of any such issue, then in trust to transfer said third part of such trust fund to the right heirs of such deceased child."

The ninth clause reads thus: "I give and bequeath to the Philadelphia Trust, Safe Deposit and Insurance Company as a special or separate trust the sum of \$30,000 for the equal benefit of my nephew, Horace Jackson, and my nieces, Helen L. Ballou and Lucy R. Sanderson, the income to be paid to them during their natural lives, and at the deaths of each or either of them, the portion or part of the principal shall be paid to their heirs or legal representatives."

All of the life-tenants, including Maria L. Jackson, the first taker, are still living. Stephen W. Ballou, a child of Helen L. Ballou, died leaving a will, dated Feb. 27, 1897, proved in New York, by which he gave his estate absolutely to his wife, Katharine Ballou, the petitioner.

The petitioner, claiming that her husband, Stephen W. Ballou, took a vested interest in the estate of Charles D. Reed under the will of that testator, asks for an accounting by the trustees thereunder.

Words denoting contingency are perhaps as often used in the creation of vested as of contingent interests; the test of their significance being whether they are attached to the gift so as in effect to be a part of it, or whether they relate simply to the time of its payment. *When, upon, then*, and words of the same genus, in a gift to a person or class at a certain period, if preceded by a limitation of the estate, do not imply a contingency upon which the gift itself turns, but merely the point of time at which it will fall into possession. *Manderson v. Lukens*, 23 Pa. 31; *Womrath v. McCormick*, 51 Pa. 504, and *Crawford v. Ford*, 7 W. N. C. 532, will serve as illustrations. In *Manderson v. Lukens* the gift after the wife's death was to testator's children "which may be then alive or who may have left heirs." In *Womrath v. McCormick*, at the death of the wife, the estate was to be divided into as many parts as the testator should "then have children living, the issue of a deceased child to represent their parents," each surviving child and the issue *per stirpes* of each deceased child to take one share. In *Crawford v. Ford* the gift was to the wife for life until the eldest child

should attain 21, "and upon and after that event, such child to receive a portion of income, and when the youngest should be 21, the whole residue to be divided among all of testator's children then living and the issue of deceased children. In all of these cases the children took a vested interest at the death of the testator. The gift over was to a class, to wit, testator's children, which was complete at his death and could not be increased; and the presumption was that the testator meant that all should take at once, subject to certain conditions as to age, &c., which might postpone but could not prevent the ultimate enjoyment. When, however, the gift is to the children of another than the testator, an element of uncertainty is introduced which may render it contingent. List v. Rodney, 83 Pa. 483, is in point. The operative words were "the devise to my daughter and to her children shall give to her children living at her death and to the lawful issue of any deceased child the real estate." The membership of the class to whom the remainder was given, to wit, the children of the daughter, could never be determined until her death; some of those living at testator's death might die and others be born after his death, and the words to be construed were not words of division, as in *Womrath v. McCormick*, but words annexed to the gift. So in *McBride v. Smyth*, 54 Pa. 245, the gift in remainder, although to testator's children, was not to a definite class embracing all of his children, but only to such of them as should be living at a given period. It was held to be contingent, because the condition of survivorship was essentially descriptive of those who should take and was a condition precedent to their taking. The testator in *Pleasanton's Appeal*, 99 Pa. 362, after the death of his sister and of a niece and her husband, annuitants under his will, and so soon as her youngest child should attain majority, divided his estate among the then surviving children of his niece and the issue of any of her children who might be dead. The interests of the niece's children and issue of deceased children were held to be contingent upon their outliving the event of the death of all of the annuitants, *Sharswood, C. J.*, saying that until the death of the last annuitant it could not be known to whom the estate would fall. In this case, as in *Coggins's Appeal*, 124 Pa. 10, where the gift was to those who should attain the age of twenty-five years, the circumstance that there was no previous gift, as of income, to the parties, tended to show that the vesting was deferred to the time of payment and that the gift was therefore contingent. *Craige's Appeal*, 126 Pa. 223, was similar to *Pleasanton's Appeal*. The estate was given after the death of testator's son and of the son's wife to their children living at their death. The son died in 1878 and his widow in 1888. The son left two children, one surviving the mother and one dying before her. It was held that the gift to the children was contingent, and vested only on the death of both parents, in such children as were then living.

The list of cases which bear upon the interpretation of the present will may be indefinitely extended. It embraces, among others, *Mergenthaler's Appeal*, 15 W. N. C. 441, in which, as in *List v. Rodney*, *supra*, the argument favoring a contingent interest was strengthened by the limitation over in default of issue: *Woelpper's Appeal*, 126 Pa. 562, *Cascaden's Estate*, 153 Pa. 170, and *Steinmetz's Estate*, 194 Pa. 611. If we apply to the present will the principles on which these decisions were rested, the result would seem to be sufficiently obvious. In the trust for the three children of his sister and their heirs, the testator used the word "heirs" as a word of purchase, his manifest intention being that the children should take no more than a life-estate, and that the remainder should go to their issue as a new stock. A definite failure of issue was intended, because in default of issue the estate was given to the right heirs. If a child should die in the mother's lifetime leaving issue, then at the mother's death such issue would take the child's share; if no issue should survive at that time,

10 DIST. R.

Reed's Estate.

the estate would go to the heirs. The condition that the issue of Helen L. Ballou should outlive her mother, Mrs. Jackson, was annexed to the bequest to them, and not to its payment. Mrs. Jackson is still living, and it cannot be determined who, at her death, will answer to the description. Certainly the interest of her grandson, Stephen W. Ballou, was contingent upon his survival of his grandmother, and on his death in her lifetime without issue, his share passed to his right heirs, among whom the widow cannot be included.

What has been said relates to the gift of \$50,000. The bequest in the 9th clause of \$30,000 in trust for the payment of the income for life to the nephew and nieces, and at their several deaths the principal to their heirs or legal representatives was, we think, a gift to the heirs who should survive the tenant for life. If "heirs" was used as a word of limitation, then Helen Ballou takes a present absolute estate and as *nemo est hæres viventis*, the widow of her deceased son can claim nothing. If the word is, on the contrary, a word of purchase, then only those of her children, or the issue of her deceased children who shall survive her, can take, and the deceased son's widow is debarred from taking.

The petition is dismissed.

Powers's Estate.

Decedents' estates — Payment of annual sum — Apportionment — Filing account—Practice, O. C.

Testator gave to C "the yearly sum or annuity of \$800 during her life, and, upon her decease, . . . a like yearly sum or annuity unto her sister during her life." *Held*, the bequest to C was the payment of an annual sum which could be apportioned.

No necessity appearing to warrant the expense of filing an account, the court will dispense therewith, and order that the amount which was to be paid to the beneficiary, which had accrued up to the date of her death, be paid to her executor.

Petition for an order to pay. O. C. Phila. Co., Oct. T., 1882, No. 80.

J. C. Stillwell, for petitioner; *Sharswood Brinton*, for respondent.

FERGUSON, J., March 2, 1901.—The question raised by the petition and answer in this case is whether an annuity is apportionable. This whole question as to what is an annuity in the technical sense, which is not apportionable, and an annual sum to be paid under the directions of a will out of income, which is apportionable, was so fully considered and ably discussed by Judge Penrose in an adjudication filed in Bayard's Estate, 7 District Reps. 279, that we do not think it necessary to discuss the question further, and rest the decision of this case upon that adjudication. We, however, see no necessity of putting this estate to the expense of filing an account at this time as prayed for, but direct that the amount which was to be paid to the beneficiary, which had accrued up to the date of her death, be paid to her executor. Let a decree be prepared accordingly.

• Notes of Treasury Department Decisions.

From February 23 to March 18, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Banks.

Special tax. A bank beginning business during the year ending June 30, 1901, is not required to pay special tax on its capital for this year. Under the new

Notes of Treasury Department Decisions.

law going into effect July 1, 1901, a bank then or thereafter beginning business must pay the special tax reckoned on its capital "at the time of commencing business." No. 293, March 7, 1901. 4 Treasury Decisions, No. 11, page 35.

Billiard and Pool Tables.

Special tax. No. 301, March 18, 1901. 4 Treasury Decisions, No. 12, page 26.

Bucket Shops.

Stamp tax. That part of ruling 21,279 (Treasury Decisions, 1899, vol. 1, page 1164) which holds that, in closing bucket-shop transactions, written memoranda thereof, as agreements to re-sell shares of stock, must be made, and that stamps must be affixed thereto, is revoked. No. 290, March 2, 1901. 4 Treasury Decisions, No. 10, page 24.

Distillers.

Exempting distillers of brandy from figs or cherries from those provisions of law from which distillers of brandy from certain other fruits have been exempted. No. 288, February 23, 1901. 4 Treasury Decisions, No. 9, page 23.

Equalization of Wantage.

No. 296, March 11, 1901. 4 Treasury Decisions, No. 11, page 37.

Instructions Relative to Entry of Daily Receipts and Accounting for Fractions.

No. 289, February 25, 1901. 4 Treasury Decisions, No. 10, page 23.

Instructions Relative to the Special Tax Created by Act of Congress, approved March 2, 1901.

No. 292, March 7, 1901. 4 Treasury Decisions, No. 11, page 33.

Internal Revenue Law—Act of March 2, 1901, Amending the War Revenue Act.

No. 291, March 5, 1901. 4 Treasury Decisions, No. 10, page 25.

Legacy Tax.

Legacies for uses of a religious, literary, charitable or educational character exempt from tax. The Act taxing legacies does not apply to an estate where testator died before June 13, 1898. No. 299, March 15, 1901. 4 Treasury Decisions, No. 12, page 25.

Liquor Dealers in Local Option Districts.

Special tax. No. 302, March 18, 1901. 4 Treasury Decisions, No. 12, page 27.

Medicine Vender's Entertainment.

Special tax. No. 294, March 7, 1901. 4 Treasury Decisions, No. 11, page 36.

Passage Tickets.

Stamp tax. No. 295, March 7, 1901. 4 Treasury Decisions, No. 11, page 37.

Sales of Warehouse Certificates.

Special tax. Where conditional warehouse certificates are sold and fully paid for, the purchaser thereby obtains all rights that he could by purchase of unconditional certificates for whiskey in bond, and the vender is required to pay special tax as a wholesale liquor dealer. No. 300, March 16, 1901. 4 Treasury Decisions, No. 12, page 26.

Special Tax Stamps for Brokers, Class 2.

No. 298, March 15, 1901. 4 Treasury Decisions, No. 12, page 25.

Unlawful Issue of Receipts for Moneys Received in Payment of Special Taxes

No. 297, March 11, 1901. 4 Treasury Decisions, No. 11, page 38.

Com. ex rel. Henry C. McCormick, Attorney-General, v. Anchor Building and Loan Association of York, Penna.

Building associations—Loans—Payments on account—Appropriation of—Credits on loan.

Where the bonds given to secure loans by a building and loan association to its stockholders contain the clause, "And further, . . . the above-named . . . do hereby expressly agree that all money heretofore paid or hereafter to be paid by . . . into the association on the stock I now hold in the same shall be taken and considered as payments on and in liquidation of this bond," there is an express appropriation and application of the payments on the stock at the inception of the contract, and credit should be given to the borrowing stockholders upon the loans made to them for the dues and interest paid on their stock.

Building and loan associations—Closing series—Stockholder transformed into creditor.

A stockholder who, upon the closing of his series, allows the amount ascertained to be due thereon to remain on deposit with the association, under an agreement with its directors by which the association is to pay interest thereon, is thereby transformed into a creditor, and has the status of a creditor upon distribution of its assets upon its subsequent insolvency.

Building associations—President and directors—Becoming creditors of association—Proper care in performance of their duties.

The president and directors of a building and loan association who became endorsers on notes given by the association, the proceeds of which were applied to the proper and authorized uses of the association, and who made payment upon the judgments obtained against them as endorsers, occupy the position of creditors of the association upon its insolvency, notwithstanding the money borrowed was in excess of the amount authorized by law.

Nor does liability ensue because of injudicious or insecure investments made through the secretary and attorney of the association, who were also directors, or the premature closing of a series of stock which precipitated the failure of the association, when the by-laws authorized the employment of counsel, and care was exercised in his selection, and there is no proof that the directors willfully disregarded or paid indifferent attention to the discharge of their duties, but only seemed to lack the capacity to grasp fully the manifold matters and problems involved and necessary to be comprehended in winding up properly the various series and affairs of the institution, and were mistaken as to the attainments of the secretary and attorney.

Building associations—Duties of directors.

To escape personal liability, the duties imposed upon the directors of a building and loan association are strict integrity, attendance at stated periods for the purpose of investing and loaning the money of the association, reasonable skill, time and diligence in the management of the financial affairs of the association, and care in and according to the duties and usages of the business.

Exceptionous to auditor's report. C. P. Dauphin Co., Commonwealth Docket, 1896, No. 178.

N. M. Wanner and Ross & Brenneman, for directors of the association.

C. A. Hawkins and Niles & Neff, for general creditors of the association.

Edward Chapin, for Harry E. Frank, a special creditor of the association.

WEISS, J., Jan. 12, 1901.—The York Trust, Real Estate and Deposit Company became the receiver of the Anchor Building and Loan Association, pursuant to a decree of this court, made Feb. 10, 1896. It filed an account, which was confirmed, and an auditor was appointed to make distribution of the fund in its possession.

Among the claimants are stockholders, to whom the receiver refused credit for dues and interest paid on stock, upon which loans were made to them by the association. Demand for the amount of the loans was made upon the borrowers, accompanied with notice that a refusal to pay the entire loan would be followed by process, whereupon payment was made under protest.

The bond given to secure the loan contains the following clause: "And further the above-named do hereby expressly agree that

Com. ex rel. Attorney-General v. Anchor Building and Loan Association.

all money heretofore paid or hereafter to be paid by into the association on the stock I now hold in the same shall be taken and considered as payments on and in liquidation of this bond." This clause operated as an express appropriation and application of the payments on the stock at the inception of the contract (*York Trust Co. v. Gallatin*, 186 Pa. 159), and the auditor is right in awarding to the borrowing stockholders the sums so paid by them.

Another claimant upon this fund is Harry E. Frank, who was a stockholder in the thirteenth series, and late in December, 1895, was notified by the treasurer of the association that the designated series would be declared matured and closed at the meeting of the directors in January, 1896. There was not sufficient money at hand to pay the amount of this claim, and there was also a desire expressed to avoid resort to the discount of a note in bank. At the meeting of the board of directors on that day, it was arranged that Frank should allow the money to remain for the period of thirty days, and that the association would pay him interest on the sum of \$1050, the ascertained amount of the claim, from that time. Before the expiration of the time at which payment was to be made, the association was adjudged insolvent and a receiver appointed. Whether the earnings actually warranted the maturity and closing of the series or not, Frank, who was a shareholder and not connected with the management, had a right to rely upon the statement of the officers at a meeting of the board of directors, at which a number of them were present, and acting thereon and accepting the proposal, his relation to the association was changed from a shareholder to a creditor. The fact that he knew that the association did not then have the money does not charge him with knowledge that the series may have been prematurely closed. The agreement to pay interest, respecting which there is no dispute, evidences a change of relationship, for, as a shareholder, he was debtor for dues. The determination to mature and close the series and the accompanying ascertainment of the amount due, together with the engagement to pay interest for the use of that amount transforms the shareholder into a creditor, and the right to close the series, as well as the right to borrow money, resides in the managing body of the association. If payment had then been made to Frank, the association could not, subsequently, have recovered the money from him, and the fact that he allowed it to remain for the time being does not affect the character of the transaction, nor deprive him of any rights then and thereby fixed and established. We are in entire accord with the facts and the law found and declared by the auditor in this behalf.

Another claimant upon this fund is Henry W. Heffener, who was president and a director of the association, and who, with other directors, became endorsers on notes given by the association, which were discounted by a bank, and which he and they were obliged to pay in whole or in part. One of the notes was given April 23, 1894, for \$10,000, and another Jan. 7, 1895, for \$5000, upon which and the renewals, the association paid the discounts to Feb. 29, 1896, and April 14, 1896, respectively. The proceeds were received by the treasurer, by whom they were applied, at the instance of the board of directors, to the extinguishment of outstanding liabilities and to borrowing and withdrawing stockholders.

Participation on an equality in the distribution of this fund on the part of Heffener and others, also directors, who made payments upon the judgments obtained against them as endorsers, is resisted by creditors not associated with the managing officers or directors, for the reasons that the moneys borrowed by the association were in excess of the amount authorized by law; that Heffener and others were guilty of negligence in the management of the affairs of the association in making improvident and insecure loans, and in prematuring shares of stock, through which losses were sustained and insolvency ensued. It does not follow that because loans were made beyond the amount authorized by

Com. ex rel. Attorney-General v. Anchor Building and Loan Association.

law, this class of creditors is excluded from participation in this fund. The borrowed money was not deflected to improper or unauthorized uses, and it must be assumed to be, and doubtless is, among and part of the assets in the hands of the accountant. It is a case of one class of creditors denying the right of another class, which borrowed beyond the amount authorized by law, from a share in the fund, which was increased by the excess borrowed, and there is no known rule that, for this reason, excludes the latter class from a share in the proceeds, or postpones that class to the former class in a scheme of distribution.

Nor is the contention tenable that liability ensues because injudicious or insecure investments were made, among others, to Boll, the secretary, and Fisher, the attorney, who were also directors of the association. The by-laws authorize the employment of counsel, whose duty it was to examine titles, make searches, draw instruments relating to investments, and approve "the security of deeds, titles, bonds, judgments, &c." Application for a loan by a stockholder was required to be in writing and submitted to a committee of three directors, who were to make report to the board at its next meeting. The manifest and chief duty of this committee was to investigate the value and desirability of the security proposed to be given for the loans, and those made to Boll and Fisher were subject to a like proceeding and scrutiny. It is true that Heffener and the other claimant directors cannot shield themselves behind the report of the committee; but they had a right to believe that the members of the committee reported their best judgment upon the nature and value of the security offered. These claimants might or may have arrived at the same conclusions as the committee. The latter, doubtless, saw the properties and investigated the kind and nature of the securities. There is no proof that there was willful disregard of, or indifferent attention paid to, the discharge of their duties. Members of a governing body have a presumptive right to rely upon a report made by a committee of the body upon matters relating to values of securities for loans, and are protected when, as in this case, the fault imputable to the members of the committee is an unfortunate result in the exercise of judgment. The presumption is that the other directors informed themselves of the probable accuracy of the values of the securities for loans either from the reports of the committee or their general knowledge of the subject, or both. The report is neither a shield nor a weapon. What the directors did or omitted to do protects or punishes, and the evidence in this case, so far as it relates to inadequate security, does not warrant the infliction of pains by way of postponing the claimants to the creditors not connected with the management of the association.

If any losses were sustained by aught the attorney employed by the association did, or omitted to do, in the line of his duty, no deprivation of any right which the claimant directors otherwise had can be visited upon them. The board of directors had authority to employ counsel and they exercised caution in selecting one who was reputed, and doubtless was, well-versed in the duties intrusted to his care. The employment was of a character with which directors are not familiar, and with the nature of which they are not expected to acquire knowledge or attain proficiency. The board had a right to rely implicitly upon a report made by their attorney, and in acting upon it, merit no exclusion or postponement in this distribution if loss ensued in consequence of any act done in that capacity and in the course of professional duty.

Considerable stress is laid in the charge that the series of stock were closed and declared matured before the earnings warranted a foreclosure, and there is scarcely a doubt that loss ensued and probable insolvency was precipitated, if not caused, by prematuring these series of stock. The directors were bound to a diligent observance and exercise of duty in the management of the affairs of the association, and to bring a reasonably intelligent *quantum* of skill to the

Com. ex rel. Attorney-General v. Anchor Building and Loan Association.

discharge of it. They are not insurers against insolvency, nor must they be expert accountants, nor required to become such. They are not obliged to give the same time and attention to the management of the business as a person may reasonably be supposed to bestow upon his own affairs. They are not chargeable during the course of conducting the business with the possession of that most dangerous of all kinds of knowledge, usually acquired after the fact. They examined the statements submitted to them by the secretary and counsel, who were familiar with matters relating to building associations, which disclosed a sufficient accumulation of funds to warrant the closing of a series in full. They depended upon these officers and confided in their integrity as well as in the correctness of the statements. Apparently, the statements warranted belief in their accuracy. There is nothing to indicate purposed misstatement. The secretary says it *happened* that the series were run out too soon by six months or a year, and, while he is not a disinterested witness, there is nothing to show misrepresentation. It is altogether probable that the most searching scrutiny on the part of these directors would not have disclosed inaccuracies, and they are not chargeable with expert skill, nor answerable for not undertaking the likely impossible task for them of verifying the statements. Nothing by way of dishonesty or fraud is imputed to them. They gave time and loaned money or credit to the association. They had, and doubtless merited, the confidence of the business community. They seemed to have possessed general business fitness, exercised a diligence fairly commensurate with the character and extent of the business, were strictly honest in their dealings with, and not unfaithful in their conduct of, the affairs of the association. Measured by the standard of their duty, we cannot say that they fell short in the observance of it to an extent sufficient to incur liability. Had they known that the concern was insolvent, or had their duties required such constant attention to and supervision over, the somewhat complex accounts and affairs as to invite the reasonable conviction that they could and ought to have acquired knowledge of insolvency, or that the manner of conducting the business would necessarily result in insolvency, a different rule would apply. The directors were paid, but the amount was small and altogether disproportioned in amount to the responsibility now sought to be imposed upon them. We do not see that the duties of Heffener, the president, entailed more insight and investigation into the affairs of the association than those of the other directors, and in respect to the matters under consideration, he acted, being also a member of the board, in the capacity of a director. To hold the directors liable in this case, the hard rule, deterrent in its effects, would have to be applied, that they were bound to know, from an examination and investigation of the varied securities, resources and liabilities, that the association was insolvent. We apprehend, that if a cashier of a bank would report to its board of directors that he had money earned in the drawer to pay a dividend, they would not be required, to escape liability, to verify the statement by an examination of the notes, securities, discounts and books. To go there and see it in the drawer would not prove that it was an earned product, and it is probably not an indignity to the average bank director to say that such an examination by him would not prove a fruitful contribution towards immunity from insolvency. There is no provision in the Acts of Assembly governing building associations, nor in the rules relating to this one, which imposes greater responsibility upon directors than the rule which we have endeavored to formulate as applicable to the case in hand. Strict integrity, attendance at stated periods for the purpose of investing and loaning the money paid by the stockholders to the clerk "for instalments, fines, interest, &c."—who is directed to pay the same to the treasurer—reasonable skill, time and diligence in the management of the financial affairs of the association, and care in, and according to, the

Com. ex rel. Attorney-General v. Anchor Building and Loan Association.

duties imposed, and the usages of, the business, are the requisites to escape liability. That, we think, the testimony shows was fairly bestowed by the claimant directors. What these directors seem to have contributed to the wreck was a lack of capacity to grasp fully the manifold matters and problems involved and necessary to be comprehended to wind up the various series and affairs of the institution properly, added to the confidence mistakenly placed in the attainments of the secretary and attorney.

The inference from all the surroundings is not strained that the shareholders knew the character, reputation and pursuits of those intrusted by them with the management, and while they had a right to expect better results, they cannot convert misfortune, unaccompanied with fraud or gross dereliction of duty, into culpability.

We are of the opinion that the auditor reached correct conclusions, and the exceptions to his report are accordingly overruled, and the report confirmed.

From William M. Hargest, Harrisburg, Pa.

Bolivar Borough v. Coulter.

Boroughs—Act of June 4, 1897.

The Act of June 4, 1897, P. L. 121, confers upon the chief burgess of a borough jurisdiction to hear and determine a case for the violation of any ordinance by which a fine or penalty is imposed.

Certiorari—Proceedings before burgess.

Upon conviction before the chief burgess of a borough, under the Act of June 4, 1897, of a violation of a borough ordinance, the record should state the ordinance violated, show that the defendant had an opportunity of being heard, and that judgment was duly entered. Hence, an entry by the burgess in the official record, "Burgess instructs him what fine & costs is & he refuses to pay it," is not a sufficient record of the entry of a judgment for a fine imposed by ordinance, and the proceedings will be set aside for irregularity, upon a *certiorari*.

Fine — Voluntary payment.

In such case, the voluntary payment of the fine does not oust the jurisdiction of the court on *certiorari*.

Certiorari. C. P. Westmoreland Co., Feb. T., 1900, No. 308.

Spiegel & McGeary, for certiorari; Beacom & Newell, contra.

MCCONNELL, J., Feb. 2, 1901.—The Act of June 4, 1897, P. L. 121, seems to confer on the chief burgess jurisdiction to hear a case for the violation of any ordinance for which a fine or penalty is imposed. This the Act of April 3, 1851, P. L. 320, did not do: *Com. v. Thompson*, 110 Pa. 297. By the 2nd section of the Act of 1897 it is provided, that "all actions, prosecutions, complaints and proceedings for the violation of borough ordinances, and for the collection of fines and penalties imposed thereby, may be commenced by warrant or by summons, at the discretion of the chief burgess or justice of the peace before whom the complaint is made or the proceeding begun, but no warrant shall be issued except upon complaint, on oath or affirmation, specifying the ordinance for the violation of which the same is issued." A complaint seems to have been lodged with the burgess of the borough of Bolivar, charging defendant with a violation of some ordinance (which is not recited in the record as returned), by allowing his cows to run at large on the public streets of said borough. The record does not say whether either a warrant or a summons was issued, but does set out that the defendant below appeared and claimed the animals. The record then proceeds as follows: "Burgess instructs him what fine and costs is, and he refuses to pay it. And now, Aug. 17, personally came D. Coulter, pays fine and costs, which was as follows: Fine, \$2; police costs, \$1; feed for cows, \$1.25; burg. costs, \$1; total am't, \$5.25.

It does not appear that there was any trial, but it does appear that the burgess exacted and received, through the instrumentality of the proceedings before him, a fine and fees such as could be recovered under the provisions of the Act of 1897. It does not appear that he ever pronounced judgment against defendant for that which he received from him. The lodging of the complaint with the burgess could only have been done for the purpose of instituting legal proceedings. It is essential that the proceeding be a judicial one, in order that we may be able to review it by *certiorari*. "It (*certiorari*) lies only to inferior courts and officers exercising judicial functions, and the act to be reversed must be judicial in its nature, and not ministerial or legislative:" 3 Am. & Eng. Ency. of Law, 63. If the proceeding is judicial or designed to be so, we have full authority to review it. "The judges of the Courts of Common Pleas, within their respective counties, shall have power to issue writs of *certiorari* to justices of the peace and other inferior courts not of record, and to cause their proceedings to be brought before them, and right and justice to be done:" Art. v, § 10, Constitution, 1874.

Having determined these two things, viz., that the proceeding was designed to be judicial, and that we have power to review it, there can be but little difficulty in determining that the record is fatally defective, if the payment of the fine does not have the effect of placing the proceedings beyond the reach of a writ of *certiorari*. "Where a defendant convicted before a magistrate and sentenced has voluntarily paid the fine and costs, the Court of Common Pleas has no power on *certiorari*, subsequently, to reverse the judgment and order restitution:" Com. v. Gipner, 118 Pa. 379. In the case above cited, however, there was a good record, and here there is not. There is nothing here shown but the complaint and the execution of a judgment that was never pronounced. There could be no fine collected legally, in a case of this kind, without the legal liability for it having been previously judicially ascertained by trial or confession, and it does not appear that this was done. It did so appear in the case cited, and it also appeared that it was voluntarily paid after such judicial ascertainment and sentence. We think the case cited does not rule this one. "The purpose of the writ (*certiorari*) is to have the entire record of the inferior tribunal brought before the Superior Court to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law:" 3 Am. & Eng. Ency. of Law, 61. It is the review of the proceedings, not simply of a judgment pronounced. "There may be a reversal, although no formal judgment was entered:" Ferriday v. Reinbold, 8 District Reps. 637. It cannot be claimed, therefore, that because no judgment was pronounced that the proceeding cannot be reviewed. The material thing is that the proceeding was designed to be judicial, and the burgess has failed to proceed according to the essential requirements of the law. If there was no judgment pronounced, there ought to have been one, in order that the essential requirements of the law be complied with. No ordinance is set out in the record. "Upon conviction before a justice of a violation of a borough ordinance, the record should state the ordinance violated, show that the defendant had an opportunity of being heard, and that judgment was duly entered:" Com. v. Lynch, 6 Pa. C. C. Reps. 536; Stroudsburg Borough v. Brown, 11 Pa. C. C. Reps. 272. We do not know the nature of the ordinance, and cannot tell whether the fine exacted was warranted by it or not. For the burgess simply to set out in his record, "Burgess instructs him what fine & costs is & he refuses to pay it," is not a sufficient record of the entry of a judgment for a fine imposed by any ordinance.

The second, third and fifth assignments of error are sustained. The proceedings before the burgess are reversed.

From J. A. C. Ruffner, Greensburg, Pa.

Bergdoll v. The Bergdoll Brewing Company et al.

Corporations—Directors—Fiduciary relations.

In the absence of authority conferred either by the by-laws or by an Act of Assembly, a majority of the board of directors of a corporation cannot create salaried offices other than those existing under the charter and by-laws, and elect themselves to such offices by a vote of the board, and a court of equity, upon a bill filed by a minority of the board, will declare such resolutions null and void.

Act of May 14, 1891—Construction.

The Act of May 14, 1891, P. L. 61, amending the 5th section of the General Corporation Act of April 29, 1874, P. L. 78, and allowing officers receiving salaries to be directors and to receive compensation, permits an officer of a corporation to serve on the board of directors and receive at the same time such compensation for his services as such officer as the board may direct, but does not allow members of the board of directors to create salaried offices other than those existing under the charter and by-laws and elect themselves to such offices.

Act of March 31, 1868—Construction—Constitutionality.

The Act of March 31, 1868, P. L. 50, entitled "An Act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks and other securities, and fixing the time for holding elections for directors," and providing "that it shall and may be lawful for any and all companies . . . and also for the directors . . . thereof, with the approval of the stockholders, to invest . . . and to reinvest . . . and to prescribe . . . the mode of making such investments . . . with the approval of the stockholders, and the amount or amounts thereof to be purchased, . . . and to make such compensation as the said directors, managers or trustees may deem proper, to any director, manager, trustee, treasurer or other agent or officer of such company, for the keeping, receiving, paying, investing or reinvesting of any of the moneys belonging to the said company, or for any other services performed by him or them as agents of the company or otherwise," only permits compensation to a director as treasurer for services rendered in the exercise of the new powers conferred by the Act, and, in so far as it attempts to give the directors authority to vote themselves salaries for services performed as agents of the corporation, or otherwise, is unconstitutional, since such subject nowhere appears in its title.

By-laws—Construction.

Under a by-law which provides that "No director, as such, shall receive any salary for his services, but this is not to be construed to preclude any director from holding any other office in the company and receiving compensation therefor or performing any special services for which compensation may be allowed, provided that no director shall be chosen to any office, for which compensation is allowed or such compensation be fixed, except by a majority of the whole number of directors," a resolution creating certain salaried offices, other than those existing under the charter and by-laws, and electing members of the board thereto, is invalid, unless passed by a majority of the whole number of directors, without counting the votes of those members of the board who were elected to the offices under the resolution.

Hence, where the board of directors of a corporation consisted of seven members, and at a meeting attended by six of the board resolutions were passed by a vote of four to two, creating six salaried offices other than those existing under the charter and by-laws, and electing five members of the board to five of said offices and a stockholder who was not a member of the board to the sixth office, against the protest of the two directors who represented the minority stockholders and voted against the resolutions, *held*, that as the votes of the directors who had a pecuniary interest in the passage of the resolutions were necessary to make a majority of the board, the resolutions creating the five additional offices to which members of the board were elected, and electing members of the board to such offices, were invalid, and a court of equity, on bill filed by those directors who represented the minority stockholders and had voted against the passage of the resolutions, would declare them null and void; but the resolutions creating the sixth office and electing a stockholder not a member of the board to such office was valid, although the stockholder so elected had voted his shares of stock in support of the majority of the board at the last election, and his election to such office was part of a general scheme for "harmonizing all interests" by giving everybody a salary.

Findings by trial judge. C. P. No. 1, Phila. Co., Dec. T., 1900, No. 175, in Equity.

George S. Graham and Samuel Dickson, for complainant.

Ira J. Williams, F. L. Breitingner, R. O. Moon, and Alex. Simpson, Jr., for respondents.

Bergdoll v. The Bergdoll Brewing Company et al.

BETTLER, J., Feb. 28, 1901 (after a careful analysis of the bill and answer omitted from report).—While a careful reading of the foregoing analysis of the bill and answer will show the issues as made up, and the facts as they, in the main, exist, yet a statement of the facts, as admitted in the pleadings or found by me from the testimony, in narrative form, will aid in determining the questions presented.

Louis Bergdoll built up an extensive brewing business. He formed a corporation under Pennsylvania laws, and put the business into this corporation. The authorized capital stock was, and is, 6000 shares of the par value of \$100 each. He died, and the stock is now held by his widow, the complainant, and others. The stock is thus distributed :

The complainant, Emma C. Bergdoll, holds in her own right.....	230 shares.
W. Frederick Snyder, Charles A. Woerwag and Charles F. Schoening, as executors and trustees under the will of Louis Bergdoll, the founder of the business, hold.....	1933 shares.
These 1933 shares are held :	
For Louis Alter.....	1288
Elizabeth F. Rieger.....	215
Catharine W. Sauers.....	215
Louisa Schoening, a minor.....	215
Charles F. Schoening holds.....	45 shares.
Catharine W. Sauers holds.....	215 shares.
Elizabeth F. Rieger holds.....	215 shares.
Her husband, George Rieger, holds.....	5 shares.
Louisa Alter holds.....	50 shares.
Her husband, John Joseph Alter, holds.....	50 shares.
Charles Barth, guardian of the minor children of Louisa Bergdoll, junior, holds.....	1103 shares.
Louisa Alter and Otto Wolff, trustees under the will of Elizabeth Bergdoll, deceased, hold.....	1934 shares.
These are held in trust—one-half for the children of Louis Bergdoll, and one-half for Elizabeth F. Rieger, Catharine Sauers and Louisa Schoening.	
George S. Graham holds.....	5 shares.
Miss Louise Schoening holds.....	215 shares.

6000

On Nov. 1, 1900, the annual meeting of the stockholders was held, and a board of directors, composed of seven, was elected. These directors are Emma C. Bergdoll, the complainant (who owns 230 shares of stock), Charles Barth (who individually owns no stock, but as guardian of the minor children of Louis Bergdoll, Jr., owns 1103 shares), W. Frederick Snyder (who individually owns no stock), Charles A. Woerwag (who individually owns no stock). Messrs. Snyder and Woerwag, along with Charles F. Schoening, are the executors and trustees under the will of Louis Bergdoll, Sr., and as such hold 1933 shares; George Rieger (who holds 5 shares; his wife holds 215 shares); Harry P. Sauers (who owns no stock), and John Joseph Alter (who owns 50 shares).

At the time these directors were elected, the corporation was in being and had been managed by a president, a treasurer and a secretary and other employees. To these officers liberal salaries were being paid. No director, as such, was receiving any compensation.

On Nov. 6, five days after the election, one of the counsel chosen by the board to represent the corporation, gave an opinion to Mr. Woerwag upon the 10 Dist. R.

Bergdoll v. The Bergdoll Brewing Company et al.

question of the directors rendering services to the company and charging compensation therefor.

Counsel, from his knowledge of the company's affairs and a study of the reports, states that he is convinced that the board "cannot properly conduct and develop the large and complicated interests of that business without the creation of certain new offices, and the performance of many delicate and responsible duties that must necessarily appertain thereto."

He advised that an office of "superintendent of loans" be created, "who, together with an assistant," should pass upon loans; that the real estate and securities should be placed under a department subject to the "control and direction of some person or persons especially appointed for that purpose;" that "some person or persons thoroughly qualified for such work" should be employed by the board to manage the financial department; and, also, that "some person or persons, whose time and business capacity can be devoted to this," be employed by the board to superintend the purchase of supplies. He concludes: "It seemed to me, therefore, absolutely necessary that certain new offices should be created, for which proper compensation should be paid, and I am also decidedly of opinion that there is no reason why the members composing the present board of directors should not perform these extraordinary duties and receive the proper compensation therefor."

The next day the directors met. There were six of the seven present. Mr. Alter was the absentee. This resolution was presented:

"Resolved, that the company do appoint as additional employees, two agents, who shall have general supervision and care (*exclusive of collecting rents*) of all the real estate of the company, who shall make monthly returns to the board of directors, and whose compensation shall be fixed at \$2000 each per year, payable quarterly."

"Resolved, that the special services of Mr. George Rieger and Harry P. Sauers be engaged for those purposes."

Upon the vote being taken, Harry P. Sauers and George Rieger, the directors named in the resolution, together with W. Frederick Snyder and Charles A. Woerwag, voted for the resolution, and Charles Barth and Emma C. Bergdoll voted against it.

Then the following resolution was presented:

"Resolved, that auditors of the accounts, loans, investments and scrip be appointed by the company, who shall audit all the accounts of the company, and shall have general supervision and care of all the loans and investments, which have been or will be made by the company, and the financing of the funds of the company for the retiring of the outstanding scrip; they shall make monthly reports to the board, and, as compensation for their special services, each shall receive \$2000 per year, payable quarterly."

"Resolved, that Mr. John Joseph Alter, W. Frederick Snyder and Charles A. Woerwag be appointed as such auditors."

John Joseph Alter was not present. W. Frederick Snyder and Charles A. Woerwag, named in the resolution, and Harry P. Sauers and George Rieger, named in the previous resolution, voted in the affirmative, and Mrs. Bergdoll and Mr. Barth in the negative.

Thus, at this meeting, by a vote of four to two in each case, the four directors voted themselves and their absent co-director \$10,000 per annum. Two of them were to "have general supervision and care (*exclusive of collecting rents*) of all the real estate of the company." The other three were to act as "auditors of the accounts, loans, investments and scrip of the company," and to "audit all the accounts of the company, and have general supervision and care of all the loans and investments which have been or will be made by the company, and

the financing of the funds of the company for the retiring of the outstanding scrip."

At the same meeting, a resolution was adopted: "Resolved, that Charles F. Schoening be appointed general manager of the company at a salary of \$5000 per annum." For this, Messrs. Rieger, Sauers, Snyder and Woerwag voted, and Mrs. Bergdoll and Mr. Barth voted against it. Mr. Schoening, as before stated, owns in his own right 45 shares of stock, and he and Messrs. Snyder and Woerwag are, as executors and trustees under the will of Louis Bergdoll, Sr., deceased, the holders of 1933 shares. The board of directors had elected Charles Barth president of the company.

At this same meeting, by a vote of four to two (Barth and Bergdoll voting in the negative), the board passed a resolution, "that hereafter the exclusive jurisdiction over all employees be vested in the board, and that no employee shall be discharged, employed, or his salary increased or diminished, without the sanction of the board of directors."

The president's salary is \$7500; the secretary's salary is \$2500; the treasurer's salary is \$2500.

Previous to the election, counsel then representing some of the stockholders, but now (in conjunction with the counsel referred to as giving the opinion to Mr. Woerwag) representing the corporation, formed a coalition among the large stockholders (excluding Mrs. Bergdoll and Mr. Barth). These latter had enough shares to secure their election by voting them cumulatively. The rest of the shares were voted principally for Messrs. Rieger, Sauers, Snyder, Woerwag and Alter. The answer sets out that these gentlemen represent 3698 shares of stock, or have that number in sympathy with them and supporting them. Mrs. Bergdoll, the complainant, had been previously the president. Her salary had been \$15,000.

The company employs, since the present board was elected, two lawyers as general counsel, at an annual salary of \$3500 each. It formerly employed, and still employs, a lawyer to look after "loans." These latter are loans to saloonkeepers, repaid, as a general thing, by a charge made to the saloonkeeper of one dollar extra upon each barrel of beer he buys. They are made to "push" business, and necessarily not upon such security as a trustee would require. There was submitted to one of the witnesses a list of these loans, but the list was not put in evidence.

The sections of the by-laws with which we have specially to do are sections 3, 4, 5 and 16, set out in full, *ante*.

The corporation was chartered under the Act of Assembly of April 29, 1874, and the supplements thereto.

The first question for our consideration is whether the action of the directors hereinbefore referred to, of voting to themselves salaries for the performance of the duties referred to in the resolutions, is permissible under Pennsylvania statutes.

A director is defined by the Century Dictionary to be "one who directs; one who guides, superintends, governs or manages." The American and English Encyclopædia of Law defines directors to be "its chosen representatives, in whom the active management and direction of its affairs are ordinarily vested."

Section 5 of the Act of April 29, 1874, P. L. 73, under which this company was incorporated, was amended by the Act of May 14, 1891, P. L. 61.

The amendment provides: "The by-laws of every corporation created under the provisions of this statute, or accepting the same, shall be deemed and taken to be its law, subordinate to this statute, the charter of the same, the constitution and laws of this Commonwealth and the constitution of the United States. They shall be made by the stockholders or members of the corporation at a

Bergdoll v. The Bergdoll Brewing Company et al.

general meeting called for that purpose, unless the charter prescribes another body or a different mode. They shall prescribe the time and place of meeting of the corporation, the powers and duties of its officials, and such other matters as may be pertinent and necessary for the business to be transacted. . . .

"Officers and their duties.

"The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents and factors as the corporation authorizes for that purpose, and nothing in any law contained, shall prevent or be construed to prohibit the vice-president, treasurer, solicitor or other officer of any corporation organized or existing under this Act, from being a director of such company, and receiving at the same time such compensation for his services as such officer as the board of directors of such company may direct."

The title of this Act tells just what its object was; to allow "certain officers receiving salaries to be directors and receive compensations." The new words inserted in 1891 in the Act of 1874 are, "and nothing in any law contained shall prevent or be construed to prohibit the vice-president, treasurer, solicitor or other officer of any corporation organized or existing under this Act, from being a director of such company, and receiving at the same time such compensation for his services as such officer as the board of directors of such company may direct."

Applying this to the corporation under consideration, it would permit the stockholders to elect as directors the secretary or treasurer, and his salary as such officer would go on, though he was a director. The Act is one to enlarge the powers of stockholders. If the Act of 1868, hereafter referred to, was effective to give directors the authority to pay themselves for services of any kind rendered to the corporation, this Act, or rather amendment, was unnecessary. It seems to indicate that in 1891 the Act of 1868 was not regarded as covering the case of an officer receiving salary as such.

The amendment does not say that directors may elect themselves officers. It does say that stockholders may elect officers to be directors. It has no application to the questions involved in this case.

The Act of March 31, 1868, P. L. 50, is entitled "An Act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks and other securities, and fixing the time for holding elections for directors."

The Act is very loosely drawn, and, so far as I can discover, has never been passed on by the courts. It is somewhat significant that it has never been cited or relied on in the several cases to which reference will be hereafter made. Its language is certainly comprehensive. The grant of power is, however, to do certain things, all related to dealing in stocks or securities.

The Act, stripped of surplusage, reads:

"That it shall and may be lawful for any and all companies . . . and also for the directors . . . thereof, with the approval of the stockholders, to invest . . . and to reinvest . . . and to prescribe . . . the mode of making such investments . . . with the approval of the stockholders, and the amount or amounts thereof to be purchased, . . . and to make such compensation as the said directors, managers or trustees may deem proper, to any director, manager, trustee, treasurer or other agent or officer of such company, for the keeping, receiving, paying, investing or reinvesting of any of the moneys belonging to the said company, or for any other services performed by him or them as agents of the company or otherwise."

It seems plain that what the Act intended was to permit compensation to a

Bergdoll v. The Bergdoll Brewing Company et al.

director or treasurer for services rendered in the exercise of the new powers conferred by the Act, and while the language is general enough to embrace more, the legislative intent must be taken from the entire Act. The Act being thus construed, the authority given to the directors may perhaps be sustained as germane to the object of the bill, and therefore fairly embraced in the title. To attempt to carry the authority further would lead us to the conclusion that so much of the Act is unconstitutional. There is nowhere in the title anything to give notice that the object of the bill was to give directors of corporations authority to vote themselves salaries "for any services performed by him or them as agents of the company or otherwise." So much, therefore, of the Act is clearly unconstitutional, and it is very doubtful whether the entire section giving compensation to the directors for any service is not equally unconstitutional: *Ridge Ave. Pass. Ry. Co. v. Philadelphia*, 124 Pa. 219; 142 Pa. 484; *La Plume Boro. v. Gardner*, 148 Pa. 192; *Com. ex rel. v. Samuels*, 163 Pa. 286.

Neither this Act nor the Act of 1891, then, gave authority to the directors of the brewing company to vote themselves salaries as real estate agents or as auditors of accounts.

The by-laws of the company, says the Act of 1891, "shall be deemed and taken to be its law." If, then, they permit what was done, the Acts must be sustained. The by-laws provide:

"Section 4. No director, as such, shall receive any salary for his services, but this is not to be construed to preclude any director from holding any other office in the company and receiving compensation therefor or performing any special services for which compensation may be allowed, provided that no director shall be chosen to any office, for which compensation is allowed or such compensation be fixed, except by a majority of the whole number of directors."

"No director, as such, shall receive any compensation for his services." This is the plain language of the by-laws. They can be amended at any annual meeting or special meeting by a two-thirds vote of the stockholders. Two-thirds of 6000 is 4000. The directors say that "the owners, absolute and beneficial, of 3696 shares of the stock of the said company, sanction, approve and ratify" their action. It is manifest, then, that they cannot command the necessary two-thirds to amend the by-laws to permit the directors to vote themselves salaries.

This qualification is, however, attached: "But this is not to be construed to preclude any director from holding any other office in the company and receiving compensation therefor or performing any special services, for which compensation may be allowed, provided that no director shall be chosen to any office, for which compensation is allowed or such compensation be fixed, except by a majority of the whole number of directors."

It seems clear, then, that the by-law does permit a director to hold any other office in the company and receive compensation therefor, or to perform special service and be allowed pay therefor.

But what is meant by "any other office in the company?" The officers of the company are president, treasurer and secretary (section 3). Employees there are in addition, but these are the officers. Their duties are defined by sections 16, 17 and 18. The board selected one of its number president. It could have taken the secretary and treasurer from its membership. But nowhere in the by-laws is there anything to create the office of "agents of real estate" and "auditors of accounts," and put five of the seven directors in these offices. Section 4 does not mean this. But if it does mean that the directors may create as many offices as they please, and that the directors may hold these offices, does not the proviso, "no director shall be chosen to any office for which compensation is allowed or such compensation be fixed, except by a

Bergdoll v. The Bergdoll Brewing Company et al.

majority of the whole number of directors," make the action of the directors in this case of no effect? There were six present at the meeting, out of seven. Two voted against all the resolutions challenged. When the offices for Messrs. Rieger and Sauers, and their salaries, were passed on, Messrs. Snyder and Woerweg voted for, and Mrs. Bergdoll and Mr. Barth against, the resolution. It then fell, unless Messrs. Rieger and Sauers had a right to vote themselves salaries. If they had a right to vote, then "a majority of the whole number of directors" favored it.

Upon this point, the voluminous briefs presented by counsel cite many cases. The complainant relies upon *Kelsey v. Sargent*, 40 Hun (N. Y.), 150, wherein the court said: "There are other authorities which appear to assume that the board of directors have the right to vote salaries, but in none to which our attention has been called does it appear that the question of their power so to do was raised or discussed. Without stopping to determine the question as to whether or not the board of directors have the power, by resolution, to vote salaries to one or more of their own body, we are clearly of the opinion that such salaries so voted are not binding on the company, when the director in whose favor the salary is voted is present, participating in the proceeding. In the case under consideration the five directors were present. The motion was carried unanimously. The inference to be drawn from the proceeding is that they all participated. We are consequently of the opinion that, under the circumstances of this case, the salaries voted ought not to be upheld." *McNab v. McNab & Harlin Manuf. Co.*, 62 Hun (N. Y.), 18, reaffirmed *Kelsey v. Sargent*.

The principle seems to have grown into text-book law. 2 Cook on Corporations, § 657, says: "The voting of a salary or compensation must be entirely free from fraud, actual or constructive. The vote is illegal if it is carried only in including the vote of the director who received the salary or pay."

This is so entirely in accord with the most fundamental rules of fairness and honesty that it would seem that it must be the law. The defendants, however, say that it is not the law of Pennsylvania, and contend that, under our authorities, "a transaction between a director and his company (even though he votes therefor and his vote is necessary) is not void. The question here, however, it should be remarked in passing, is whether, when the question of compensating Messrs. Rieger and Sauers for two offices created in the resolution fixing the salary was up for consideration, a majority voted for the resolution when Rieger and Sauers had to be counted as voting to make the majority.

The defendants cite many cases. Among them is *Mueller v. Fire Clay Co.*, 183 Pa. 450. The inapplicability of that case to the principles here involved is apparent from a study of its facts. (See, also, *Paper Co. v. Paper Box Co.*, 7 District Reps. 481.) A most careful study of the other cases cited does not show that the law of Pennsylvania has yet given its approval to such action as these defendants took. No case says that where compensation can only be given to a director by a majority vote of the board, his vote can be counted to make the majority.

The sound, the honest rule, the rule that commends itself at once to our approval, is that laid down by Judge Porter in *Loan Association v. Stonemetz*, 29 Pa. 534: "Thus stands the law. We have no fear of practical inconvenience from it. If the services of the director become important to the corporation, let him resign and enter its employment like any other man. If it be proper that directors generally should receive compensation, let it be so provided in the organic act which creates the body. Those who commit their money to its care will then do it with their eyes open. Until this be provided, there is no reason in law or morals for allowing their property to be taken without their knowledge or consent."

Bergdoll v. The Bergdoll Brewing Company et al.

This view of the case dispenses also with any extended consideration of the other contention by the defendants that the resolutions provided for "special services." It seems odd that never, in previous years, has the necessity for these special services been apparent. The real estate committed to Messrs. Rieger and Sauers consists of the brewery (which makes up three-fourths of the whole valuation) and numerous properties in the immediate vicinity, and a few other properties. Four thousand dollars for the supervision and care of the Chester lots, \$2500; Richmond, Va., lots, \$1000; Atlantic City lots and buildings, \$6600; Sea Isle City lots and buildings, \$19,500, and Yeadon property, \$3364.04, a total value of \$32,964.04, seems like a very large sum to pay. It is, in fact, over twelve per cent. per annum.

The other properties embraced in the schedule of real estate hereinbefore given are in charge of real estate agents. The net rentals all the properties produce are less than \$8000.

The necessity for an auditor or auditors of accounts, loans, &c., is a little more apparent. If the trial judge may inject herein some knowledge gained by him by service in the License Court during the past year, he will say that he has no doubt whatever that the question of loans to saloonkeepers cannot be settled at Mr. Woerwag's office, or at Mr. Snyder's bank, nor by any of the rules upon which banking houses or trust companies make loans. A man desires to buy out a licensed saloon, the keeper of which owes the brewing company. Shall it accept the new man in lieu of the old debtor? Shall it advance him still larger sums to enable him to pay off the whiskey man and the cigar man? The determination of this question is an eminently practical one. It involves in great measure the character of the new man. If he is honest, if he has been successful, if he is likely to please the customers, a large loan to him, entirely unsecured, may be safer than the old loan to the licensee who wants to sell out. That this business is risky is apparent. That the profits warrant some risk is fairly to be deduced from the fact that the assets of a \$600,000 concern are appraised at more than four times that amount, and the shares are appraised by the State for the purposes of taxation, without demur, at \$300, the par being \$100.

But, aside from these considerations, a majority of the board of directors never voted to give Messrs. Alter, Woerwag and Snyder salary for extra services as auditors, or Messrs. Rieger and Sauers salary for extra services as superintendents of real estate.

The defendants contend that this court ought not to entertain this bill, because the plaintiff should first seek relief within the corporation.

If the cases cited so hold, then this plaintiff is powerless, and she and her children must see \$10,000 per year paid out to directors, who have no authority to take the money simply because they represent enough stock to make more than a majority. The trial judge does not read any of the cases cited that way. They do not decide that a useless thing must be done.

She has done all she can do when, as a director, she voted against the resolutions. She cannot command the votes to put out the offending directors, and appeal to the officers, except to the president, would not avail. The treasurer is the brother of one of the directors, the secretary the brother of another.

The case, as it presents itself to the trial judge, is one to be passed on by a court of equity. In these days, when corporations are growing in numbers and strength and power to an extent that is compelling the serious thought and exciting the apprehension of our best and ablest public men, the need of sharply defining the powers of directors is apparent and pressing. Stockholders have too few rights. Directors are too prone to consider that they may do with the corporation as they please. When they step over the law, and for their own pecuniary benefit, they should be promptly checked.

Bergdoll v. The Bergdoll Brewing Company et al.

The trial judge is convinced that the resolutions giving salaries to five directors should be declared null and void.

The bill also prays that the resolutions giving Mr. Schoening a salary as general manager, and putting into the hands of the directors the employment and discharge of all employees and the fixing of their salaries, be declared null and void.

While the trial judge believes that Mr. Schoening was made general manager in order that a plan to give everybody a salary (called "harmonizing all interests") might be carried out, yet he believes that the board has the right to employ a general manager. Mr. Schoening appears, by the testimony, to be familiar with the brewing business, to have been connected with Mr. Bergdoll in his lifetime, and to have been at one time president. This resolution was passed by a vote of four to two, and there is not anything to show that it was not proper. The mere fact that Mr. Schoening voted the shares of which he, with Messrs. Snyder and Woerwag, was trustee for the directors, who made him general manager, does not amount to either actual or legal fraud.

The other resolution may or may not be within the power of the board of directors to pass. The power given may never be exercised, or it may, if exercised, be exercised entirely in accordance with the president's views. If the president discharges a drunken or dishonest driver, and the board refuses to sanction the discharge, the president can refuse to draw a check to pay the driver, and the question would then be raised; but until it is raised as a practical question, the court need not pass on it.

The prayers of the bill to have these two resolutions declared null and void are refused.

The defendants have presented numerous requests for findings of fact and law. I have stated my findings and conclusions upon the points in the case in my own language, and, hence, do not rule *seriatim* upon these. They are, however, attached hereto. The prothonotary will give ten days' notice of the filing hereof to the counsel for the respective parties, and if, at the expiration thereof, no exceptions have been filed, he will mark the same confirmed absolutely, whereupon counsel for the complainant may present a decree in accordance herewith for signature by the trial judge.

The Pennsylvania Co. for Insur. on Lives, &c., v. The Philadelphia Contributionship for Insur. of Houses, &c.

Fire policy—Construction—Building regulations.

In computing the loss sustained by the insured and chargeable to the insurer under a fire policy, the cost of rebuilding, up to the amount designated in the policy, is to be included, although increased beyond the original cost of construction by reason of an Act of Assembly regulating the construction of buildings passed before the fire but after the policy was issued, where the improved construction of the building caused by the legislation does not increase its market value.

Case stated. C. P. No. 4, Phila. Co., Sept. T., 1900, No. 270.

John G. Johnson, for plaintiff; *W. W. Montgomery*, for defendant.

WILLSON, J., March 21, 1901.—On Oct. 14, 1851, the defendant company issued a policy of insurance against fire to William Wurts, in the amount of \$5000, on a brick store and counting-house, situated on the north side of Market street, between Fourth and Fifth streets, as per a survey of the same, which was attached to the policy, signed and agreed to by the assured. In the survey, the walls were described as eighteen, fourteen and nine-inch walls. By subsequent transfers, approved by the defendant company, the ownership of the said policy

The Penna. Co. for Ins. on Lives, &c., v. The Philadelphia Contributionship, &c.

of insurance became vested in the plaintiff's testatrix, who was, at the time of her death, the owner of the property referred to. She also held another policy of insurance upon the same property for \$10,000, issued by the Franklin Fire Insurance Company, and the defendant company endorsed upon the policy now in suit that such insurance was allowed, the loss, if any, in case of fire to be borne proportionately. Subsequent to the issuing of the policy by the defendant company, various other privileges were given to the assured upon additional deposits being made, but for the purposes of this case it is not necessary to refer to such matters in detail. On Nov. 29, 1899, a portion of the building covered by the insurance was destroyed by fire. It was then found that, in consequence of an Act of Assembly regulating the construction, maintenance and inspection of buildings in cities of the first class, which was approved May 5, 1899, P. L. 193, it was not possible to reconstruct the part of the building which was destroyed in the same manner in which it existed before the fire. Under the provisions of the Act, the municipal authorities in charge of such matters required that the wall should be constructed of a thickness greater than that which was stated in the survey referred to. This necessitated either the tearing down and the rebuilding of those walls, or strengthening them by means of a steel construction. This latter plan was, in point of fact, adopted, because of a smaller expense being thus made possible. If the building could have been reconstructed after the fire, without the demolition of the walls in order to comply with the requirements of the law, the cost of the construction would have been \$6650, but the actual cost of rebuilding in the method prescribed was \$11,330.36. In point of fact, the market value of the building, after its reconstruction according to these requirements, was no greater than it would have been, if it had been rebuilt according to its original plan as described in the survey.

The foregoing resume of the case is, in substance, that which is agreed to by the parties in their agreement for the case stated. The controversy between the parties arises upon these recited facts. The plaintiff demanded from the defendant one-third, or its proportionate share, of the cost of rebuilding the premises according to the requirements of the law, namely, \$3776.79. The defendant declined to pay that sum, but offered to pay \$2216.67, which is admitted to be its one-third or proportionate share of what would have been the cost of rebuilding according to the description contained in the survey. Indeed, this sum has been paid by the defendant company to the plaintiff, so that the amount which is involved in this controversy is the difference between the amount paid and the amount claimed, namely, \$1516.12. If the last-named amount shall be found by the court to be due to the plaintiff, then it is agreed that judgment shall be entered for the plaintiff for that amount, with interest from March 1, 1900; but, otherwise, that judgment shall be entered in favor of the defendant.

The point involved in this controversy is a novel one. The industry of the counsel for plaintiff and for defendant has not succeeded in finding any precedents which throw light directly upon the case, and we have not been able to make any more fruitful search. It is necessary, therefore, to attempt to dispose of the question involved in the case on principles which are equitable and reasonable, in view of the nature of the contract which existed between the parties. Without any elaboration of the thought, it is hardly necessary to say that the contract was intended to give to the party assured indemnity and protection against loss by fire up to a certain specified amount. The liability of the insuring company could not be carried, whatever the loss might be, beyond the amount designated in the policy. But up to that amount, whatever the loss might be, the insuring company would be liable, either fully or proportionately,

The Penna. Co. for Ins. on Lives, &c., v. The Philadelphia Contributionship, &c.

according to the circumstances of the case. This position must be regarded as unquestionable, in view of the well-recognized doctrine of the law in regard to such contracts. The difficulty in the case arises when the effort is made to determine what was the loss against which the company insured; or, in other words, upon what basis the plaintiff can estimate the damages which are proper to be included in the loss insured against. Are these damages only such as are to be arrived at by a computation of the cost of the reconstruction of the building exactly according to the description contained in the survey attached to the policy, or is the true result to be reached by taking the cost of reconstruction according to the conditions existing and lawfully imposed at the time when the fire occurred? Certainly it would not be claimed that the insurers are only liable for such an estimate of cost as would be based upon the market price of materials at the time when the contract of insurance was made. It would seem, also, if the materials out of which the building was originally constructed were not to be obtained at the time of the fire and reconstruction, that the insurers would be liable for the cost of reconstruction out of such materials as were reasonably proper and adequate at the time of rebuilding.

These illustrations indicate that a contract of insurance may need to be interpreted with regard to changed conditions for the purpose of arriving at a proper standard for estimating the extent of the liability of an insuring company at the time of loss. It is our judgment that the case in hand must fall under such a general classification. It has long been recognized that building regulations and restrictions are matters properly within the scope of legislative and municipal authorities. This must have been known to the contracting parties at the time when the policy involved in this suit was issued. The defendant company did not, by the terms of the policy, become liable only for the loss which might accrue to the owner of the policy in case of fire, to the extent of what it would cost to rebuild the premises injured according to the actual dimensions of the walls of the building as described in the survey. It did insure a building which corresponded to the description therein contained, but the insurance was against loss to the owner by reason of the destruction or injury of that building by fire, and if, in consequence of a state of the law existing at the time of the fire, the loss was increased above what it would have been by reason of regulations which required the rebuilding to be done in some other way, according to some different plan, for the protection of the community, it seems to us that there is nothing in good reason or law why the insuring company should not be held liable for the actual loss thus incurred, up to the extent of the amount designated in the policy, provided the proportional amount of the loss falling upon the company reached that sum. Applying such a principle would not involve the insuring company in any loss greater in extent than that which it undertook to assume when the policy was made, and the method of arriving at the extent of the loss which we have adopted appears to us a just, reasonable and lawful one.

The decision in *Brown v. Royal Ins. Co.*, 1 Ellis & Ellis, 853, while not ruling the exact question involved in this case, yet may be regarded as in general harmony with the view already expressed, so far as the differing facts of the two cases would allow.

Brady v. Northwestern Ins. Co., 11 Mich. 445, and *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 86 Texas, 103, were referred to in the argument, but they turned upon a different point, and they are only mentioned here for the information of those who may hereafter be interested in the question under discussion.

Judgment will, therefore, be entered for the plaintiff for the sum of \$1658.92.

Edenborn's Estate.

Decedent's estate—Foreclosure of mortgage—Agreement to settle—Validity of—Facts known to testatrix and unknown to legatee.

Where a testatrix herself had invested \$1000 on mortgage, and there is no reason to suppose that she was unaware that the terre-tenant was the wife of her executor, and a legatee, who was ignorant of the ownership, joined in a written request to the executors to accept \$500 in full settlement, rather than incur the expense incident to foreclosure, the validity of the agreement is not affected by such ignorance after it had been acted upon by the executors, especially when, on a sale of the property, the amount realized was only about \$9 in excess of what was received under the settlement. The fact that the amount paid under the compromise was advanced by the daughter of the terre-tenant and one of the executors is not important.

Decedent's estate—Auditing judge—Finding of facts.

Findings of fact by an auditing judge, not shown to be erroneous, will not be disturbed.

Decedent's estate—Surcharge—Insolvent debtor—Credit—Residuary legatee.

An executor cannot be surcharged with the amount of a debtor's notes, who was and is insolvent, although, as residuary legatee, the debtor is entitled to credit equal to what the other legatees received in distribution.

Commissions—Compensation.

Although commissions, as such, cannot be allowed upon assets not collected, yet, where the administration of the estate involves much more than the usual amount of trouble, special allowance may be made as compensation for services, irrespective of the actual receipts.

Exceptions to adjudication. O. C. Phila. Co., July T., 1900, No. 92.

Isaac S. Sharp and C. Andrade, Jr., for executors.

John M. Gest, for E. R. Edenborn et al.

PENROSE, J., March 2, 1901.—The mortgage for \$1000, subject to a prior mortgage of \$6000, was an investment of the testatrix herself, made three years before her death. The interest appears to have been paid with regularity, so long as she lived, by the terre-tenant, the wife of one whom she appointed, and who is now, an executor; and there is, therefore, no reason to suppose that she was not aware of such ownership. If, therefore, the exceptant, who is one of the residuary legatees, when he joined with his brother in the written request to the executors to accept \$500 in full settlement, rather than incur the expense and risk incident to foreclosure, was ignorant of a fact with which the testatrix must have been entirely familiar, it is not easy to see why this should affect the validity of the paper so given, after it had been acted on by the executors. And even conceding that the general principle that a written instrument cannot be set aside upon the unsupported oath of a single witness (*Juniata B. & L. Ass'n v. Hetzel*, 7 Outerb. 507) does not apply as between an executor and legatees, the testimony of the exceptant as to want of knowledge, &c., &c., is positively contradicted by that of his brother, having precisely the same interest, who swears that he was fully informed as to every essential particular. Moreover, in view of the fact that no profit was derived from the transaction, the amount realized on sale of the property being only about \$9 in excess of what was received by the executors under the settlement, the abstract question as to the agreement becomes immaterial.

Nor is it important that the amount paid under the compromise was advanced by the daughter of the terre-tenant and of one of the executors, to whom the mortgage was then assigned. It is a matter of indifference to a mortgagee receiving payment from what source the money comes, and the mortgagor, in such case, may, under well settled principles of equity, ask for an assignment instead of the entry of satisfaction.

The other exceptions on the part of the distributee relate to matters of fact, as to which it is not shown that the findings of the auditing judge are
10 DIST. R.

Edenborn's Estate.

erroneous. Commissions, as such, cannot, of course, be allowed upon assets not collected, but he has found that the administration of the estate involved much more than the usual amount of trouble, and compensation for services is not measured by actual receipts.

That the debtor was and is insolvent is a complete answer to the effort to surcharge the accountants with the amount of his notes, though as one of the residuary legatees he is entitled to a credit equal to what the two others have received in distribution.

The exceptions are dismissed, and the adjudication, corrected by the allowance of cost of filing account, \$13.50, and by striking out the surcharge of \$235, already debited in the account, confirmed absolutely—subject, however, to the award of collateral inheritance tax to the Commonwealth, if not already paid. Counsel will prepare the necessary decree.

Carracher or Kiker's Estate.

Decedent's estate—Attachment—Issued after debtor's death.

An attachment cannot be issued against the share of a deceased distributee after his death.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 170.

Lewis Hopper, for exceptant; *Robert Mayer* and *Jos. J. Broadhurst*, contra.

HANNA, P. J., March 2, 1901.—Testator died in 1873, leaving all his real and personal estate to his wife for life, and after her death he directed his estate to be sold by his executors, and the purchase-money divided into fourteen equal shares, one of which he gave to his son Jacob. Testator's widow and his son both survived him, but they are now deceased. His son Jacob died March 4, 1890, in the lifetime of his mother, who survived until May, 1900, when she also died. The real estate of testator has been sold by the administrators *d. b. n. c. t. a.*, and, with the personal estate, the proceeds are now to be distributed. It appears that one John Bornemann obtained a judgment against testator's son Jacob in the Court of Common Pleas No. 1, to March Term, 1879, No. 1085, on Aug. 14, 1900. This, as shown, is more than ten years after the death of the defendant. On Oct. 17, 1900, an attachment *sur* judgment was issued upon the judgment, making the administrators *d. b. n. c. t. a.* garnishees. And on Dec. 11, 1900, a rule was taken, we presume by the garnishees, although it does not appear from the record, the evidence, or statement of counsel by whom it was obtained, and, as stated by counsel, the rule was discharged by the Court of Common Pleas.

The situation, therefore, is simply this: There is a judgment of the Court of Common Pleas against one of the distributees of the present fund, upon which an attachment has been and is still pending. The attaching creditor claims that the share of the deceased distributee, instead of being awarded to his administrator, should be directed to be held by the accountants subject to the final determination of the attachment. This would be proper if the attachment had issued during the lifetime of the defendant. But, as stated, it issued after his death. This gives the attaching creditor no preference over other creditors of the defendant. Immediately upon the death of the latter his estate passed into the grasp of the law. As stated by Agnew, J., in *Nice's Appeal*, 54 Pa. 200, then "fixing its condition and prescribing its management and its distribution." This was following *Kater v. Steinruck's Admin'r*, 40 Pa. 504, where the same principle is maintained. And to the like effect is *Bank v. Shouse*, 102 Pa. 488, and *Jackson's Estate*, 18 W. N. C. 568, affirmed in *Heft's Appeal*, 19 W. N. C. 302.

In Hughes's Estate, 1 Lack. Jur. 317, where a creditor had a lien, by virtue of a levy upon the goods of a debtor, at the time of the latter's death, but the writ was returned stayed by the plaintiff's attorney, it was held that the lien was lost. And, for the same reason, the right of a landlord to distrain the goods of his tenant ceases upon the death of the tenant, and the landlord is then remitted to his rights of preference under the statutes providing for the distribution of decedent's estates: *Gandy v. Dickson*, 34 W. N. C. 529. And in *Klein's Estate*, 15 Phila. 538, an injunction was issued by this court to restrain a judgment creditor of a husband from levying on the property of his deceased wife to pay his debt.

For these reasons, the award to the administrator of the deceased distributee is proper and for the benefit of all his creditors. The exceptions are dismissed and the adjudication confirmed.

Ruffner v. Brown.

Interpleader—Act of May 26, 1897—Claimant's bond—Wife's affidavit.

To entitle the wife of a defendant in execution, claiming the goods levied on, to file her own bond without security, under the Act of May 26, 1897, P. L. 95, she must show that the goods were found in her own possession and not the joint possession of herself and husband, and she must also specifically aver in her affidavit just how she obtained title.

Exception to bond filed in interpleader proceedings. C. P. Blair Co., June T., 1900, No. 114.

Robert W. Smith, for plaintiff; *J. S. Leisenring*, for defendant.

BELL, P. J., Jan. 14, 1901.—Mrs. Sadie C. Brown, claimant in this interpleader proceeding, is the wife of C. W. Brown, defendant in the execution. She claims the right to file her own bond, without security, under that portion of the Act of May 26, 1897, P. L. 95, which provides that: "If the goods and chattels levied on are found in the possession of the claimant, or his agent or bailee, and not in the possession of the defendant in the execution or process, the court may permit the claimant to file his own bond, upon it being shown that the claimant does not derive his title thereto by, from or through the said defendant."

But I do not consider Mrs. Brown entitled to this privilege—

1. Because it cannot fairly be said that the goods were found in her possession and not in the possession of her husband, the defendant in the execution. Where, as in this case, goods and chattels are found in the joint possession of husband and wife, the *prima facie* presumption is that the possession is that of the husband: *Rhoads v. Gordon*, 38 Pa. 277.

2. The bald statement of Mrs. Brown in her affidavit, that she did not derive title to said goods and chattels by, from or through her husband, although amplified by some further expressions of a general nature, is not sufficient showing of such fact. She should, at least, go further and specify just how she did obtain title to the goods and satisfy the court on this subject.

This last conclusion seems to be in accord with the following authorities, seemingly decided under rules of court similar to said recited extract from said Interpleader Act of 1897: *Barrett v. Gross*, 2 W. N. C. 324; *Bacharach v. Levy*, 19 Phila. 340; *Hagen v. Dormeyer*, 14 Lanc. 231; *Garrison v. Settle*, 12 Pa. C. C. Reps. 665; *Stauffer v. Souder*, 11 Lanc. 323.

Now, Jan. 14, 1901, exceptions to bond sustained, but Mrs. Sadie C. Brown, claimant, is given until Saturday, Jan. 26, 1901, to justify by filing a new bond with sufficient surety.

10 DIST. R.

Philadelphia v. Athow et al.

Municipal claims—Time of filing claim—Acts of July 26, 1897, and April 1845—Retroactive—Constitutionality.

The Act of July 26, 1897, P. L. 420, is applicable to the city of Philadelphia. Its effect, where assessments are made by foot-front rule within the time required by the Act, is to render claim valid which is filed within a year of the completion of the entire contract.

The Act is retroactive in character, but is not unconstitutional, for that reason. Its effect is not to revive liens generally which had lost their hold upon properties again which claims had been filed when the Act was passed, but only to operate upon claims which were then alive, where the liens were still in existence under the definition and requirements contained in the terms of the statute.

Hence, a claim will be revived and made operative where the assessment has been made or confirmed within six months from the completion of the whole work covered by the contract as distinguished from the work in front of the particular property liened, and the claim filed within six months from the making or confirmation of such assessment, and where, filed five years before the passage of the Act, it has been kept alive by issuing a writ of *scire facias*. Where a sewer was constructed in front of property on Nov. 11, 1893, the entire contract finally completed May 4, 1894, the assessment made May 12, 1894, the claim filed on Nov. 1, 1894, and a *scire facias* issued Nov. 11, 1899, held, that, notwithstanding the fact that the lien was under the law as it existed before the passage of that Act, it was revived as to its provisions.

for a new trial and for judgment on the point reserved. C. P. No. 1894, Nos. 1728, 1735, 1737-1739, 1743-1746, 1749, 1752.
Sept. T., 1894, Nos. 1728, 1735, 1737-1739, 1743-1746, 1749, 1752.
Wm. Davis and James Alcorn, assistant city solicitors, and John L. Kinsey, city solicitor, for plaintiff. L. H. R. Nyce and Alfred R. Haig, for defendant.

WILSON, J., March 21, 1901.—These cases all grew out of the construction by the city of a sewer on Main street from Schur's lane to Ridge avenue. The contract for the construction of the sewer was made on Aug. 19, 1893. That portion of it which was in front of the properties of the defendants, Athow, Ball and the heirs of Righter, was finished on Nov. 11, 1893, and the part in front of the properties of the other defendants was finished on May 4, 1894. The assessor's bills as to each of the properties were made on May 12, 1894, and the claims for the amount of the bill in each case were filed in this court on Nov. 12, 1899. The writs of *scire facias* on each were issued on Nov. 11, 1899. The cases came to trial on Oct. 2, 1900, and verdicts were directed for the plaintiff under the following agreement:

"And now, to wit, Oct. 3, 1900, after the evidence had been submitted, the parties agreed that the court direct a verdict for the plaintiff in each of the twelve cases for the full amount of the claims, with interest, subject to the opinion of the court upon the following reserved point:

"That the sewer was constructed on Main street in front of the properties of the defendants, Hannah Athow, Henry C. Ball et al. and heirs of Michael Righter, on Nov. 11, 1893, and in front of the properties of the other defendants on May 4, 1894, and the final completion of the sewer from Ridge avenue to Schur's lane was on May 4, 1894. That the contract for the construction of the sewer was made Aug. 19, 1893, and it was designated as being on Main street from Schur's lane to Ridge avenue.

"That the assessments were made for the cost of the construction of the sewer on May 12, 1894. That the claims for the assessments were filed on Nov. 12, 1899. The parties agree that the above facts were proven, and consent to the court reserving the point whether, under the facts as above stated, the plaintiff is entitled to recover. The ordinances offered in evidence and the special Act of Assembly, and the contract for the construction of the sewer to be a part of the reserved point. This agreement and reservation to apply to all of the cases as if made a part of the record in each."

If the law to be applied in determining whether or not the claims filed by the city are valid be that which is contained in the Act of April 16, 1845, P. L. 488, then none of these claims can be regarded as of value, under City, to use, *v. Beatty*, 9 Pa. Superior Ct. 255, for the reason that the claims were not filed within six months from the time of doing the work in front of the properties in question. If, however, the Act of July 26, 1897, P. L. 420, is applicable, then, certainly, they would seem to be good. The Act of 1897 makes valid claims filed in the office of the prothonotary "within six months from the making or confirmation of any assessment, . . . whether said assessment shall have been made by foot-front rule or according to benefits. It was provided, however, "that assessments under the foot-front rule shall have been made or confirmed within six months after the completion of the work." By the expression, "the completion of the work," we understand is meant completion of the whole work covered by the contract, and not such portion of it as was in front of the individual properties. The effect of this, it is obvious, was intended to be that the time within which it is possible that the city can file a valid claim should be a year from the completion of an entire contract. That the Act of 1897 is applicable to the city of Philadelphia in cases which fall within its proper application, can no longer be questioned, in view of the decision of the Supreme Court in *Dick v. Philadelphia*, 197 Pa. 467, a case which went up from this court.

It is, however, contended on the part of the defendants that the Act just referred to should not be regarded as controlling the situation in these cases, for the reason that, if it were, it would be retroactive in its character and therefore invalid. It cannot, however, be contended that the legislature has no authority to enact statutes which would be applicable even to the case of liens, like those which are involved in the present controversy. Such cases as the *City of Chester v. Black*, 132 Pa. 568, and *Donley v. City of Pittsburgh*, 147 Pa. 348, appear to settle beyond the possibility of successful controversy that legislation of that character is valid and constitutional. The Act of 1897 provides: "That all municipal claims, where the same are the final assessments made upon any property or properties to pay the costs, expenses or damages, or either of them, of any municipal improvements in any city, borough, township or other municipal division of the State, *which have been heretofore*, or which shall hereafter be filed in the office of the prothonotary of the Court of Common Pleas in the proper county as liens," if made according to the provisions of the law, "shall be and continue to be and remain liens on the respective properties until fully paid and satisfied." It was thus enacted that all such claims as were filed before the passage of the statute were within its provisions and were validated. Interpreting the Act, we should say that it was not intended to carry its operation back indefinitely for the purpose of generally reviving liens which had lost their hold upon properties against which claims had been filed, but only to operate upon cases which were then alive, cases where the liens were still in existence under the definition and requirements contained in the terms of the statute. To give to the law any larger scope than this would be to work great injustice, and such a construction seems to us not to be necessary. In order to determine whether or not a claim or lien was alive at the time when the statute went into effect, it would be necessary to ascertain whether or not the assessment had been made or confirmed within six months from the completion of the entire work; and, also, whether or not the claims had been filed within six months from the making or confirmation of such assessment; and, also, in our judgment, it would be necessary, in case a lien had been filed as long as five years before the passage of the Act in question, that it should have been kept alive by the issuance of a writ of *scire facias*. In the cases which are

before the court, however, the latter question would not be of any moment. The assessments were made within eight days of the completion of the work, and the claims were filed within six months from the date of the assessment.

All the requirements of the Act of 1897 were, therefore, complied with, and notwithstanding the fact that, under the law as it existed previously to the passage of that Act, the liens had expired and lost their vitality, we must, for the reasons stated, come to the conclusion that they were revived and made operative by the provisions of the Act of 1897. It necessarily follows that a new trial in these cases must be refused, and judgments entered upon the verdicts in favor of the plaintiff.

Pearson's Estate.

Wills—Construction—General intent of testator.

Where the words of a will are clear and free from ambiguity, and the external circumstances do not create any doubt or difficulty as to their proper application, the plain meaning of the words must govern, and, where the words utterly fail to show any meaning, conjecture cannot be accepted as a substitute for what the statute says shall be expressed in writing. In all other cases, the object is always to ascertain the intention of the testator from his entire will, in the light afforded by the nature of his estate and the circumstances surrounding him at the time of its execution.

Testator, the largest part of whose estate consisted of \$2900 in cash, bequeathed "to my wife . . . all my right, title and interest in all my real estate, stocks, or any other investment, except such property as shall be hereinafter described and bequeathed," without mentioning the \$2900. Held, the \$2900 passed under the words "other investment."

Contemporaneous interpretation of parties in interest.

In doubtful cases, the contemporaneous interpretation of those affected by it, continued through a considerable period, has much weight, especially where no other is suggested until rights have changed by reason of death.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 582.

Cody & Develin, for exceptants; *Charles W. McConnell*, contra.

PENROSE, J., March 2, 1901.—The dictum of an English judge, that in expounding a will the "question is not what the testator meant, but what is the meaning of his words," has the merit of being epigrammatic, and for that reason, perhaps, has sometimes been quoted as a sound enunciation of principle. It is found in Perkins's Williams on Executors, 1148, though not in the former editions of that work, and while true in a certain limited sense, is calculated, if received as a general rule, to lead to error and misunderstanding. Of course, where the words are clear and free from ambiguity, and the external circumstances do not create any doubt or difficulty as to their proper application to the objects or the subject to which the instrument relates, no interpretation contrary to such plain meaning is permitted; and so, conversely, where the words utterly fail to show any meaning, conjecture cannot be accepted as a substitute for what the statute says shall be expressed in writing: but except in such cases, the object is always to ascertain the intention of the testator from his entire will, in the light afforded by the nature of his estate and the circumstances surrounding him at the time of its execution. This is so well settled that it is embodied in many familiar maxims,—*Verba intentioni*, &c., &c., *Benigne interpretamur*, &c., &c., *Quando res non valet ut ago, valeat quantum valere potest*, &c., &c., &c. As said by Knight Bruce, in Key v. Key, 4 DeG. M. & G. 73, quoted in Hawkins on Wills, Prop. iv, "In common with all men, I must acknowledge there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of the instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpreta-

tion given to particular passages would defeat and disappoint the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly." To the same effect is what was said by Lord St. Leonards, in *Gray v. Pearson*, 6 H. L. C. 61, and by Lord Kingsdown, in *Towns v. Wentworth*, 11 Moo. P. C. 528 (*Hawkins on Wills*, 6, 7).

The *dictum* referred to, which is relied upon by counsel opposing the exceptions, was quoted, on the authority of *Weidman's Appeal*, 42 Legal Intell. 338, in *Hancock's Appeal*, 2 Amerm. 532, 541, where the reporter has given it as part of the syllabus; yet in the later case of *Jacobs's Estate*, 25 Crumr. 268, it was held that under a gift of "the residue of my money" the undisposed of real estate of the testatrix passed, for the reason, among others, that unless the words were thus understood there would be an intestacy. This decision and many others that can be referred to would have been impossible if the meaning of the word "money" had been the only thing to be considered. See, also, *Sweitzer's Estate*, 27 Crumr. 541; *Reimer's Estate*, 159 Pa. 212.

In the present case, the testator, whose only property, except a small farm in Montgomery county, some household furniture, and his business as butcher carried on with two of his sons, consisted of about \$2900 in cash, after referring to his will (obviously as the motive for its execution) to "the uncertainty of life," &c., &c., provided as follows: "I do bequeath to my wife . . . all my right, title, and interest in all my real estate, stocks, or any other investment, except such property as shall be hereinafter described and bequeathed, during her natural life, and after her decease, I will and bequeath that my sons, B. F. and W. B., . . . shall have one-half of said described property and estate, . . . and the other half of said property and estate I direct shall be equally divided between E. M., T. N., and Ella (his other children). I also request and bequeath to my two sons, B. P. and W. B., . . . all my interest, right, and title in all my personal effects, such as horses, wagons, harness, machinery, tools, &c. I also request and bequeath unto my son George . . . one hundred dollars to be paid to him by said B. P. and W. B. . . . I also appoint my wife . . . and B. P. and W. B. . . my executors. . . I also request that my funeral expenses be paid out of any funds that may be at hand or may be received after my death, . . . hereby revoking all former wills," &c., &c.

It is impossible to believe that this will, made in view of "the uncertainty of life," and revoking all former wills, was not intended to dispose of the entire estate of the testator; but if the words "stocks or any other investment" are to be restricted to their literal or even ordinary sense, he has died intestate as to the principal part of it, viz., the \$2900 above mentioned. To prevent such a result, the words "any other investment" may well be understood as referring to moneys—the natural subject of investment, and perhaps then on deposit, drawing income. That he supposed he was making a disposition of his entire estate by the words employed, is made clear by the fact that he "excepts" from what was thus given to the wife for life, the "personal effects, such as horses, wagons, harness, machinery, tools, &c.," specifically given to the sons, which no more fall within the literal terms of the gift from which they were excepted than does the money. This is shown further by the fact that in the disposition made at the death of the wife, the testator refers to "said described property and estate," giving one-half of it, in these general and comprehensive terms, to the two sons, and the other half, with these words repeated, to his other children.

This appears to have been the understanding of all the parties in interest. The widow survived the testator for eight years,—the income of the entire estate, except as excepted by the will, having been paid and received without question. In doubtful cases, the contemporaneous interpretation of those affected by it,

Pearson's Estate.

continued through a considerable period, has much weight,—especially where no other is suggested until rights have changed by reason of death (Gass's Appeal, 23 P. F. Smith, 39; McDonald v. Dunbar, 20 W. N. C. 559).

The exceptions are sustained, and the adjudication modified accordingly. Counsel will prepare the necessary decree.

Osborne's Estate.

Testamentary law—Rule in Shelly's Case—Issue—Executed and executory trusts.

Where a testator, by apt words, creates a trust, requiring active duties, for the life of his son, an implied limitation to his issue (i. e., the heirs of his body) does not have the effect, under the rule in Shelly's Case and the Act of 1855, of enlarging the life estate into a fee, when there intervenes between the life-estate and the ultimate remainder a contingent limitation to the son's children and their issue, the preservation of which requires the continuation of the trust.

A gift over to executor, in case the life-tenant dies "without leaving lawful issue," creates a definite failure of issue.

The right to create a trust for the purpose of preventing the coalescing of a life-estate with remainder to heirs is recognized, and a trust to convey is executed by law. A legal estate in the heirs is thereby created, which does not unite with the equitable life-estate in the ancestor.

Testator, after devising his residuary estate, consisting of realty and personality, to his executrices in trust, to collect rents and income, pay taxes, keep property in repair and pay net income as directed, provided by his will, *inter alia*, as follows: "And the remaining one-sixth thereof shall be paid unto my son W. for and during all the term of his natural life; and from and immediately after the decease of him, my said son W., then, as to the said income in trust, to and for the only proper use and benefit of all and every the child and children which he, my said son W., may leave, and the lawful issue of any of them who may be then deceased, having left such issue, to be equally divided between them, share and share alike, such issue of any deceased child or children of my said son W. taking, however, only such part or share thereof as his, her or their deceased parent or parents would have had and taken had he, she or they been living."

The will then proceeded to confer upon the executrices power to sell the real estate after the youngest child became of age, and to invest proceeds and apply the income as therein directed, and gave his daughters power to terminate the trusts as to themselves in the principal produced by the sale of any part of the estate, real or personal, if they so desired, and then continued as follows: "But my son W. is not to receive any of the principal moneys, either from the sale of any real or personal estate, but only the income or interest thereof as hereinbefore provided. But after his death and after a general distribution of my estate has taken place, all his property, real or personal, held in trust can be transferred to his heirs, executors and administrators, and the trust hereinbefore created to become null and void."

Held, the trust was good, and W. took only a life-interest in his share of the fund produced by a sale of ground rent.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1892, No. 32.

F. S. Phillips, for exceptant, cited Ogden's Appeal, 70 Pa. 509; Yarnall's Appeal, 70 Pa. 335; Grimes v. Shirk, 169 Pa. 74; Stouck v. Zeigler, 196 Pa. 489.

E. P. Smithers, contra.

PENROSE, J., March 2, 1901.—The testator has, by the use of apt words, created a trust for the life of his son, the exceptant, requiring active duties on the part of the trustees and giving to the *cestui que trust* his share of the net income only; and if it be conceded that there is an implied limitation to his issue, having the effect, by operation of the rule in Shelly's Case, of giving him an inheritance in tail in the realty, which the Act of 1855 has converted into an estate in fee, there intervenes between the life-estate and the ultimate remainder, or rather executory devise, the contingent limitation to his children and their issue, the preservation of which requires the continuation of the trust.

It will be noticed, however, that the gift over in case of the death of any of the *cestui que trusts* "without leaving lawful issue" (which in a bequest of personality always means issue living at the death of the person spoken of—Sill v.

Osborne's Estate.

Spear, 9 Wright, 168) clearly refers to a definite failure of issue, taking effect within a life or lives in being at the death of the testator; since it is provided in such case that the share of the one so dying shall go to "my executrices hereinafter named and the survivor of them," in trust, &c., &c., &c. A gift over in such case is perfectly valid, since it does not infringe the rule against perpetuities (Hawkins on Wills, 176. See also Smith on Executory Interests, 599); and this furnishes an additional reason for continuing the trust.

But the only principal embraced in the account arises from the sale of a ground rent under a power given to the executors, and the will declares, in express terms, that while the trust may, in the event of such a sale, be terminated at the request of the daughters so far as their shares are concerned, this shall not be the case with the share of the son, as to whom the provision is as follows: "But my son . . . is not to receive any of the principal moneys either from the sale of any real or personal estate, but only the income or interest thereof as hereinbefore provided. But after his death, and after a general distribution has taken place, all his property can be transferred to his heirs, executors and administrators, and the trust hereinbefore created to become null and void." A trust to convey or transfer is executed by the law of Pennsylvania (Renzlehausen v. Keyser, 12 Wright, 351; Chamberlain v. Maynes, 180 Pa. 39), and the "heirs," &c., have, therefore, a legal estate, which does not unite with the equitable life-estate in the ancestor (Bacon's Appeal, 7 P. F. Smith, 504; Eley's Appeal, 7 Outerb. 300, &c., &c., &c.) The right to create a trust for the very purpose of accomplishing this is well recognized. We had occasion to consider the subject in Davis's Estate, 6 District Reps. 45, and need not repeat what was there said.

Exceptions dismissed and adjudication confirmed absolutely.

Lockard's Estate.

Decedent's estate—Administrator's duty to account.

The statutory provision which allows a year to elapse before the rendering of an account by the administrator does not apply where the administrator has been dismissed within the year.

An administratrix who has been dismissed cannot evade the duty of accounting by alleging, in her answer to a petition for account, that she has paid out all the money of the estate which has come into her hands.

Petition for an account. O. C. Phila. Co., Oct. T., 1900, No. 454.

Arthur B. Houseman and William S. Divine, for exceptant.

J. B. Daly and H. H. Pigott, for respondent.

ASHMAN, J., Feb. 7, 1901.—To file an account of her decedent's estate was one of the duties to the performance of which the respondent pledged herself when she took out letters of administration. She cannot evade the obligation by alleging that she has paid out all of the moneys of the estate which have come into her hands. Creditors and other parties in interest are entitled to be furnished with proof of the payments and of their validity. The answer sets up that they were for expenses attending the last sickness and the burial of the decedent. But the petitioner, as widow, may claim her exemption, and if that claim shall be allowed, it will have precedence of those for which the respondent asks credit. It may be added that the statutory provision which allows a year to elapse from the death of an intestate before the rendering of an account by the administrator, does not apply where the administrator has been dismissed within the year.

The petition is granted, and the respondent is directed to file an account of her administration within twenty days from the date of service of this order.

10 Dist. R.

Daly et al. v. Iselin.

Practice, C. P.—Rules of court—General issue—Illegal entry of same by prothonotary—Plea in abatement—Abandonment of same.

Where the prothonotary, under rule of court, is authorized to enter the plea of the general issue after thirty days from the return-day of the summons, if the plaintiff's statement is filed before the return-day or within four days thereafter, provided no plea be entered by the defendant within said period, he has no right to enter such plea when a plea in abatement was entered within the thirty days. With the plea in abatement filed, a preliminary issue must be formed to dispose of the questions raised thereby, which can only be done by demurrer or replication, and until this is done the case is not at issue.

The plea in abatement is not abandoned by filing an affidavit of defence, when in it the plea and determination to rely thereon are expressly set forth, and it is averred therein that the affidavit is filed to prevent judgment by default; nor by obtaining a continuance of the cause.

Practice, C. P.—Sheriff's return—Conclusiveness.

The rule that a sheriff's return cannot be contradicted is true only as to matters returned which the officer knows of his own knowledge, such as the time, place, manner of service and person upon whom made, but does not apply to facts returned, the truth of which he could only know by hearsay, such as that defendant is a non-resident, doing business within the county, and that the person upon whom service is made is his agent.

Motion to take case from issue list because a plea in abatement had been filed and was undisposed of and the case was not properly at issue for trial. C. P. Clearfield Co., Sept. T., 1899, No. 43.

Cole & Moore, for motion; Frank Fielding and George A. Jenks, contra.

GORDON, P. J., Sept. 14, 1900.—We feel constrained to grant defendant's motion, for the reason that the case is not at issue and not properly on the trial list.

The defendant's plea in abatement, raising the question of the court's jurisdiction over him, was filed Sept. 20, 1899. The prothonotary, under rule of court No. 4, is authorized to enter the plea of the general issue after thirty days from the return-day of the summons in case the plaintiff's *narr* or statement is filed before the return-day or within four days thereafter, provided no plea be entered by the defendant within said period. Here the plea in abatement was entered within the thirty days, and the prothonotary had no right to enter a plea, and his act in doing so is a nullity. With the plea in abatement filed, a preliminary issue must be formed to dispose of the questions raised thereby, which can only be done by the plaintiffs' response, to wit: By demurrer, where he seeks to avoid it by an issue of law, which should be disposed of on the argument list, or by replication, where he desires to meet it on the merits as a question of fact, which would be disposed of on the trial list by a trial by jury. But plaintiff has not responded to this plea in either of the modes indicated, and hence the case is not at issue. Whether the defendant has submitted himself to the jurisdiction of the court by the appearance, pleas or other acts of his counsel, may properly be disposed of in the issue when raised. But without an issue of some kind, no trial or disposition of the case of any kind can be had. While it is true, in general, that a sheriff's return cannot be contradicted, the rule does not apply to everything contained in it. It is true only as to matters returned which the officer knows of his own knowledge, such as the time, place, manner of service and person upon whom made; but it does not apply to facts returned, the truth of which he could only know by hearsay, such as that defendant is a non-resident, doing business within the county, and that the person upon whom service is made is his agent. The return in this respect is not conclusive and may be contradicted, and the appropriate plea to put it in issue is in abatement. We cannot affirm plaintiffs' position that defendant's

Daly et al. v. Iselin.

counsel abandoned their plea, first, by the affidavit of defence filed, because in it they expressly put forth said plea and signify their determination to rely upon it, and state that the affidavit is filed to prevent judgment by default; and second, by obtaining a continuance of the cause at May term and raising the pending question first when the case is called for trial, because they claim that they are now and always have been, since the case was put upon the issue list, ready to meet the issue raised by their plea, and understood that that issue alone would be for trial. In the opinion of the court, there is no excuse for the case remaining so long without being at issue, and that both sides are at fault on account thereof. Either could have moved to have it put at issue, had they had knowledge of the situation and desired the issue.

If plaintiffs will forthwith file replication to defendant's plea in accordance with the latter's proposition at bar, the trial may now proceed upon the issue thus raised; otherwise, the defendant's motion will be granted, the cause continued and the case taken from the issue list.

Now, Sept. 14, 1900, plaintiffs having refused to file replication as proposed, it is ordered, adjudged and decreed that defendant's motion be and is hereby granted, the cause continued and the case directed to be taken from the issue list, and exception is noted to plaintiffs.

From Benjamin F. Chase, Clearfield, Pa.

United States ex rel. v. Fuellhart, Sheriff.

Secret service—Agents of—When they may make a search or arrest without warrant.

The secret service division of the United States treasury department lawfully exists, and its agents, under the stress of urgent necessity, may lawfully make an arrest or search without warrant. Hence, where secret service agents, acting in conjunction with a deputy United States marshal, who was armed with a warrant for the arrest of an alleged counterfeit, entered a dwelling-house where the supposed offender was said to be staying, and found there evidences that the inmates were concerned in making spurious coin, or in possession of the same, and thereupon searched the house and arrested a person for whom they had no warrant, and who, being afterwards tried and acquitted of the alleged crime in the United States District Court, subsequently procured the arrest and the finding of indictments in a State court against the secret service agents for assault and battery and malicious mischief: *Held*, that upon *habeas corpus* proceedings, under sections 751, 752 and 753 of the Revised Statutes of the United States, against the sheriff of the county in which the criminal prosecutions were brought, their release would be directed, their conduct being lawful and within the scope of their authority.

Habeas corpus. Circuit Court of the United States, Western District of Pennsylvania, May T., 1901, No. 7.

D. M. Miller, Assistant United States District-Attorney, for petitioners.

C. D. Olmstead, for sheriff.

ACHESON, Circ. J., Feb. 14, 1901.—Upon the petition of William J. Flynn and Thomas F. Berriman, agents of the secret service division of the treasury department of the United States, who were restrained of their liberty, and were in the custody of John H. Fuellhart, sheriff of Warren county, Pennsylvania, the writ of *habeas corpus* here was issued under the authority conferred by sections 751, 752 and 753 of the Revised Statutes of the United States, and the case has been heard by the court, and is now to be disposed of agreeably to the provisions of section 761, which enacts: "The court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

10 DIST. R.

United States ex rel. v. Fuellhart, Sheriff.

It appears from the sheriff's return to the writ of *habeas corpus* and otherwise, that the petitioners were in custody of the sheriff by virtue of process issued out of the Court of Quarter Sessions of Warren county, Pennsylvania, based on two indictments found in that court at December Sessions, 1900, Nos. 17 and 18, one charging the petitioners with assault and battery upon the person of one John B. Bennett, and the other charging them with malicious mischief with respect to his property. Each of these two criminal proceedings was instituted by the said John B. Bennett, and he is the prosecutor in each of them.

At the hearing before this court, the following formal admission was entered of record: "It is admitted that the charge of assault and battery and malicious mischief against William J. Flynn and Thomas F. Berriman, upon which indictments were found against them at December Sessions, 1900, Nos. 17 and 18, in the Quarter Sessions Court of Warren county, Pennsylvania, grew out of the acts of the said officers in their searching the house of John B. Bennett, arresting and conveying him to the United States commissioner—said officer acting in conjunction with W. S. Blair, the United States deputy marshal.

The facts as clearly shown by the evidence are these: The petitioners are, and on Oct. 1, 1900, were, duly and lawfully appointed agents of the secret service division of the treasury department of the United States, assigned to duty in the Western District of Pennsylvania, of which Warren county is part. On the day last named, the petitioners, in discharge of their official duties as such agents, in company with W. S. Blair, a deputy United States marshal for said district, who had a lawful warrant for the arrest of one John Henderson upon a charge of making and passing counterfeit coins of the United States, visited the dwelling-house of said John B. Bennett in Warren county, where they were informed Henderson was abiding. The three officers entered the house through the doorway without any violence. Bennett was told the purpose of their visit. The only inmates of the house were Bennett, his wife and one Hyde. Bennett immediately and hurriedly tried to reach a shelf above an inside door, with the evident purpose of removing something from the shelf, but failed. He then hastened upstairs, and was there seen by the officers pouring a fluid from a bottle into an open space between the weatherboarding and the inside plastering of the house. Investigation then made showed that this fluid was cyanide of potassium, which is commonly used by counterfeiters in silverplating. Upon his return downstairs, Bennett was observed to hand something to his wife, which she attempted to conceal, but, upon arising from her chair, the officers noticed on the seat thereof a counterfeit dollar not completely finished. Upon being asked at the time if he had any explanation to give as to this counterfeit dollar, Bennett said he had none, and told his wife not to say anything. A twenty-five cent counterfeit coin was found in the pocket of Hyde, who stated to one of the officers that Bennett had put it there. Lying on the ground outside the house was found a counterfeit half-dollar. On the shelf, which Bennett had tried to reach, the officers found about one-half pound of cyanide of potassium and a bottle of nitric acid. This latter substance, like the former, is of common use in making counterfeit coin. In the pockets of an overcoat hanging in the kitchen were found a bottle of nitric acid and a small tin of cyanide of potassium. Bennett and Hyde each denied ownership of this coat, but afterwards Hyde stated that it was his. Some plaster of paris, in dry form in a bag, was found in the house. Out of this substance counterfeiters habitually make their moulds. In the pantry was found what had evidently been a plaster of paris mould, but the impression had been removed. In the same place was found a tin of copperas in crystal form, a substance employed by counterfeiters. In the cellar was found a cup which had recently contained a solution of copperas and nitric acid, the inside of the cup being yet wet with the solution. Lying on a shelf in a bed-

United States ex rel. v. Fuelhart, Sheriff.

room was a genuine silver dollar, wet with nitric acid. The United States deputy marshal (the said W. S. Blair) was present during the search of Bennett's premises made by the petitioners, and he assisted them in making such search.

Believing from what then and there occurred, and from what was seen as above recited, that Bennett was guilty of making and having in his possession for a fraudulent purpose counterfeit coins of the United States, the United States deputy marshal arrested Bennett, the petitioners participating in such arrest. As soon as possible on the same day, Bennett was taken by these officers before a United States commissioner, who bound him over to answer at the next term of the United States District Court for the Western District of Pennsylvania. Indictments for making and fraudulently having in his possession counterfeit coins of the United States were found against Bennett, but, upon trial, he was acquitted.

Aside from his arrest, no assault or battery was committed upon the person of Bennett, and no malicious mischief whatever to his property was perpetrated by either the petitioners or by the deputy marshal.

The secret service division of the United States treasury department lawfully exists. One of its purposes is the detection and bringing to trial and punishment of makers and dealers in counterfeit money. The rules and regulations for the government of its agents in the discharge of their duties, promulgated by the authority of the secretary of the treasury, are to be regarded, I think, as laws of the United States within the meaning of section 753 of the Revised Statutes relating to the writ of *habeas corpus*: In re Neagle, 135 U. S. 1. One of these rules declares: "It is of the first importance that warrants should be obtained before arrests are made. The exceptions to this rule should be of exceedingly rare occurrence." By plain implication, this rule sanctions an arrest without warrant, under exceptional circumstances requiring immediate action. Another rule reads thus: "Agents of this service will not attempt to search any house, store, building, boat or other place without having first procured a search warrant, unless in case of arrest, or the necessity be so urgent that the agent is convinced the delay necessary in obtaining a warrant will be disastrous to the success of the case in hand. In all cases, discretion must be used for the protection of the accused and agent alike." The petitioners, it seems to me, in what they did here, kept within the spirit and letter of these rules, and I am of opinion that they did not exceed their duty.

The case of Bennett was very exceptional, and prompt action on the part of the United States officers was imperative. All the circumstances indicated strongly, if not conclusively, that Bennett was engaged at that time and place in making counterfeit coin, and had such coin in his possession. He was seen by the officers in the very act of putting out of reach the visible evidences of his guilt. His house was in the country; remote from magistrates. The officers had come there, not expecting to arrest Bennett, but Henderson. Under the then existing facts, the case, I think, was to be classed as one of exceedingly rare occurrence, and the necessity so urgent as to excuse the absence of a search warrant or warrant for arrest.

It is a mistake to suppose that no search or arrest can lawfully be made without a warrant: *Wakely v. Hart*, 6 Binn. 316. As was there said, such prohibition would "endanger the safety of society." The constitutional provision is only against "unreasonable searches and seizures."

Moreover, the petitioners acted in conjunction with the United States deputy marshal, and section 788, Revised Statutes, provides: "The marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States as the sheriff and their deputies in such State may have, by law, in executing the laws thereof." Now, the sheriff is the principal

United States ex rel. v. Fuellhart, Sheriff.

conservator of the peace in his county; he may make arrests upon view, and he may and is bound, *ex officio*, to pursue and take all felons and other misdoers: 1 Bl. Comm., 343; South v. State of Maryland, 18 Howard, 402. I entertain no doubt that upon such visible evidence of crime and guilt as existed in this case, it would be the right and duty of the sheriff of Warren county to make an arrest without writ or process. In fact, Bennett's arrest was made by the United States deputy marshal, the petitioners assisting him, as they might lawfully do.

It is clear to me that the imprisonment to which the petitioners have been subjected under the criminal proceedings instituted and prosecuted by John B. Bennett, in the name of the Commonwealth of Pennsylvania, is for acts done by them "in pursuance of a law of the United States" and authorized by it. The decisions, I think, justify this Court in discharging the petitioners and require such action: *Ex parte Jenkins*, 2 Wall, Jr., 421; *Ex parte Royall*, 117 U. S. 241; *In re Neagle*, 135 U. S. 1.

Let the order discharging the petitioners be drawn.

From Edwin L. Mattern, Pittsburgh, Pa.

McKean v. New York National Building and Loan Ass'n.

Foreign corporations—Jurisdiction—Attachment.

A citizen of Pennsylvania who is a member of a corporation organized for the mutual benefit of its members, chartered by, and having its domicile in, the State of New York, and being subject to and governed by the laws of that State, cannot maintain a foreign attachment against the company in Pennsylvania when the association was insolvent at the time the writ issued, and a court of competent jurisdiction at the place of domicile had determined the fact of insolvency and appointed a receiver.

Building and loan associations—Contract of membership—Construction.

A member of a building and loan association cannot select a single clause of his certificate of membership and recover on it, irrespective of its relation to other parts of the contract which may materially modify its meaning.

In the application for membership, the applicant agreed "to abide by the articles of incorporation and by-laws of said association and the rules and regulations provided by its board of directors." The first sentence of the certificate provided that "the shareholder agrees to pay this association sixty cents monthly for each share until such share matures or is retired." The certificate then provided what payments, fines, etc., should be paid into the loan fund, and further provided that "once in six months the profits arising from interest, premiums, fines and other sources shall be apportioned among the shares in good standing. Whenever the amount standing in the loan fund to the credit of any share equals \$100, such share shall be deemed to have matured, and no more monthly payments shall be required." The last clause of the certificate provided: "This certificate is guaranteed to mature in seven years from date, unless sooner retired." Held, that the last clause must be construed, as between the parties, as merely an estimate of the time of maturity, otherwise it would be entirely inconsistent with and repugnant to the rest of the contract.

Rule for judgment for want of sufficient affidavit of defence. Foreign attachment. C. P. Warren Co., Sept. T., 1899, No. 44.

D. I. Bull, for rule; Parmlee & Lindsey, contra.

LINDSEY, P. J., Jan. 3, 1901.—By the plaintiff's statements of claim and exhibits thereto attached, it appears that he is a member and stockholder in a mutual association doing business on a mutual plan, incorporated under the laws of the State of New York, with its principal office or place of business in New York City in said State.

The statements set forth that on or about April 1, 1892, the said plaintiff purchased from the said defendant ten shares of the capital stock of the defendant corporation, and received from it a certificate to him of said shares of capital stock, a true copy of which certificate is hereto attached and made part of this statement. The certificate on its face shows it to be executed in the City and

McKean v. New York National Building and Loan Association.

State of New York. It provides in the second paragraph of its terms and conditions that "all moneys due from members to the association, or due from the association to members, shall be due and payable at the home office in New York City."

The plaintiff's contract was clearly a New York contract and governed by the laws of the State of New York. It is a general rule that contracts are governed by the law of the place where they are to be performed: *Bennett v. Eastern B. & L. Ass'n of Syracuse*, 177 Pa. 233.

The affidavit of defence states that the association is incorporated under and by virtue of chapter 122 of the laws of 1851 of said State of New York, entitled "An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations," and the Acts amendatory thereof and supplementary thereto. To the supplemental affidavit is attached a copy of plaintiff's application, which contains the following: "I, Harper McKean, . . . hereby apply for membership in The New York National Building and Loan Association, and subscribe for ten (10) shares of stock. I hereby agree to abide by the articles of incorporation and by-laws of said association, and the rules and regulations provided by its board of directors. All payments on stock are due and payable at the home office; but for the convenience of themselves, the association sends for collection to the local bank or treasurer the monthly instalment receipts."

It will thus be seen that the plaintiff's rights depend upon the constructions to be given to the articles of incorporation, by-laws, rules and regulations of the association and laws of the State of New York. We, therefore, do not think this action can be sustained in this State: *Clark v. Mutual Reserve Fund Life Ass'n*, 43 L. R. A. 390; *Condon v. Mutual Reserve Fund Life Ass'n*, 44 L. R. A. 149; *Christian's Appeal*, 102 Pa. 184; *Madden v. Penn Electric Light Co.*, 181 Pa. 617; *Fraternal Guardians' Estate*, 159 Pa. 594.

The affidavit of defence sets forth that on July 27, 1899, the defendant association was judicially determined to be insolvent and its affairs placed in the hands of a receiver by a court having jurisdiction over it at its domicile in the City of New York.

The writ of attachment in this case was not issued until Aug. 2, 1899, some days after the insolvency of the defendant had been judicially determined and receiver appointed. Upon the insolvency of a building and loan association, and an assignment for the benefit of the creditors, the shareholders of matured stock are not creditors, and can only share *pro rata* with the holders of unmatured stock after the payment of the creditors of the association: *Criswell's Appeal*, 100 Pa. 488.

Where a receiver of a corporation has been appointed by a court of competent jurisdiction in another State, a creditor, who resides in that State and is bound by the decree of its court appointing said receiver, cannot, in an execution attachment, recover the assets of the association in Pennsylvania which the receiver claims: *Bagby v. Atl., Miss., etc., R. R. Co.*, 86 Pa. 291; *Long v. Girdwood*, 150 Pa. 413; *Wing v. Bradner*, 162 Pa. 72.

Although the plaintiff in this case is, in point of fact, a citizen of the State of Pennsylvania, so far as his relationship to the defendant corporation is concerned, he is presumed to be a citizen of the same State as the corporation: *Madden v. Penn Electric Light Co.*, 181 Pa. 617.

In the United States Courts for judicial purposes, the members of a corporation are conclusively presumed to be citizens of the State in which the corporation is domiciled: *Shaw v. Quincy Mining Co.*, 145 U. S. 444; *St. Louis and San Francisco R. R. Co. v. James*, 161 U. S. 545. In *Madden v. Penn Electric Light Co.*, *supra*, and in *Morris v. Stevens*, 6 Phila. 488, it was held that a resident of Pennsylvania has no right to call upon the courts of his own State to protect
10 Dist. R.

McKean v. New York National Building and Loan Association.

him from the consequences of a valid membership in a foreign corporation. By the act of membership, he intrusted his money to the control of an organization owing its existence to and governed by the laws of another State.

The plaintiff being a member of a corporation having its domicile in the State of New York, and being subject to and governed by the laws of that State, and the articles of incorporation having been obtained under the laws of that State, and the corporation being a mutual association organized for the mutual benefit of its members, and it being insolvent at the time the plaintiff issued his attachment in this State, and the fact of insolvency having been determined by a court of competent jurisdiction at the place of domicile, and a receiver having been appointed by said court to take charge of its assets before the attachment in this case issued, we are of the opinion the action cannot be maintained in this court.

But the plaintiff in his statement of claim confines the contract to the plaintiff's certificate and certain written representations contained in a pass-book furnished to the plaintiff. He, however, claims the right to recover on a breach of the last clause in his certificate, which clause is as follows: "This certificate is guaranteed to mature in seven years from date, unless sooner retired." He cannot select a single clause of his certificate and recover on it, irrespective of its connection with other parts of the contract which may materially modify its meaning.

In his application for membership, the plaintiff states: "I hereby agree to abide by the articles of incorporation and by-laws of said association and the rules and regulations provided by its board of directors." He is certainly bound by such by-laws, rules and regulations as are stated in his certificate. Everything contained in the certificate, according to its express terms, forms a part of the contract between the plaintiff and defendant, and if the last clause has any particular force or binding effect, it is because it forms a part of the contract between the parties. The certificate states that it is "issued to and is accepted by the holder thereof upon the following express terms and conditions:" *First*, the shareholder agrees to pay to this association sixty cents monthly for each share until such share matures or is retired." If we regard the certificate as constituting the entire contract between plaintiff and defendant, as was argued by counsel for plaintiff, we must construe it as a whole, and not by selecting any particular clause therein. We find that the very first sentence provides that "the shareholder agrees to pay this association sixty cents monthly for each share until such share matures or is retired." It then provides what payments, fines, etc., shall be paid into the loan fund, and further provides that "once in six months the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing. Whenever the amount standing in the loan fund to the credit of any share equals \$100, such share shall be deemed to have matured, and no more monthly payments shall be required."

The last clause, the one on which this suit is brought, if construed literally, is in conflict with the other parts of the contract. The plaintiff agrees in the first sentence to pay to the association sixty cents monthly for each share until such share matures or is retired. After stating what funds shall be apportioned to the shares in good standing, the ninth clause in the certificate states that whenever the amount standing to the credit of any share equals \$100, such share shall be deemed to have matured. The shares, therefore, can only mature when the amount of earnings of the association applicable to them, as stated in the ninth paragraph, equals \$100 to such share, whether that time should be longer or shorter than seven years. We, therefore, think the last clause must be construed, as between the parties, as having been an estimated time of maturity.

McKean v. New York National Building and Loan Association.

Otherwise, it would be entirely inconsistent with and repugnant to the balance of the contract.

This is the construction placed upon a substantially similar contract in the case of *O'Malley v. People's B., L. & Sav. Ass'n*, 38 N. Y. Supp. 1016, or in 92 Hun (N. Y.), 572. In that case it was stated in the certificate that the association agreed to pay the shareholders, his heirs, etc., the sum of \$100 for each of said shares at the end of five years from the date thereof. The five years expired and the plaintiff presented his certificate and demanded the par value thereof, and payment was refused. The court held that where an action is brought to recover upon a certificate of a building fund association upon maturity thereof, the articles of association and by-laws must be treated as a part of the contract. Such associations have no power to issue a certificate having a fixed period of maturity, and any time of maturity specified in said certificate will be construed to be an estimated time. This construction applied to the plaintiff's certificate makes the last clause thereof consistent with the balance of the certificate, and makes the terms thereof harmonious. Without this construction, the last clause would be repugnant to the other parts of the contract, repugnant to the plan of the organization, and beyond the power of its officers to make.

The plaintiff is bound to know the terms of his contract, and is presumed to know that his stock would not mature until the earnings of the association applied thereto, according to the terms set forth in his certificate, would equal the par value of his stock.

As the plaintiff's statement nowhere sets forth the maturity of the stock according to the terms of his certificate, we are of the opinion that he cannot recover on said statement. Rule discharged.

From Watson D. Hinckley, Warren, Pa.

De Noon Brothers v. Shew.

Practice—Appeal from judgment of justice of the peace—Payment of costs—Act of June 24, 1885.

The Act of June 24, 1885, P. L. 159, is mandatory, and requires that, before an appeal is taken from the judgment of a justice of the peace, the appellant pay all the costs that have accrued prior to the time of the taking of the appeal.

Rule on behalf of plaintiffs to strike off appeal. C. P. Venango Co., Nov. T., 1900, No. 60.

Stipulation.—"And now, Nov. 27, 1900, it is hereby stipulated and agreed that all the costs before the justice of the peace hearing in this case were demanded of the defendant by the said justice before the granting the transcript filed herein; the only costs paid were the justice's costs and constable's costs."

J. H. Osmer & Sons, for plaintiffs; *John M. McGill*, for defendant.

CRISWELL, P. J., Dec. 10, 1900.—The Act of June 24, 1885, P. L. 159, authorizes and, as construed by the Superior Court in *Carbaugh v. Sanders*, 13 Pa. Superior Ct. 361, requires the justice from whose judgment an appeal is taken to demand of the appellant all costs which have accrued prior to the time of the taking the appeal. Our local Acts require only the payment of the justice and constables' costs. Assuming that the local Acts have not been repealed by subsequent general laws and are still in force, this is no reason why the Act of 1885 should not be given effect. It supplements the local Acts, and its provisions relative to payment of costs as construed is mandatory. For this reason, we make the following order: And now, Dec. 10, 1900, the rule to show cause why the appeal in the above-entitled case should not be stricken off is made absolute.

From E. H. Lamberton, Franklin, Pa.

Bliss v. Milholland.

Commissioners of other States—Acts of Feb. 26, 1831, April 14, 1846, and March 29, 1860.

The Act of Feb. 26, 1831, P. L. 92, empowers commissioners appointed by any court of record in this Commonwealth to issue subpoenas to compel by attachment the attendance of witnesses.

The Act of April 14, 1846, P. L. 329, authorizes the appointment of commissioners by the Judges of the District Court of the city and county of Philadelphia, and confers upon such appointees the right to administer oaths.

The Act of March 29, 1860, P. L. 341, vests commissioners appointed by the courts of other States with all the powers and authority of commissioners appointed for like purposes by the District Court of Philadelphia under the laws of the Commonwealth.

Under the statute, it rests in the discretion of the court to enforce obedience to a subpoena issuing by virtue of a commission or by virtue of letters rogatory.

In the exercise of its discretion, the court will not pass upon the relevancy of the questions propounded: such matter is exclusively for the consideration of the court of the sister State from which the commission issued. Hence, a witness under subpoena issued by a commissioner sitting within the county, appointed by the court of a sister State, will be ordered by a Court of Common Pleas of Philadelphia county to answer all interrogatories propounded to him, unless his answers may tend to criminate him; but will not be ordered by the court to produce, under a subpoena duces tecum issued by the commissioner, the books of a corporation which is a stranger to the litigation and in which parties thereto have no common interest.

Petition for answers to interrogatories. C. P. No. 5, Phila. Co., March T., 1901, No. 599.

John Weaver, for petitioner; A. T. Freedley, contra.

MARTIN, P. J., April 9, 1901.—In a suit pending in the Supreme Court for the city and county of New York by William H. Bliss v. John E. Milholland, a commission was issued to Henry C. Esling, Esq., of the city of Philadelphia, authorizing him, as commissioner, to examine George J. Murray and Charles T. Harrop as witnesses in the case. The commissioner issued a subpoena duces tecum, directing these witnesses to appear before him on March 19, 1901, and testify in answer to interrogatories annexed to said commission, and demanding that said George J. Murray produce certain books and records of the Batchelor Pneumatic Tube Company. The witnesses appeared before the commissioner, accompanied by their counsel. They were sworn and the interrogatories read to them. Certain of the interrogatories they declined to answer by the advice of counsel. The books and papers called for by the subpoena were not produced.

The commissioner thereupon presented to this court a petition, under oath, setting forth the facts and circumstances, accompanied by a copy of the commission and interrogatories, and the testimony taken in pursuance thereof.

It appeared by the answers to certain of the interrogatories that George J. Murray had been secretary and treasurer of the company, and Charles T. Harrop was, at the time of the examination, a director of the company. Neither the company nor the witnesses were parties to the litigation.

The petition prayed for a rule on the witnesses to show cause why the court should not order and direct them to make full answers to the interrogatories, and on George J. Murray to produce the books and records of the Batchelor Pneumatic Tube Company.

An answer was filed, under oath, on behalf of the witnesses, setting forth, *inter alia*, that the books and records of the Batchelor Pneumatic Tube Company were not subject to the control of the witnesses for the purposes of production, but were under the control of the board of directors of the company, and also questioning the authority of the commissioner to issue a subpoena duces tecum to compel their production.

A rule to show cause having been granted, was argued by counsel.

Bliss v. Milholland.

While there is some conflict in reference to their power to procure evidence, the Act of Feb. 26, 1831, P. L. 92, empowers commissioners appointed by any court of record in this Commonwealth to issue subpoenas to compel by attachment the attendance of witnesses. The Act of April 14, 1846, P. L. 329, authorizes the appointment of commissioners by the judges of the District Court of the city and county of Philadelphia, and confers upon such appointees the right to administer oaths. The Act of March 29, 1860, P. L. 341, vests commissioners appointed by courts of other States with all the powers and authority of commissioners appointed for like purposes by the District Court of Philadelphia under the laws of this Commonwealth.

In *Mencke v. Strause*, 17 Phila. 104, on a rule to show cause why a commissioner appointed by the Supreme Court of Cook county, Illinois, should not have leave to issue an attachment against non-attending witnesses, Court of Common Pleas No. 2 ordered the attachment to issue under the authority conferred by these Acts; and the same course was pursued by the Court of Common Pleas No. 2 of Allegheny county, in a carefully considered opinion by Judge White, in *Robb's Petition*, 1 District Reps. 367, 640.

In the present case, the witnesses attended and answered certain of the interrogatories, but declined to make answer to others, under the advice of counsel, who claimed that the questions were of such a sweeping nature that a proper case was not presented for enforcing answers.

In the case of *Capt. McKenzie*, 2 Pars. Eq. Cases, 227, two of the witnesses who appeared in response to a subpoena issued under letters rogatory declined to answer certain interrogatories, acting under the advice of counsel. After argument, it was said by Judge King: "In executing this commission, it is a courtesy to be extended by all judicial tribunals, one to the other, for the purpose of aiding in the administration of justice, and peculiarly to be regarded when such an application is made by the tribunals of a sister State. . . . In the administration of justice, it perpetually happens that individuals are compelled to testify as to matters which operate against their feelings, yet such a reason never avails against the rule which makes persons liable to testify in courts of justice; and all good citizens must yield their private feelings to the good of the community." As to the relevancy of the testimony, the judge remarked that it was a matter exclusively for the decision of the New York tribunal. That he was bound to presume that the questions propounded were considered by that court as relevant; that were he to undertake to regulate his discretion by adjudging upon the relevancy or irrelevancy of the questions attached to the letters rogatory, it would make the benefit proposed to be derived from such letters, in many cases, totally illusory.

In the case of *Kotz v. Eilenberger*, 9 Pa. C. C. Reps. 341, the president judge of the Court of Common Pleas of Monroe county dismissed an application to compel the attendance of witnesses before a person named in a commission issued out of the Supreme Court of the State of New York, upon the ground that the commissioner was without power to enforce the attendance of witnesses, and there was no authority vested in the court to aid him under the Acts of April 14, 1846, and March 29, 1860; but the attention of the learned judge does not seem to have been called to the authorities above cited.

In dealing with the question of the power vested in the court, Judge White said, in *Robb's Petition*, 1 District Reps. 368: "It is a mistake to suppose that this court has no power in the premises except such as is expressly conferred by statute. Letters rogatory are not the creation of a statute. They existed before any statute on the subject. They arose from the principle of comity between friendly nations or independent States. As one nation could not compel the attendance of witnesses from another nation, justice would often fall unless

Bliss v. Milholland.

there could be some mode of getting their testimony. . . . A commission is much more simple and speedy method of obtaining testimony, and is now generally adopted in the States of our Union."

Upon a further application in the same case (1 District Reps. 640), it was said "If a question asked of a witness is manifestly improper, or if the testimony sought is, in the judgment of the commissioners, clearly incompetent or irrelevant, they should not require the witness to answer. But if they are in doubt as to its competency or relevancy, they should take the testimony, noting at the same time the objection and the grounds of it.

"The counsel for defendants have no right to instruct a witness not to answer a question. The witness has no right to refuse to answer a question sanctioned by the commissioners, except on one ground only, namely, that the answer might tend to criminate him; that is, implicate him in some criminal offence."

In the recent case of *Simpler's Petition*, 10 District Reps. 141, Judge Wiltbank refused to enforce the attendance of a clerk in a national bank, in the case of a roving commission issued from the Supreme Court of the State of New York, or to compel him to produce the books of the bank where there was nothing before the court to indicate the character of his proposed examination, or that the presence of the witness was required for anything other than to identify the books. After reviewing the authorities, he said: "We have no doubt that a judicial inquiry in another State of the Union may be advanced in this jurisdiction upon recognized principles of comity, where it is clear that the officer of the foreign State has been duly qualified, and this is made to appear to us, whether by letters rogatory or by commission, and where also the manner of treating the witness and the subject of the issue are proper. Under the statutes, it rests in the discretion of the court, upon application to enforce obedience to a subpoena issuing by virtue of a commission or by virtue of letters rogatory."

The application in that case was virtually to compel the production of books of account before the commissioner to be subjected to inspection and examination practically without restriction, and this the courts have uniformly declined to countenance.

In *Thomas v. Smith*, decided by the District Court and cited in the foregoing opinion, it was said: "Where books and papers are produced before the court and jury in a public court, there is an evident restraint upon making a bad use of them. Were we to establish the precedent asked for, every defendant who was unwilling to pay the plaintiff's demand would resort to this mode for the purpose of fishing up a defence or attack upon the plaintiff from his books and papers. There are few merchants who would be willing, with such a power hanging over them, to have all their letter-books and account-books taken to the office of a justice of the peace and then overhauled, studied and copied by their adversary or his lawyer. I can only conceive one case in which the court might safely make a rule to produce a paper in which the parties had not a common interest before a magistrate or commissioner, and that would be in the case of a deed or other paper to which the person proposed to be examined was a subscribing witness and necessary to prove it." The principle was applied by Thayer, J., in *Pennsylvania Co. v. Philadelphia, etc., R. R. Co.*, 20 Phila. 332.

In *Sollers v. Dunbar*, 1 W. N. C. 313, Court of Common Pleas No. 2 declined to compel the production of books of account before a magistrate who was to take the deposition of a going witness in aid of the trial; and in *Prestlen v. Sarmiento*, 4 W. N. C. 89, the same court discharged a rule for an attachment against witnesses who appeared before a notary at a time appointed for taking depositions in obedience to a subpoena, but declined to produce their books of account in response to a clause of *duces tecum*. The court said: "It has never been the practice to compel the production of books or papers in preliminary

Bliss v. Milholland.

proceedings before a notary or commissioner to take depositions (citing Sollers v. Dunbar, *supra*). If, in a special case, justice requires that the party have access to books and papers before trial, it should be by bill of discovery, in which the rights of both parties may be properly guarded."

And now, April 9, 1901, the above petition, together with the answers and argument of counsel, came on to be heard before this court on Saturday, March 30, 1901, it is ordered, adjudged and decreed that the witnesses who have appeared before the said commissioner and been sworn, and refused to answer interrogatories addressed to them, shall proceed to answer said interrogatories, unless the answers to said interrogatories shall criminate them or tend to criminate them; and the prayer of the petition to enforce the production before the commissioner of the books and records of the Batchelor Pneumatic Tube Company, set forth in the copy of the subpoena annexed to said petition, is refused.

Yerkes's Estate.

Decedent's estate—Petition for account—Rent derived from real estate being only asset.

Where the only moneys received by an executrix are the rents from the real estate of decedent, of which the executrix is trustee, the executrix should show, until the interest of the testatrix in the real estate be sold, what amount has been received by her from the property and the expenditures thereout. This can only be done by filing an account of the receipts and disbursements.

Petition for an account. O. C. Phila. Co., Oct. T., 1899, No. 622.

William H. Peace, for petitioner; *Charles H. Pile*, contra.

HANNA, P. J., March 2, 1901.—Upon an examination of the record, it appears petitioner is entitled to be paid out of the estate the sum of \$10 per month during his life; that he has been paid this sum by the executrix, who is also the residuary legatee, until Dec. 21, 1899, the monthly payment then due not being paid by her, nor has she since paid the same nor any sum subsequently due. The testatrix died Dec. 21, 1898, and letters testamentary were granted to the executrix Dec. 29, 1898, so that it would appear petitioner is entitled to an account. But the executrix avers that no personal property of the testatrix came into her possession, and the only asset of the estate consisted of an undivided one-third part in certain real estate, of which the respondent was and is the owner of the remaining undivided two-thirds parts; that said real estate is heavily encumbered, and she has endeavored to pay the interest on the encumbrances for her own protection as owner, and also, out of her separate estate, paid monthly payments to her brother, the petitioner, together with debts of the testatrix. As we must consider the averments of the answer to be admitted to be true, the matter coming before us on petition and answer, it is therefore conceded that the executrix has no personal estate for which to account. It furthermore appears, the only moneys received by the executrix are the proportion of rent from the real estate referred to belonging to the testatrix, viz., one-third. These rents, after payment of the taxes, water rent, interest and repairs, are to be applied to the payment of the monthly sum bequeathed to the son of the testatrix, and the residuary devisee is entitled to any balance remaining. Therefore, as to the real estate, the executrix is a trustee, and, until the interest of testatrix therein be sold, she should show what amount has been received by her from the property and the expenditures thereout. And this can be satisfactorily done only by filing an account of the receipts and disbursements. The petition is granted and decree made accordingly.

10 DIST. R.

Nathans's Estate.

Wills—Accepting benefit thereunder—Disputing validity thereof.

Where a testator, who held real estate in trust for his son, by a species of fraud, possessed himself of the same and bequeathed thereout an annuity to his son, and the substituted trustees, by a decree of court, compelled the restitution of the premises to the beneficial owners, *held* (1), the substituted trustees had, to that extent, overthrown the will, and were not in a position to claim the legacies which the will on its face seemed to show were given by way of compensation for the injury done; (2) the testator's executors, however, could not recover back the annuities which they had paid for two years with full notice of the suit to compel restitution.

Petition for review. O. C. Phila. Co., April T., 1897, No. 156.

Alex. Simpson, Jr., and John G. Johnson, for petitioner.

Eugene Raymond, for respondent.

ASHMAN, J., March 14, 1901.—The testator, after reciting that he had purchased certain premises in which the wife of his son, Harry I. Nathans, and her two children were living, directed his executors to pay the taxes and repairs thereon, and to allow his daughter-in-law (Louisa E. Nathans) to reside therein until the youngest child (Harry I. Nathans) should reach full age; and in case both children should die in their minority, then for one year after the death of the last survivor, and no longer. He bequeathed to his said son an annuity of \$250 for life, and to his grandsons (Isaac E. and Harry I. Nathans) each \$2000, to be paid to them, respectively, at their age of twenty-one years. The premises

in question had been conveyed to the testator, in trust, for the use of his son, Harry I. Nathans, for life, free from his debts, and at his death for the use of such persons as would take by way of intestacy. In 1894 the property was sold for non-payment of taxes, and title was taken by testator in his own name under a mesne conveyance by the purchaser, who had acted as his agent. In 1897 the substituted trustees, under the deed of trust, tendered to the executor the sum of \$832.40 to redeem the said property; and by decree of the Court of Common Pleas the executor was, thereupon, ordered to convey the same to the said trustees.

The executors filed their account, which was duly confirmed in 1897, and by the adjudication they were directed to pay the annuity to Harry I. Nathans and the legacies to the two grandchildren when the latter should, respectively, attain full age, and they have paid the annuity, as it has accrued, to the said annuitant. They now ask that the adjudication may be opened and the award of the said interests to them as trustees set aside, on the ground that the *cestuis que trusts* (respondents), having taken by adversary process a property devised to them by the will, are precluded from claiming the legacy given them by that instrument.

The doctrine that one who accepts a benefit under a will cannot dispute the validity of the instrument is, of course, elementary. It is based upon the assumption that the beneficiary has calculated upon a larger advantage from the will than from the law without the will, and has made his choice accordingly. The principle was carried to its logical conclusion in *Cox v. Rogers*, 77 Pa. 160, where a testator, after certain bequests to his wife, proceeded to devise to her, for life, a property which she already owned in fee. She received the legacies and was held entitled to a life-estate only in the realty. In its main feature, that case was the counterpart of this. The present testator, by a species of fraud, had possessed himself of the premises which are the subject of the devise, and the respondents compelled their restitution to the beneficial owners. They held, therefore, by a title distinctly adverse to the testator's, and to that extent they have overthrown his will. They are not in a position now to claim

Nathans's Estate.

the legacies which the will on its face seems to show were given by way of compensation for an injury which the respondents have themselves remedied. Whether the review is demandable as a matter of strict right, and not of favor, may be doubted. The petitioners were originally the stakeholders, but when certain of the *cestuis que trusts* attempted to revoke one of the testamentary dispositions, the trustees were bound, in the interests of the remaining distributees, to uphold the instrument. Before the filing of their account as executors, however, they had full notice of the suit in the Common Pleas, yet they allowed without objection an award to be made of the several legacies, and they paid during two years the annuity to one of the respondents. The moneys so paid cannot, we think, be recovered back. Otherwise, the case calls for equitable relief, and the review prayed for is accordingly granted.

Boyle's Estate.

Decedent's estate—Life-tenant—Collection of income—Prevention by executor—Costs.

A life-tenant is entitled to collect her income without interference by executor or remainderman. And an executor or remainderman who prevents a life-tenant from collecting her own income must pay all costs incurred by her in the enforcement of her right so to do.

But a real estate agent who had faithfully collected the rents and paid the same to the widow and whose interference, when the controversy arose, was passive rather than active, and in pursuance of instructions from the executor, was relieved from payment of the costs.

Order to pay and answer. O. C. Phila. Co., Oct. T., 1899, No. 317.

E. Spencer Miller, for petitioner.

James Gay Gordon, Harry A. Mackey, Wm. Gorman and John A. Gorman, for respondents.

HANNA, P. J., March 2, 1901.—We cannot reach any other conclusion than that, in equity and good conscience, the respondent executor should pay the costs incurred by the petitioner in the prosecution of her right under the will. As life-tenant, she is clearly entitled to collect her own income, and without interference by the executor *qua* executor or as devisee in remainder. And this right is so incontrovertible, the position assumed by her was finally conceded, and the injunction issued upon her complaint made permanent without dispute. This being the case, who should pay the expenses of a litigation provoked by the error and mistake of the executor? Certainly not the widow. She undoubtedly could revoke and withdraw from the further continuance of the agreement alleged to have been made by her with the executor. And it was his plain duty to comply with her request that she be permitted to collect the rents from the real estate of which she is the life-tenant. By his refusal, the enforcement of her right was begun by advice of counsel, and, although resisted, was eventually successful. The costs and expenses were incurred by reason of the position assumed by the executor, and, as he is the losing party, he cannot avoid the natural legal consequence. And we discover no exception to the general rule. But, we think, the real estate agent should be relieved from this penalty. He had faithfully collected the rents and paid the same to the widow, and when the controversy arose, his interference was passive rather than active, and in pursuance of instructions from the executor. The order to pay, as to him, is therefore vacated, but made absolute as to John Dougherty, the executor, who is accordingly ordered and directed to pay to the counsel for the petitioner, within ten days from the service of a copy of this order, the bill of costs filed, with the further costs upon her petition for the original order to pay, and any other costs which may accrue by reason of his failure to comply with this order.

10 DIST. R.

Lloyd's Estate.

Will—Family settlement—Caveat against probating will and issuing letters testamentary thereon—Interest of executor—Practice.

Where a decedent leaves an estate consisting of realty and personalty, and by his will directs the realty to be converted by the executors named therein and the entire estate to be divided among his widow and children, all of whom are *sui juris*, there being no debts of the decedent, it is competent for the widow and heirs to enter into a family settlement in which they make a wholly different distribution of the estate, and in which they elect to accept the real estate of said decedent as land, and agree that this land shall not be sold.

Such a family settlement supersedes the will and sets it aside, and one having no interest in the estate cannot interpose to prevent the family settlement from being carried out.

An executor, by virtue of prospective commissions, has not such an interest as gives him a standing to interfere with or successfully oppose such a settlement.

The practice followed in this case was (a) filing a caveat in the office of the register of wills against the granting of letters testamentary to the person named as executor in said will; (b) filing a caveat against admitting such will to probate; (c) obtaining a rule on the person named as such executor to show cause why a probate of such will should not be refused; (d) certifying the question at issue before the register of wills by such register to the Orphans' Court.

Caveat against probating of will, etc., because of family settlement. O. C. Centre Co., Jan. T., 1901.

Thomas H. Murray, for caveators; Reeder & Quigley, for proponents.

LOVE, P. J., Jan. 1, 1901.—This is a rule granted upon the executor nominated in the last will and testament of Robert Lloyd, deceased, to show cause why the said will should not be set aside and that letters testamentary shall not be issued thereon. Robert Lloyd, the testator, died Nov. 19, 1900. He made and executed his last will and testament June 17, 1898. In his said will he devised some real estate to his wife, which, after the execution of his will and prior to his death, he sold and conveyed to others and appropriated the proceeds to himself, thus defeating the said devise to his wife. He leaves an estate of which the personal property is valued at fully \$160,000, of which amount there is about \$158,000 cash in sundry banks in this and Clearfield county. He also died seized of considerable real estate which is valuable, and most of it is yielding quite a good revenue in royalties from coal mines being worked thereon. The will empowered and authorized his executors or the survivor to sell and convey his real estate, thus working equitable conversion of the same. The executors named in his will are Ida Lloyd Tyson, a daughter of testator, and C. T. Fryberger. The testator left to survive him a widow and eight children, all of whom are *sui juris* and competent to contract. They were all beneficiaries under the will, and are the only legal heirs or representatives interested in the estate.

On Dec. 1, 1900, the said widow and heirs of said decedent and testator, entered into an agreement of family settlement, and duly executed and acknowledged the same, in and by which they agreed upon a distribution of the whole of the decedent's estate, and practically elected to accept the real estate of said decedent as land, and that the same should not be sold, as provided for in the will. C. T. Fryberger was duly notified at the time of this family agreement and settlement. The settlement and basis of distribution agreed upon in writing were entirely different from the distribution provided for under the terms of the will. The said C. T. Fryberger was requested to renounce his right to take out letters by all of the parties to whom the estate was devised and who had any interest in the estate. He declined. On Dec. 3, 1900, caveat was filed in the register's office by the widow and heirs, by their attorney-in-fact, T. H. Murray, against the granting of letters testamentary to said Fryberger. Dec. 4, 1900, a caveat was filed against the admission of

Lloyd's Estate.

the will to probate, setting forth that there was no necessity therefor, that its provisions were impossible of execution and that the decedent left no debts.

Dec. 4, 1900, the affidavits of subscribing witnesses to the will were taken as to the execution of the will, but it was not probated by the register. The questions raised by the filing of the *caveats* were requested to be referred to the Orphans' Court by the widow and heirs, and certified to the court Dec. 10, 1900, by the register.

The widow and heirs, by their attorney-in-fact, presented their petition to the Orphans' Court Dec. 4, 1900, setting forth the family agreement and settlement of the entire estate made Dec. 1, 1900, and that the said *caveats* had been filed against the probate of the will and the issuing of letters testamentary thereon to said C. T. Fryberger. Also setting forth that the decedent left no debts whatever, and also that C. T. Fryberger was objectionable to the parties interested in the estate, and who were the only distributees entitled thereto. The only question raised by this proceeding is whether the family agreement and settlement made Dec. 1, 1900, supersedes and sets aside the will? If it were merely a question of removing an executor named in the will, we would have no jurisdiction until letters had been granted: See Harberger's Appeal, 98 Pa. 29.

We, however, need not discuss the evidence as to the question of C. T. Fryberger having interests adverse to those of the estate, as the question here is, is the will of the testator superseded by the family settlement and agreement of Dec. 1, 1900? The parties to said agreement are all *sui juris*, and are all the persons having any interest in the estate. They, by the agreement, have changed the distribution of the estate entirely from that provided for in the will. The real estate they accept as land. The failure of the devise of certain real estate to the widow, by reason of the testator having sold it in his lifetime and appropriated to himself the proceeds, is compensated for by the agreement, and from the evidence taken it is proven that the decedent left no debts. It is contended that there is a revenue tax that is a debt. While there may be a tax under the War Revenue Act of Congress, it is not a debt of the decedent, but a debt due from the distributees of the estate, and is not such a debt as necessitates administration. The will creates no trust. It is true it confers a power to sell real estate and distribute the proceeds, and thus works an equitable conversion thereof; but the beneficiaries have a right to elect to take as land. Now, when the decedent leaves no debts, and his estate involves practically distribution only, then the distributees are, under the will or intestate laws, the owners of the estate, and where there are no creditors having any interest therein, we are of the opinion that the beneficiaries of the estate, all being *sui juris*, have the right and power to agree among themselves to a satisfactory distribution of the estate, and a family settlement of this kind made supersedes the will, and none, without any interest in the estate, can interpose to prevent it. The prospective commissions that may be earned by an executor named in the will is not such an interest as gives him a standing to interfere or successfully oppose such a settlement. A family agreement or settlement made different from the provisions of a will supersede the will or prevail over it: Wilen's Appeal, 105 Pa. 121; Walworth v. Abel, 52 Pa. 370; Weaver v. Roth, 105 Pa. 408. "Family arrangements are the favorites of the law, and if fairly made are not to be disturbed by the parties." And if not to be disturbed by the parties, what standing has a stranger, without interest in the estate, to gainsay them or endeavor to annul them. This agreement making an entirely different distribution of the estate than that provided for by the will, and having been made by the parties *sui juris* and in whom there was a complete equity in the property, they have the right and may distribute without administration, there being no creditors or others interested in the estate. That being so, there is no will to
10 Dist. R.

Lloyd's Estate.

execute, the agreement of settlement supersedes it, and hence it is set aside by persons who have the right and power to do so and who are competent to do so. *That being so*, why should letters testamentary issue thereon? We fail to see *any good reason* for so doing or any equity therefor.

We are therefore of the opinion that the said agreement and family settlement supersedes the will and sets it aside, and that there is no occasion for the issuing of letters testamentary thereon.

It is therefore ordered, adjudged and decreed that said will be set aside and be not admitted to probate, and that no letters testamentary be issued thereon by the register to the said C. T. Fryberger. It is further ordered and decreed that the costs of this proceeding be paid out of the estate by the distributees, and that any legitimate expense incurred by said C. T. Fryberger in offering said will for probate be paid out of the estate.

From Wilbur F. Reeder, Bellefonte, Pa.

In re Retail Liquor License Sureties.

Liquor license—Sureties—Act of May 4, 1893, sect. 5, clause 9.

The ninth clause of the 5th section of the Act of May 4, 1893, P. L. 30, does not prohibit manufacturers of spirituous, vinous, malt or brewed liquors from becoming sureties on bonds for retailers.

Rules of court—Acts of Assembly—Inconsistency.

A rule of court requiring "neither of said sureties" to be manufacturers of spirituous, vinous, malt or brewed liquors is inconsistent with the Act and void.

Exceptions to bonds. Q. S. Schuylkill Co.

William Wilhelm, for exceptions; John F. Whalen and M. M. Burke, contra.

BECHTEL, P. J., Jan. 21, 1901.—In the matter of exceptions or objections to sufficiency of sureties. The disposition of the question presented by the exceptions really depends upon the interpretation of the ninth clause of the 5th section of the Act of May 4, 1893, P. L. 30, which does not change the language of the Act of 1887 in this respect. The entire 5th section is devoted to stating what the petition shall contain, and is divided into ten clauses, the ninth of which is as follows: "The names of no less than two respectable freeholders of the county where the liquor is to be sold, who will be his, her or their sureties on the bond which is required, and a statement that each of said sureties is a bona fide owner of real estate in said county, worth over and above all encumbrances the sum of \$2000, and that it would sell for that much at public sale, and that he is not engaged in the manufacture of spirituous, vinous, malt or brewed liquors." The Act of 1887 required the sureties to be of the ward or township, while the amendatory Act of 1893 allows them to be taken anywhere in the county, and the language above given really combines the two sections or gives the law as amended by the Act of 1893. The wholesale Act of June 9, 1891, P. L. 257, in the 4th section, prescribes substantially the same requisites as to petition, and contains in the tenth clause the same language found in the Acts of 1887 and 1893, above given. Under the wholesale Act, some of the requirements appear to have been dispensed with, particularly as to the third clause:

See Pittsburgh Brewing Co.'s License, 12 Pa. Superior Ct. 176, and Pittsburgh Brewing Co.'s License, 14 Pa. Superior Ct. 188. We refer to these cases, not as deciding the question presented in this case, but as tending to show the construction given to the question of the requisite of the petition. In discussing the construction of statutes, Mr. Justice Green says, in Umholtz's License, 191 Pa. 181: "Statutes are to be so construed as best to effectuate the intention of the legislature, though such construction may seem contrary to the letter." "All

vol. 10—14

In re Retail Liquor License Sureties.

laws must be executed according to their sense and meaning, which they imparted at the time of their passage." A reading of the 5th section of the Act of 1887, as amended by the Act of 1893, we think, shows conclusively that the pronoun "he," in the ninth clause, refers to the applicant, and means that the petition must say that "he" is not engaged in the manufacture of spirituous, vinous, malt or brewed liquors. In this opinion this court is unanimous, and we believe this interpretation to be in accordance with the intention, sense and meaning of the Act, the distinguishing features of the rule above given. It seems more reasonable to say, that the Act forbids the applicant to be engaged in manufacturing than that the sureties should be forbidden. To hold that "he" refers to sureties would be to treat it as plural and change "is" to are; otherwise, the natural question is, to which one of the sureties does "he" refer. Which one is it that shall not be engaged in manufacturing, and if one is forbidden, why not both. All these difficulties are avoided by simply giving to the pronoun "he" its usual and ordinary meaning, and treat it as referring to the applicant, thus forbidding him from being engaged in the manufacturing business. But it is suggested that a rule of court provides otherwise, and we are referred to the 108th rule, which copies the requisites of the petition from the Act, but omits "he" and supplies "neither of said sureties." We learn this rule does not appear to have been observed in our practice, possibly for the reason that the Act does not seem to justify it. It must be borne in mind that we cannot legislate, and if the Act does not require sureties not engaged in manufacturing, the court cannot add new requirements or impose greater burdens by its rules.

In Mercersburg's Licenses, 5 District Reps. 171, the court was requested to say when saloons should open and close, but refused for want of power: See opinion of Stewart, P. J. If we possess the power to say that sureties shall not be engaged in manufacturing, when the Act does not, then we add a new requirement, and, by virtue of the same power, could require three or four sureties, instead of two, or dispense with one, and require but one. Surely this would simply mean that we undertake to legislate rather than construe. We feel more secure while we remain within our legitimate sphere and the legislature enacts our laws.

And now, Jan. 28, 1901, for the reasons given, this court being unanimous in its conclusion, refuses to adopt the construction contended for.

From J. O. Ulrich, Tamaqua, Pa.

Reed and Amour's Nominations.

Justices of the peace—Township officers—Act of July 9, 1897, sec. 5.

For election purposes and within the meaning of section 5 of the Act of July 9, 1897, P. L. 223, justices of the peace are borough or township officers.

Objections to certificates of nomination. C. P. Northumberland Co., Feb. T., 1901, No. 234.

W. H. M. Oram, W. W. Ryon and Jefferson Shipman, for exceptants, cited Donahoe v. Johnson, 8 District Reps. 316; Com. v. Snyder, 5 District Reps. 121; Com. v. Kerr, 3 Pitts. Reps. 348; Com. v. Shindle, 19 Pa. C. C. Reps. 258; Camp-hausen's Case, 3 Pitts. Reps. 57; Com. v. Machamer, 18 Pa. C. C. Reps. 92; Articles v, VII, VIII and XIV of Constitution.

C. M. Clement and J. C. Bastress, for nominees, cited Justice's Appointment, 4 District Reps. 142; Respublica v. McClean, 4 Yeates, 399; Com. v. Gamble, 62 Pa. 343; Ringler's Nomination, 8 District Reps. 620; Wright v. Millar, 1 Lack. Legal News, 346; Com. v. Brower, 7 District Reps. 254; Bedford Monumental Works v. Dewees, 9 District Reps. 68; Reading's Constable Case, 8 Pa. C. C.

10 DIST. R.

Reed and Amour's Nominations.

Reps. 101 ; Com. v. Callen, 3 Pennyp. 39, and the Acts of May 6, 1874, P. L. 118, March 22, 1877, P. L. 12, and art. v of Constitution of 1790, and art. v, Constitution of 1874.

SAVIDGE, P. J., Feb. 7, 1901.—This controversy calls for a construction of section 5 of the Act of July 9, 1897, P. L. 223, amending the Election Act of June 10, 1893, P. L. 419.

Nomination certificates of Reed and Amour, Republican justice of the peace candidates for Mt. Carmel borough, were filed within twenty-eight days and more than eighteen days prior to the coming February election. They are objected to on the claim that the said nominees are not candidates for borough offices within the meaning of said section, and the certificates, not having been filed twenty-eight days prior to election day, are therefore void.

We have no appellate court guide. Two Common Pleas judges have passed upon the precise question. Judge Little, of Columbia county (8 District Reps. 620), holds the certificate filed in time. Judge Bechtel, of Schuylkill county (8 District Reps. 316), holds the contrary.

Three classes of certificates are provided for. Class one is for candidates for national and State offices, including judges, senators and representatives. Class two is for candidates for all other offices except township and borough offices. Class three is for township and borough offices, including election officers and school directors.

The scheme of the section is plain. State officers proper, elected by the whole people, United States officers whose duties are to the people of the nation and State, State legislative officers, judges who may exercise the functions of their offices throughout the State, certificates for these are not to be filed with the county commissioners, whose duty it is to print and distribute the ballots, for the reason that their nominations are not by counties, but by the people of the State at large, or by representative, senatorial, legislative or judicial districts—districts composed of one or more, or parts of one or more, counties. The secretary of the Commonwealth is selected as a suitable official to prepare and transmit lists, &c., of these candidates. Certificates for county officers are filed with the county commissioners because they can most conveniently prepare the lists and ballots for these. A longer time is given the secretary of the Commonwealth, because of the magnitude of the work ordinarily to be done by him. The officials of class one and class two are those to be voted for at the general election in November.

It is evident the classification was made with reference to the character of the office, the time of election and the political divisions by and for which the candidates are to be elected. Class three comprises all officials elected by and for municipal divisions of a county, namely, townships and boroughs, at the February elections. Among these are justices of the peace. For election purposes and within the meaning and intent of the section in question, justices of the peace are borough or township officers.

I cannot bring my mind to the conclusion that the legislature intended that certificates for nominees of the same primaries should or might be filed with the commissioners at different times, the more especially as no good reason can be assigned for so unnecessary a proceeding.

The case upon which Judge Bechtel bases his conclusion are those of Common Pleas judges and on questions which arose prior to the constitution of 1874. A change in the character of the office was made by that instrument. In *Com. v. Callen, 3 Pennyp. 39*, the Supreme Court affirms an opinion of Judge White, of Allegheny county, wherein it is clearly held that justices are to be considered as "belonging to the class of ward, borough or township officers, because placed

Reed and Amour's Nominations.

there by the constitution." Other reasons might be assigned and further argument indulged in did opportunity permit.

It is a satisfaction to know that this conclusion of the question will not put the opposing candidates at a disadvantage. They will stand in the Democratic column side by side with Reed and Amour in the Republican column, and the electors will be in no wise hampered in the expression of their choice at the polls.

The certificates of nomination of J. H. Reed and William Amour are adjudged sufficient, the objections are dismissed, and the commissioners are directed to act accordingly.

An exception is noted and a bill sealed for the exceptants.

Keith v. Moore.

Attachment—Act of July 12, 1842—Attachment issued after judgment and appeal therefrom entered.

The 27th section of the Act of July 12, 1842, P. L. 346, contemplates and provides for original process, and a writ of attachment cannot issue as a supplement to or after the issuing of a summons. Hence, when a judgment has been obtained in a civil suit before a justice of the peace and an appeal taken from said judgment, the justice of the peace cannot issue an attachment for the same debt under the Act.

Certiorari. C. P. Blair Co., June T., 1900, No. 162.

M. A. Young, for plaintiff; *Robert W. Smith*, for defendant.

BELL, P. J., Jan. 14, 1901.—Plaintiff, on May 24, 1900, obtained judgment in a civil suit before a justice of the peace. From said judgment defendant duly appealed. After said appeal had been taken, the same magistrate issued an attachment for the same debt under the provisions of section 27, Act of July 12, 1842, P. L. 346.

The magistrate's transcript sets forth: "Attachment in debt on a judgment not exceeding three hundred dollars (\$300). Plaintiff's demand is for two hundred and ninety-nine dollars and ninety-five cents (\$299.95), due him on a judgment obtained May 24, 1900, from which said judgment appeal has been taken."

It will be observed that this action partakes of the character of execution process, or assimilates itself to a *scire facias* on a judgment, rather than being of the nature of original process.

But said section 27 of Act of July 12, 1842, contemplates and provides for original process—an original action—and furnishes no warrant for this incongruous proceeding on a judgment appealed from.

That this is so is shown by the following remarks as to said section: It is a part of the Act abolishing imprisonment (by *capias*) for debt; the attachment can only be resorted to "when no *capias* can issue;" thus indicating that the attachment is a substitute for a *capias*, which was an original process. Again, in section 30, a hearing, as to the amount of the debt, is provided for, as in the case of a summons, and in section 34 an appeal is provided for as in a like case of summons. But how shall a magistrate again, on attachment, hear a case which he has already heard on a summons? Why should a defendant be compelled a second time to appeal from a judgment for same cause of action? I am decidedly of the opinion that the attachment provided for by said section 27 of Act of July 12, 1842, is original process, and cannot issue as a supplement to or after the issuing of a summons. It is unnecessary to consider the other assignments of error.

For the reasons above indicated, the proceedings are set aside and the judgment is reversed.

10 DIST. R.

Scott's Estate.

Guardian and ward—Society for the prevention of cruelty to children—Act of June 11, 1879.

Where a minor had been duly committed to the custody of the Society for the Prevention of Cruelty to Children under the Act of June 11, 1879, P. L. 142, and, without notice to the society and without the attention of the court being called to the fact that, under said Act, the minor had a guardian, another one was appointed, the appointment of the latter will be revoked.

Petition to revoke appointment of guardian. O. C. Phila. Co., Oct. T., 1900, No. 298.

E. J. Mingey and N. D. Miller, for petitioner.

M. L. Nicholas and H. W. Boss, for respondent.

FERGUSON, J., March 2, 1901.—The above-named minor was duly committed by a magistrate having the authority, upon sufficient cause, to the custody of the Society for the Prevention of Cruelty to Children. The Act of Assembly (June 11, 1879, P. L. 142) provides that "such society shall thereupon have all the rights of a guardian of the person of such child." Without notice to the said society, and without the attention of the court being called to the fact that, under the said Act of Assembly, the said minor had a guardian, application was made for the appointment of another one, which was granted. We think this appointment was improvidently made, not only because the child already had a guardian of its person, but because the lawful custodian of the child had no notice of the proceedings.

The appointment of Margaret Williams as guardian is therefore revoked.

Boileau's Estate.

Wills—Election by widow to take against—Laches—Absence of fraud—Ignorance of law—Petition for review.

A widow, with confessed knowledge of the value of her husband's estate, and the regular receipt of income under the will for sixteen years, cannot, without a suggestion that fraud or misrepresentation was practiced against her, be permitted to make her election to take against the will on a plea that she was not advised as to the law.

Petition for review. O. C. Phila. Co., April T., 1884, No. 502.

Edward G. McCollin and Joseph R. Rhoads, for petitioner.

W. N. Morris, Arthur E. Weil and Edward H. Weil, for respondents.

ASHMAN, J., March 14, 1901.—To reach a finality in legal proceedings is almost as essential as to see that they are righteously conducted. The statutes of limitation and the legal presumptions of payment are based upon this theory, and they have worked beneficently because they have quieted titles and prevented frauds. The hardship which has been attributed to their enforcement has generally resulted from the apathy of the complainant himself, and its remedy would work a still greater injury to others who had been innocently misled by his laches. Fraud, of course, is out of the question, because fraud vitiates all that it touches and deserves no protection.

In the class of cases to which the present petition belongs, the statute has fixed the period within which a review is demandable as of right, and has left it to the courts to determine how far outside of that limit relief may be given as a matter of favor.

The testator, against whose will the widow now seeks to claim, died in June, 1883, and the executors' account was filed in June, 1884, and audited in July,

Bollean's Estate.

1884. The will was free from all ambiguity. It gave the estate to the executors, in trust, to pay one-third of the income to the wife and two-thirds to the father and mother and the surviving parent, for life, with remainder to collaterals. Her share of income was paid, thereafter, regularly to the widow for sixteen years, and her election to take against the will was made for the first time in October, 1900, at the audit of the account which followed the death of the testator's parents. Her plea is that she was ignorant of the law, and that until 1900 no one informed her of her legal rights. She does not allege that any one misinformed her, nor that any one intentionally misled her, but simply that those who might reasonably have been expected to advise her were silent.

It is a matter of considerable moment that the testimony on this point was by no means one-sided in her favor. One witness declared that shortly after the death of the testator's father, which took place in 1889, the witness had said to the petitioner on more than one occasion that she could have taken a part of the principal to use as she pleased, instead of being confined to the income, and that she had replied that it was probably best as it was—that she might have spent the money. He was corroborated as to these conversations by his wife, who produced a letter, dated Oct. 5, 1900, from the petitioner, in which the latter, referring "to the many talks" they had had on the subject of the will, and in particular referring to an interview of 1890, wrote: "It would have made things unpleasant if I had contested the will before the father and mother died, and I—even if I had known I could." The words "and I" were crossed out, and a different turn was apparently given to the sentence.

We are willing to give the petitioner the benefit of the inference which she draws from this evidence, to wit, that at the dates of the interviews she was unapprised of her right as a widow to elect. One fact, however, she unquestionably knew—the proximate, if not the exact, value of her husband's estate. She gave more than sixty receipts for the quarterly income, which, for sixteen years, had been regularly paid to her by the trustee, and she knew, according to her own statement, that the occasional variations in these payments arose from deductions for taxes and changes of investments. On one occasion, when an evident mistake appeared in the check, she went to the trust company, in person, and had it corrected. One title to relief is, therefore, missing. She was, moreover, a woman of keen intelligence, in no sense a recluse, but, on the contrary, holding a responsible position as a teacher. Her case, then, stands in this way: For seventeen years following her husband's death she accepted, without protest, the provisions of her husband's will. In that period the trust officer of the corporation trustee, who was originally in charge of the estate, and who, according to the answer, explained to her the provisions and effect of the will, died. Her two co-life-tenants received during the balance of their lives the remaining income, and the residuary legatees were awarded vested interests in an estate of nearly \$27,000, of which two-thirds have vested in possession, and of which the petitioner claims that \$13,500 belongs absolutely to her.

It is not wholly fair to say that because the trustee has not actually distributed the fund, the parties in remainder will be put, if the petitioner prevails, precisely where they would have stood if she had made her election within a year after the testator's death. They may have hypothecated their interests; they may have based upon them contracts to whose fulfilment they are essential; for all that appears to the contrary, they may have sold them outright. But dismissing all speculation whatever as to the possible results, the conclusion is inevitable that the review can be granted, if granted at all, upon the bald allegation of ignorance of the law. There is no vestige of fraud, of misleading information, or of mistake of fact, upon which it can hang. Exactly the same length of delay, accompanied, as here, with full knowledge of the value of the

Bollean's Estate.

estate, occurred in *Bradford v. Kents*, 43 Pa. 474, and *Strong, J.*, said: "I know of no case in which it has been held that a lapse of time of more than five years after acts done, which are usually treated as indicating an election, will not be binding upon a widow and prevent her denial of an election, though the acts were done in ignorance of her rights." In *Cox v. Rogers*, 77 Pa. 160, the testator died in 1829, and the widow in 1868. She owned the land, in which the will gave her, however, only a life-interest. It was held, that having accepted a legacy under the will, her subsequent declarations that she held the land as her own and had not elected to take under the will, would not, even if she had accepted the legacy in ignorance of her right, have availed her after such lapse of time. Relief has been granted where there was suspicion of fraud, as in *Woodburn's Estate*, 138 Pa. 606; where the question was whether certain acts in *pais* done by the widow amounted to an election, as in *Anderson's Appeal*, 36 Pa. 476; and where she had not full knowledge of her husband's estate, as in *Holt's Estate*, 39 Pitts. L. J. 395. But we can find no case in Pennsylvania where, with the confessed knowledge of the value of the estate of the husband and the regular receipt of income under his will for sixteen years, and without a suggestion that fraud or misrepresentation was practiced against her, the widow, on a plea that she was not advised as to the law, has been permitted to make her election. On the contrary, we find that reviews have been refused where the delay in asserting a right was less than is here apparent, in *Bunting's Appeal*, 4 W. & S. 469; *Baggs's Appeal*, 43 Pa. 512; *Gosner's Estate*, 133 Pa. 528, and *Curran's Estate*, 9 Pa. C. C. Reps. 514.

The petition for review is dismissed.

Hall's Estate.

Decedent's estate—Creditors—Liens on real estate—Extending same.

To extend the lien of debts on a decedent's real estate there must be a proceeding at law. An award to creditors of a dividend while their liens are alive will not operate to revive them, nor entitle their holders to another dividend after the statutory period has ended.

Decedent's estate—Surcharge—Executor acting by advice of counsel.

Where an executor had reason to believe the estate was solvent, and did not unduly delay the sale of realty, and acted by advice of counsel, he will not be surcharged with payments made for its preservation.

Exceptions to adjudication. O. C. Phila. Co., July T., 1895, No. 95.

Charles E. Lex, J. M. Ridings, J. F. Lamorelle, and Horace Haverstick, for exceptants.

Alex. Simpson, Jr., contra.

ASHMAN, J., March 16, 1901.—The policy of the law in this State has been uniformly to favor heirs and to quiet the title of innocent purchasers. That its results have commended themselves to the legislative mind is shown by the statutes which have reduced, by successive stages, the duration of the lien of decedent's debts from seven to two years. These acts inflict no wrong upon creditors; they take away no remedy, and the limit of time to which they restrict the application for remedial process is ample to serve the purpose even of the most procrastinating claimant. The decision in *Kerper v. Hoch*, 1 Watts, 9, that the proceeding to extend the lien must be had by an action in a court of common law, which was followed in *Bindley's Appeal*, 69 Pa. 295, was accepted in *Bartley's Estate*, 7 District Reps. 36, as conclusive against the efficacy of an attempt to revive by a citation or by the presentation of a claim at an audit in the Orphans' Court. Under these cases, it is clear, without argument, that an

Hall's Estate.

award to creditors of a dividend while their liens are alive will not operate to revive those liens, nor entitle their holders to another dividend after the statutory period has ended. The points made by the single creditor who, in this instance, renewed his lien, were, after full consideration, overruled by the auditing judge. The widow was devisee for life of the three properties owned by the testator. She lived in one of the houses apparently against her own wishes, and only to keep it in order until it could be sold. The acting executor collected the rents of the other premises, and out of them paid the taxes, water-rent and mortgage interest. These rents, undoubtedly, belonged to the devisee, and might have been kept out of the account altogether. The executor seems to have had some reason to believe that the estate was solvent, and if he did not unduly delay the sale of the realty, of which there was no proof whatever, he ought not to be surcharged with payments made for its preservation. He acted, moreover, by advice of counsel, and as this advice was tendered in a matter which involved a question of law rather than of business judgment, he was protected by it.

The exceptions are dismissed.

Gouldey's Estate.

Decedent's estate—Investment by trustee—Depreciation in value—Liability of trustee.

A trustee must manage the trust estate with the same care, skill and prudence that he would manage his own affairs, and he is not responsible for the depreciation in value of an investment which was only made after the fullest investigation and examination.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1886, No. 156.

Peter Boyd, for exceptant; *George K. Cross*, contra.

FERGUSON, J., March 9, 1901.—The auditing judge has surcharged the accountant with a loss made upon an investment in three certain mortgages of \$2300 each on properties in the city of Camden, N. J. The question raised by the exceptions is whether the accountant acted in good faith and with the ordinary prudence that a man would in managing his own affairs. If he did so act, he ought not to be surcharged. The facts of the case are that the accountant, having the money of this estate to invest, consulted with Mr. Prosser, of the Real Estate Trust Company, who had been his counsel in this estate, as to investments. He, in turn, consulted with Mr. Hipple, the president of said company. The result was that there was sold to the accountant certain securities, among them being the three mortgages in question, upon which the loss has occurred. Mr. Hipple had himself invested in these identical mortgages as the guardian of some minors, but as his wards had arrived at full age, he had to settle their estate and realize upon his investments. He therefore had the mortgages for sale and recommended them to the accountant. Mr. Hipple testified: "I told him I had some mortgages in Camden, *some good mortgages*, that I would have to convert in settlement of minors' estate." This was in 1888. According to the testimony of the man who built the houses, the real estate assessor and experts, the houses were at that time worth enough to amply secure these mortgages. The accountant, who is a practical builder himself, made a personal examination of the properties before the mortgages were bought, and was satisfied that the investment was a good one. He thus had not only the advice of others, but his own judgment to guide him. That it was then a good investment is further evident from the fact that the interest on these mortgages was paid regularly for years. There came a time, however, when, from some cause, there was a great depreciation in the value of these

10 DIST. R.

Gouldsey's Estate.

properties and default was made in the payment of interest, and the accountant was obliged to sell them under foreclosure proceedings, and had to buy them in at the sheriff's sale. He then put them up at public sale by S. T. Freeman, auctioneer, 12th and Walnut streets, after giving notice in writing to all the parties interested of the time and place of sale. The attorney for these parties was present, and the premises were sold at a price less than the amount of the mortgages originally thereon, and thus this loss. As those interested were all *sui juris*, and as everything in connection with this sale was with full notice to them, we do not see how the accountant can be held responsible for the loss that occurred by reason of this sale, and as the original investment was made after the fullest investigation and examination, we do not see why he should be surcharged upon that account. It is no doubt unfortunate for those interested that there has been this loss, but why should it be saddled upon the trustee, who has acted with the utmost good faith and fidelity? As before stated, all that the law requires is that a trustee shall manage the estate with the same care, skill and prudence that he would manage his own affairs. If it were otherwise, few persons would dare to assume the responsibility of being a trustee in any estate and take the risk of encountering a loss from a cause absolutely beyond their control. The exceptions are sustained.

Commonwealth v. Priestly.

Criminal law—Grand jury—Bill ignored—Review.

In the absence of irregularity or fraud, the Court of Quarter Sessions has no jurisdiction to review the investigations of a grand jury, and hence cannot entertain an application to refer a bill ignored by one grand jury to the next grand jury.

Motion by prosecutor's attorney to send a bill ignored by the grand jury to the next grand jury. Q. S. Warren Co., Dec. T., 1900.

E. Mullin and J. O. Parmlee, for petitioners.

D. I. Ball and R. W. Stone, contra.

LINDSEY, P. J., Jan. 28, 1901.—A bill of indictment against the defendant for bribery was presented to the grand jury at the December sessions of the peace, and returned by them not a true bill. At the same session of court the following application was made:

"And now, Dec. 7, 1900, motion on the part of the Commonwealth to the court to set aside the finding of the grand jury in this case and send an indictment, containing the same charges and based on the same information, before the next grand jury of the county, and that the defendant be held to bail for his appearance at the next Court of Quarter Sessions to answer said charges, for the reason that the present grand jury ignored the bill after hearing the testimony of the witnesses for the prosecution, which testimony clearly made out a case against the defendant, which should be tried before a petit jury, as will appear by the affidavits of the witnesses hereto attached and made part of this motion." Signed, James O. Parmlee and Eugene Mullin, attorneys for prosecution.

In effect, this application asks the court to review the judgment of the grand jury and set aside its findings, not because of an oversight, mistake or fraud on the part of the grand jury, but "for the reason that the present grand jury ignored the bill after hearing the testimony of the witnesses for the prosecution, and which testimony clearly made out a case against the defendant which should be tried before a petit jury."

The research of the able counsel for the prosecutor did not produce any authority on the argument in support of such an application. Many authorities were cited, but none of them hold that the court would be justified in reviewing and setting aside the judgment of a grand jury when it has been deliberately exercised without any allegation of irregularity or misconduct on its part. But the contrary doctrine is held in all cases where that particular question has been under discussion. In the case of the *United States v. Farrington*, 2 Criminal Law Mag. and Repr. 525, Wallace, District Judge of the District of New York, says: "It is not the province of the court to sit in review of the investigations of a grand jury, as upon the review of a trial when error is alleged." This is in accord with the general rule that where public officers are clothed with powers not merely ministerial, with deliberative and discretionary powers, and have exercised them in good faith without irregularity or fraud, courts will not control or interfere with their action: *Com. v. Mitchell*, 82 Pa. 343; *Com. v. Perkins*, 7 Pa. 42.

It is true that, in a certain sense, the grand jury constitutes a part of the court, and in many things is subject to the control of the court; but within its jurisdiction the jurors act independently and independent of control or influences from any source whatever. The law has cast upon them the duty to indict or not to indict. They are made the judges of the evidence, the credibility of the witnesses, by what motives they are influenced and the truth of their statements. The witnesses are before them, they see and hear them testify, and, in making up a judgment, they act in a deliberative and discretionary capacity. Justice Field of the United States Supreme Court, in a charge to a grand jury in the District Court of California, said: "It is proper to keep in mind the fact that the only valid basis on which the institution of grand juries rest is, that they are an independent and impartial tribunal between the prosecutor and the accused, and it is the duty of the courts to refuse to tolerate any practice that conflicts with this independence and impartiality:" *Whart. Cr. Pl.*, § 366.

The unreported case cited by the counsel for the prosecutor, in the Court of Quarter Sessions of McKean county, Pa., is not like this. There the court recommitted the indictment back to the same grand jury. It did not set aside its findings, although it was asked to do so in the motion, but simply recommitted the indictment back to the same grand jury to allow it to change its findings if it saw fit, and the application was made by the district-attorney. In this case the application is made by private counsel for the prosecutor.

In the case of *Com. v. Allen*, 14 Pa. C. C. Reps. 546, the grand jury ignored the bill, directing the prosecutor to pay the cost. It was recommitted to the same grand jury, and, after further consideration by the grand jury, again returned not a true bill, directing the prosecutor to pay the costs. Private counsel then asked the court to recommit the bill to a subsequent grand jury or to direct a new bill to be sent up on the ground of alleged new testimony. This the court refused to do.

Counsel in this case do not even allege new evidence. They present affidavits of three witnesses as to what they swore to before the grand jury, and call the attention of the court to the names of the witnesses written on the back of the indictment to show that they were all who were before the grand jury, and then says: "Which testimony clearly made out a case against the defendant which should be tried before a petit jury." It is not for them to say that a case is made out against the defendant, nor is that for the court to say. That duty is lodged with the grand jury, acting under the sanctity of an oath, to diligently inquire and a true presentment made.

The defendant is charged with a grave crime, one that deeply concerns the public welfare. The purity of elections and absolute freedom of suffrage must

10 DIST. R.

Commonwealth v. Priestly.

be preserved if we would maintain and perpetuate pure government. And this court will not hesitate to use its full power within the prescribed forms of law to bring to justice any violator of the laws which the legislature, in its wisdom, has provided to protect the purity of the ballot. But we cannot consent to interfere with the prerogative which the law has cast upon a tribunal without any allegation of irregularity, oversight, mistakes or fraud. To do so would make the court the tribunal to indict as well as the tribunal to try the accused.

There is another view which this application presents. In the form in which it is made, it spreads before the court in the form of *ex parte* affidavits, in advance of a trial, the evidence against the accused, and all the evidence relied on for conviction. The judge who tries the accused should hear the evidence from the lips of the witnesses, under the sanctity of an oath duly administered, given face to face with the accused, and its truth and accuracy tested by cross-examination. This is the only form in which the evidence should be disclosed to the judge and jury, whose duty it is to try the guilt or innocence of the accused. We, therefore, refused, when the application was made, to allow the affidavits to be read in our hearing, and we have not read them since, inasmuch as it may yet become our duty to try the defendant.

The motion is refused, and the clerk is directed to detach the affidavits from *the motion* and return them to the counsel, and to file the motion, together with this opinion.

From Watson D. Hinckley, Warren, Pa.

Hotchkiss & Bro. v. Pinney.

Attachment—Acts of July 12, 1842, and March 17, 1869—Construction—Practice—Service—Question of fraud.

In an attachment under the Act of July 12, 1842, P. L. 339, it is the duty of the officer serving the writ to take the goods into his possession, under the 29th section of the Act, and, upon a failure to do so, he is responsible to the plaintiff in the suit; but, under the 28th section, possession by the officer is not essential to the validity of the service.

Where the debt is admitted, but the fraud denied, the proper way to raise the question is by a plea in abatement, and not a motion to dissolve. The decision of the justice of the peace before whom the action was brought is not final on the question of fraud, but the defendant is entitled to have it determined by the court, on appeal, as an element essential to the jurisdiction.

Attachments being purely statutory, the provisions of the Acts under which they issue must be strictly construed.

Rule to show cause why the attachment should not be dissolved. C. P. Crawford Co., Nov. T., 1900, No. 31.

Thomas Roddy, for plaintiffs; Thomas J. Prather, for defendant.

THOMAS, P. J., Jan. 28, 1901.—This is an attachment under Act of July 12, 1842, P. L. 339, instituted before James Kepler, J. P., on the application of one of the plaintiffs, and upon an affidavit acknowledged to be sufficient for the purpose.

The constable in whose hands the writ was placed made the following return: "10 o'clock A. M., Meadville, Pa., Sept. 17, 1900, by virtue of the above writ, I have this day attached the following goods and chattels as the property of the defendant therein named, to wit"—enumerating the articles—"at the same time I delivered to the defendant, S. S. Pinney, a true copy of the original attachment and an inventory of the goods attached."

After hearing had, the justice, Sept. 21, 1900, rendered judgment for the plaintiffs and against the defendant in the sum of \$230.77, from which said judgment the defendant appealed to this court, and statement of claim having been duly filed, the defendant, upon filing an affidavit denying all the material

avermments of plaintiffs' claim as to the secretion and disposition of her property with intent to defraud creditors, and as to all fraud on her part in reference thereto, procured this rule.

Defendant alleges that the rule should be made absolute for two reasons: 1. That from the constable's return it appears, and indeed it was acknowledged upon argument, that he did not take the attached property into his possession, or require the giving of a bond by defendant, as is required by section 29 of the Act of 1842, and, consequently, the justice did not acquire jurisdiction over the same. 2. Because of the fact that all of the material averments of plaintiffs' statement of claim, as well as of the affidavit filed before the justice, as to fraud on the part of defendant, having been denied by the affidavit of defendant, the burden of showing fraud to the court is on plaintiffs, and upon their failure so to do, the court has the power and authority and should dissolve the attachment.

As to the first proposition, defendant relies upon *Wolbert v. Fackler*, 32 Pa. 452, and *Pennsylvania R. R. Co. v. Pennock*, 51 Pa. 244, the former of which cases was under the Act of 1842, but it did not appear that any goods were actually seized or attached, as provided by section 28 of said Act.

The second of these was an attachment under the Act of June 13, 1836, requiring a different mode of service from that under the Act of 1842, but which was not complied with.

We think that the question is ruled by the case of *Dreisbach v. Mechanics' National Bank*, 113 Pa. 554, which was an attachment under the Act of March 17, 1869, P. L. 8, and the provisions of which are very similar to those of the Act of 1842, and especially is this true as to the provisions regarding the service of the writ. In that case, Mr. Justice Green says: "The second section of the Act is the only one which makes provision as to the manner and character of the service. By the third section it is made the duty of the officer serving the attachment to take the property into his possession when the same is capable of manual seizure. But the performance of this duty is not made a requisite to the validity of the service. It is not a part of the service, and the second section, in directing the manner of service, enjoins no duty of taking possession."

This is equally applicable to the case in hand, as sections 28 and 29 of the Act of 1842 are, in effect, the same as sections 2 and 3 of the Act of 1869. The service was valid and sufficient to create a lien upon the goods, and if the officer has failed to perform a duty enjoined by law, he is responsible therefor to the person affected thereby, but the defendant ought not to be heard to complain of the service because of the fact that the constable left her in full possession and control of the goods.

The second proposition is much more difficult, and the proper practice to pursue when, upon appeal, the debt is admitted, but the fraud denied, is less certain.

Under the Act of 1869 it is well settled that the only way to raise such a question and to relieve the goods from the lien of the attachment is by motion to dissolve, which must be disposed of by the court, and cannot, subsequently, be raised before a jury in case of trial: *Wetherald v. Shupe*, 109 Pa. 389; *Walls v. Campbell*, 125 Pa. 346; *Com. v. Klein*, 13 Pa. Superior Ct. 528.

But this is a remedy provided for by section 6 of said Act. The Act of 1842 makes no such provision, and, inasmuch as the question of attachments is a purely statutory one, we are of opinion that the provisions of the Acts under which they issue must be strictly construed.

The right of appeal is given by statute; but we do not understand that when the proceedings are brought into this court upon appeal we are governed by the Act of 1869, which is similar in purpose, but enacted with special reference to suits instituted in the Court of Common Pleas.

DISTRICT REPORTS.

Hotchkiss & Bro. v. Pinney.

Defendant maintains that if she is denied this remedy she has no mean having the question of fraud determined, and the lien on the goods is effect by the action of the justice whose court is not a court of record, and who have determined the question upon wholly incompetent testimony.

The plaintiff maintains that the action of the justice upon the question of fraud is final, and if the defendant is aggrieved, her remedy is upon the bond. We cannot consent to this, as the bond does not provide for meeting such contingencies, and, by giving the right of appeal, we believe the right to have an element necessary to maintain the action, and especially the question of original jurisdiction of the justice, even though the necessary facts to oust same do not appear of record, may be considered and determined in this court.

We think, therefore, that defendant is not without her remedy to have the question she raises adjudicated.

If there was no fraud on the part of defendant, as she maintains, the justice did not have jurisdiction, as the suit was instituted under the Act of 1842, and fraud is one of the necessary ingredients to sustain the action and give jurisdiction thereunder. And where lack of jurisdiction is not apparent upon record, the question is properly raised by a plea in abatement.

It has been held that, in attachments, defendant may plead in abatement residence, where that is a necessary element to authorize such a writ: *Bate v. Jenkins*, 1 Ill. 411; *Middleton v. White*, 5 W. Va. 572; and in *Utz v. Ralph Kulp*, 375, it was held that "if defendant, in proceedings under Act of July 1842, P. L. 339, relative to attachments on the ground of fraud, can traverse in any way the allegations contained in plaintiff's affidavit, it must be by plea in abatement."

Being of opinion that we have not the power to hear and determine this question of fact on a motion to dissolve, nor that such a motion is, in effect, a plea in abatement which we have the right to determine, the rule must be discharged. And now, Jan. 25, 1901, the rule is hereby discharged.

From Otto Kohler, Meadville, Pa.

Dinner v. McAndrews.

Landlord and tenant—Distress—Clause in lease.

Where a lease provided, "and it is further agreed that should the said lessee remove goods or any part thereof from the said premises, or in any manner attempt to vacate the premises during the said term or any renewal thereof, then, in that case, the whole rent of the unexpired part of the term shall at once become due and collectible by distress or otherwise, and said lessee's goods shall, for thirty days after such removal from the premises wherever found, be liable to distress and sale for such rent in arrear," a distress of goods which had been removed from the leased premises is valid.

The remedy by distress for rent, provided by common law and statute, may be enlarged by the contract of the parties, either as to the property to be distrained or the time of distraining.

Rule for a new trial. C. P. Lackawanna Co., March T., 1898, No. 640.

A. A. Vosburg and C. W. Dawson, for plaintiff.

W. S. Hulstander and H. S. Alworth, for defendant.

ARCHBALD, P. J., Feb. 11, 1901.—The jury wanted to find for the defendant and the first verdict which they brought in was in her favor for about \$60 in arrear. But as they had also found specially in response to the first question submitted to them, that the goods distrained were not on the premises at the time, the court instructed them that, in that case, the verdict must be the other way, and they thereupon retired and came back with a verdict for the plaintiff for six cents damages. The validity of this instruction is now called in question.

Dinner v. McAndrews.

As the case was tried, there could be no question with regard to it. But, since the trial, the defendant's counsel have discovered a clause in the lease which makes a very material difference. "And it is further agreed," says that instrument, "that should the said lessee remove his goods or any part thereof from the said premises, or in any manner attempt to vacate the premises during the said term or any renewal thereof, then, in that case, the whole rent for the unexpired part of the term shall at once become due and collectible by distress or otherwise; and said lessee's goods shall, for thirty days after such removal from the premises, wherever found, be liable to distress and sale for such rent in arrear." It was by virtue of the first part of this clause, on account of the attempted removal of the tenant, that the distress was made, and it is somewhat remarkable that the other provision immediately following it escaped notice. We might well refuse to consider it at this time, on the ground that attention was not called to it at the trial; but as the jury felt, as they did, that the merits of the case were with the defendant, and it would not have gone against her had this provision of the lease been observed, we think she ought not to suffer because it was not.

The only point, then, is whether it can be enforced. The plaintiff argues that distress for rent is a common law remedy which cannot be enlarged by contract, and that the provision relied upon, allowing it off of the premises, is therefore invalid. But it was decided to the contrary in *Gold v. Gleason*, 43 Pitts. L. J. 10, and the reasons on which the decision is based commend themselves to us. As is there pointed out, the Supreme Court, in *Schenley's Appeal*, 70 Pa. 98, sustained the distraining of a building located on the premises, the lease providing that all buildings and improvements should be so liable, the same as personal property. The right there depended upon the agreement, there being no such thing as the distress of a building for rent, either at common law or by statute. This effectually disposes, therefore, of the present argument. Nor does the case of *Owens v. Shovlin*, 116 Pa. 371, on which some reliance is placed, lend any countenance to it. There was nothing in that instance to sustain the right to distrain on the goods after their removal from the premises; but the court recognizes that had there been an agreement that any removal should be treated as clandestine or fraudulent, it could have been enforced under the statute which allows a distress in such instances; that is to say, the parties, by such a covenant, could have brought the case within the statute with regard to removals of that character, even though it would not have been so without it.

There is another point also to be observed. In order to give effect to the provision of the lease, which makes the whole rent come due upon the removal of the goods from the premises, it is necessary that the landlord should have the right to follow and distrain them, for not until they have been removed has he the right to distrain, and if, in the same moment, it is gone, the one virtually nullifies the other and makes the whole covenant of no effect. It is true that this would not apply to an attempt to vacate or remove, but that does not weaken the force of the argument, so far as an actual removal is concerned.

It is also to be noted that the right to follow and distrain is not indefinite and unlimited. The same as in a clandestine removal under the statute, it must be exercised, according to the provision of the lease before us, within thirty days in order to be available. What the result would be if there were no such limit, and the right were not exercised within a reasonable time, or what would be a reasonable time within which to do so, we are not now called upon to decide.

The rule is made absolute and a new trial awarded.

From William A. Wilcox, Scranton, Pa.

Bollinger's Estate.

Decedents' estates—Executors—Moneys belonging to estate—Depositing same in individual account—Interest received thereon—Surcharge.

An executor who deposits the moneys of the estate in his individual account in a trust company should be charged with the rate of interest allowed him by the trust company. When that item is omitted from the account, it forms a proper subject of surcharge.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 318.

Matthew Dittmann, for accountant.

Gustavus Remak, Jr., for residuary legatees.

HANNA, P. J., March 30, 1901.—The only exception filed by accountant to be considered, the others being withdrawn at the argument, is that which relates to the award by the auditing judge of the residue of the estate, after the payment of certain pecuniary legacies, to the children of a brother and sister of testator without legal evidence that they are the children of the brother and sister. It is to be noticed that a legacy is given and also awarded to the parents of the children, and no objection is made thereto. We think the exception is taken under a misapprehension or forgetfulness of what transpired before the auditing judge. The brother and sister of testator and three of their children of full age were represented by counsel, and as all are non-resident, he offered to produce the proper proofs, then in his possession, of the identity of the legatees and those entitled as residuary legatees. But this was conceded and waived by counsel for accountant, as understood by the auditing judge, and distribution was made, in accordance with the will, to the legatees named therein, and to those shown to be residuary legatees by the petition made and presented in pursuance of the rule and practice of the court. The awards are properly made and fully protect the accountant. We therefore see no reason to disturb the same, and the exception thereto is therefore dismissed. As the executor admitted he deposited the moneys of the estate in his individual account in a trust company, and should be charged with the rate of interest allowed him by the trust company, namely, two per cent., and as this was omitted from the account, it forms a proper subject of surcharge. The exception filed by the residuary legatees is accordingly sustained. And, after a calculation of interest upon the balance due the estate, and making allowance for payments by the executor, the sum of \$65 is found to be a reasonable and proper sum with which the executor is to be charged. This is accordingly added to the balance for distribution; and the pecuniary legatees being entitled to interest to the date of payment, it becomes necessary to restate the schedule of distribution. This will be done in a final decree, to be prepared by counsel in accordance herewith.

McDowell's Estate.

Trustees—Insolvency—Entering security—Act of May 1, 1861.

The only discretion given to the court by the Act of May 1, 1861, P. L. 680, relating to the entering of security by executors, administrators and trustees, is with regard to the immediate removal of the fiduciary. Where the trustee's insolvency is admitted, the prayer of the petition, that security be ordered to be entered, must be granted.

Petition for security. O. C. Phila. Co., April T., 1880, No. 97.

A. J. Wilkinson, for petitioner; *F. H. Thole* and *W. W. Ker*, for respondent.

PENROSE, J., March 30, 1901.—Whether the liability of the respondent for the amount awarded by the adjudication of the account of the executors, to be held

McDowell's Estate.

in trust for the purposes declared by the will of the testatrix, can be enforced by process applicable to trustees in general, is a question, not now arising, to be determined when the balance with which he is chargeable has been ascertained by an adjudication of an account filed by him as trustee. The present proceeding is under the Acts of Assembly which provide for the entry of security in case of the insolvency of fiduciaries.

The Act of March 29, 1832, P. L. 195, related merely to executors, administrators, or guardians, as to whom provision was made for the entry of security whenever it was made to appear upon the petition of any person in interest that the executor, administrator, or guardian, was insolvent or likely to prove insolvent, &c., &c., &c. The Act of May 1, 1861, P. L. 680, added trustees to the class embraced in the former Act. It provides that "whenever it shall be made to appear to the proper court having jurisdiction of any executor, administrator, . . . or other trustee, on the oath or affirmation of any person interested, that such . . . trustee . . . is or is likely to prove insolvent . . . it shall and may be lawful . . . to issue a citation to such . . . trustee, requiring him to . . . answer the charge so preferred as aforesaid. . . . And if on the hearing the said court . . . shall be satisfied of the truth of the matter charged, the said court . . . may, in their discretion, instead of requiring the security provided for in the 22nd section of the Act of . . . March 29, 1832, vacate the letters . . . or commission and remove such . . . trustee," &c., &c., &c.

The only discretion given to the court by this Act is with regard to the immediate removal of the fiduciary. It has no right to refuse the demand for security if "satisfied of the truth of the matter charged," and here the insolvency is admitted. There is no allegation that the exigency is such as to require the removal, in the first instance, of the respondent, but it is asked that he should be required to enter security. It is, therefore, ordered that security in the sum of \$7500 be entered by the respondent, in accordance with the prayer of the petition, within thirty days from the filing of this opinion; otherwise, that he be removed from his office as trustee under the will of the testatrix, without prejudice to the rights of the respondent under proceedings to enforce payment of the balance found due upon the settlement of his account as such trustee.

Lusch's Estate.

Partition—Will.

Where a petition is presented praying for partition of real estate, alleging that the decedent died intestate, and, subsequently, a will is discovered, the proceedings will not be set aside when the heirs take under the will the same estate they would have taken had decedent died intestate.

Orphans' Court—Act of April 13, 1840.

Under the Act of April 13, 1840, § 4, P. L. 320, the Orphans' Court has jurisdiction to award an inquest in partition when the decedent dies leaving a will.

Rule to quash. O. C. Schuykill Co.

H. B. Graeff, for rule; *J. O. Ulrich*, contra.

DUNN, P. J., April 1, 1901.—The decedent died on Dec. 22, 1882, unmarried (her husband having died on March 16, 1882), leaving to survive her, as her only heirs, two sons, Nicholas and Isadore. By her last will and testament, dated Feb. 10, 1872, duly probated on Sept. 17, 1900, she bequeathed and devised to her
10 DIST. R.

Lusch's Estate.

husband all her personal property and real estate, consisting of one house and lot in the borough of Tamaqua, said county, during his natural life; and after his death, the said real estate and personal property to be equally divided between her two sons, the said Nicholas and Isadore.

Isadore Lusch died on March 24, 1897, intestate, and unmarried, leaving him to survive, as his only heirs, three children—George I. Lusch, Gertrude (intermarried with one Deener) and William Lusch.

Nicholas Lusch died on June 30, 1900, intestate, leaving him to survive his widow, Mary Lusch, and three children—Irene (intermarried with Thomas Oliver), Harry Lusch, and Annie Lusch, as his only heirs.

On Aug. 20, 1900, Gertrude Deener, not knowing of the existence of the last will and testament of decedent, presented her petition to this court, alleging that Mary Ann Lusch, the decedent, had died intestate, and praying for an *inquest in partition* of her real estate. These proceedings had reached the stage of ordering a sale of the premises, when, on March 18, 1901, the rule above referred to was granted, on the ground, as alleged in the petition for the rule, that the real estate described in the petition for partition "is not the estate of said Mary Ann Lusch, but is the estate of Nicholas Lusch and Isadore Lusch, both of whom are now deceased."

Under the will of testatrix, her real estate vested in her sons Isadore and Nicholas as tenants in common, and had she died intestate they would have inherited her real estate as tenants in common. Both having died seized and intestate, without having made partition, an undivided one-half interest in said *real estate vested* in the heirs of Isadore Lusch as tenants in common, and the *other undivided* half-interest vested in the heirs of Nicholas Lusch as tenants in common, subject to the dower-interest of Mary Lusch, his widow.

Under the Act of March 29, 1832, § 36, P. L. 201, this court has power, on the application of the widow or any lineal descendant of the decedent having an interest in his or her real estate, to award an inquest to make partition of such real estate. It will hardly be contended that the Orphans' Court would not have jurisdiction, under this Act, to award the inquest in this case to make partition of the real estate described in the partition, if Mary Ann Lusch had died intestate.

Isadore and Nicholas Lusch, the devisees under the will, took the same estate in the real estate of testatrix as they would have taken under the intestate laws had she died intestate. They, therefore, took title by descent, and not by purchase: *Kinney v. Glasgow et al.*, 53 Pa. 141.

Do the facts that the decedent left a will, and that the petition alleges that she died intestate, deprive the court of jurisdiction? Had the petitioner known of the existence of the will before the partition proceedings had been instituted, this court would have had power, under the Act of April 13, 1840, § 4, P. L. 320, to award an inquest to make partition.

The only ground left for asking the proceedings to be quashed is that the petition alleges that Mary Ann Lusch "died intestate." Even if this mistake were material to the legality of the partition proceedings, it could be corrected by amendment: *Wistar's Appeal*, 105 Pa. 390.

Now, April 1, 1901, the petition of Henry Lusch, and the rule granted thereon to show cause why the petition in partition and all proceedings thereon should not be quashed, are hereby dismissed, at the costs of said Henry Lusch.

Horne's Estate.

Partition—Setting aside return.

The court will set aside the return of an inquest in partition where the valuations are grossly inadequate, or so low as to amount to unfairness.

Exceptions to return—Right of lien creditors and administrators to file same.

Although, in partition, no one not entitled to take or bid for a purpart has any standing to object to the proceeding, and although every one who gives credit to the owner of land subject to partition and acquires a lien thereon is liable to have his lien divested by partition proceedings of which he may have no notice, yet such lien creditor is entitled to be heard on the question of valuation and may file exceptions to the return of the inquest.

Query, whether the administrator of one of the heirs has such an interest in the estate as will entitle him to file exceptions to the return of the inquest.

Exceptions to return of inquest in partition. O. C. Delaware Co.

George E. Darlington, Garrett E. Smedley and Benj. C. Potts, for exceptions.

W. Roger Fronefeld, contra.

JOHNSON, P. J., Dec. 29, 1900.—This is a proceeding for the partition of lands. On the petition of one of the heirs, an inquest was awarded to make partition. The premises consists of about twenty acres of land in the township of Darby. The inquest made return that they had divided the lands into five tracts, and appraised No. 1 at \$1986.87; No. 2 at \$1685; No. 3 at \$1226.74; No. 4 at \$1277.25; No. 5 at \$2117.60.

The administrator of one of the heirs filed objections to the return of the inquest, on the ground that the valuations were grossly inadequate, alleging that the share of Adella, one of the heirs, now deceased, and of which estate he is the administrator, was encumbered by mortgages and by a judgment against him as administrator for burial expenses of his decedent; that if the appraisal was confirmed as made, there would not be sufficient funds realized from the land to pay said funeral expenses, but that if the lands were fairly appraised there would be sufficient to pay.

Objection was made by counsel for the partition proceedings to the court taking cognizance of this exception or petition, on the ground that the administrator had no interest in the matter because in any distribution the funds would go to the lien creditor and not to the administrator, and that a lien creditor was not entitled to notice of the proceedings in partition, was not entitled to bid for or take any purpart, and therefore he was not entitled to be heard on such an application as this.

I am not altogether sure that an administrator does not have such an interest in the estate as will entitle him to be heard on such an application as this, but am satisfied that a lien creditor may have; and as the court may, in its discretion, extend the time for filing exceptions so as to give a creditor the opportunity to do so, we will give the judgment creditor, W. W. James, leave to join with the administrator in the exceptions filed, and, that there may be no delay, dispose of the matter as though the creditor had so joined.

Although no case has been pointed out where a creditor has been successfully heard in such an application, and though the cases relating to the subject or partition are full of declarations that no one not entitled to take or bid for a purpart has any standing to object to partition, and though every man who gives credit to the owner of land subject to partition and acquires a lien thereon is liable to have his lien divested by a partition proceeding of which he may have no notice, I am of the opinion that he is entitled to be heard upon the question of valuation.

10 DIST. R.

DISTRICT REPORTS.

Horne's Estate.

Slight inadequacy of valuation is not enough to move **t** but if the valuations are grossly inadequate, or so low as **ness**, the return should be set aside. To hold otherwise wo

The only question then is, was this appraisalment so l
unfairness?

No. 1 tract contains 4 acres 154 perches, valued at \$1986
tains 4 acres and 34 perches, valued at \$1685; No. 3 tract
15.33 perches, valued at \$1228.74; No. 4 tract contains 3 ac
valued at \$1277.25; No. 5 contains a little over 3 acres, val
latter tract containing buildings worth from \$1500 to \$2000.

The exceptant called three witnesses, all men of experie
who are familiar with the value of property in that neig
say that, in their judgment, in a conservative estimate, No
\$3000, No. 2 is worth at least \$2500, No. 3 is worth at least
at least \$2000, No. 5 is worth at least \$2500.

In confirmation of their judgment, they say that, within
of land adjoining this, of 60 or 70 acres, sold for \$850 or \$87
tract of two acres in the near neighborhood, for \$1000 per ac

Witnesses stated that one of the heirs to this property sta
had recently an offer of \$800 an acre for all of his land.
uncontradicted.

The difference between the valuation returned by the in
as shown by this evidence is too great, and leads me to conc
tion returned by the inquest is so low as to amount to unfair
set aside and a new inquest awarded.

Commonwealth v. O'Neill.

Crime—Accessory after fact—Act of March 31, 1860.

Receiving stolen property, knowing it to be stolen, is a compl
distinct from the larceny of the same property. Hence, one indicted
stolen property is not an accessory after the fact to the larceny within
of March 31, 1860, § 45, P. L. 427, by which it is enacted that "the offen
the fact may be inquired of, tried, determined and punished by any
jurisdiction to try the principal felon in the same manner as if the
such persons shall have become accessory had been committed at
principal felony," and can only be tried within the jurisdiction in
committed.

It seems, however, that had the defendant been indicted as access
larceny, the case would have fallen within the purview of the Act.

Receiving stolen goods. Motion in arrest of judgment.
Aug. Sess., 1900, Nos. 165-71.

J. W. Brown, for motion; W. T. Brown, District-Attorney

LANDIS, J., Jan. 19, 1901.—The facts of this case, as ascert
are very few. John S. McCleary was arrested and committed
a number of horses and wagons and harness from sundry
the eastern portion of this county. Upon being indicted
entered pleas of guilty on all the charges made against him.
was taken by the thief to the city of Philadelphia and pla
of Paul O'Neill, the present defendant. O'Neill never was v
of Lancaster county, and what he did was to receive th
delphia. He was there arrested. Six indictments were f

this county for receiving stolen goods, and he was convicted upon all of them. Was he properly triable within this jurisdiction? This is the question which presents itself for our solution.

By the Act of March 31, 1860, § 45, P. L. 427, it is enacted that "the offences of an accessory after the fact may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon in the same manner as if the act by reason of which such persons shall have become accessory had been committed at the same place as the principal felony." Statutes of this character passed by other States have been declared constitutional; but considering this Act as not offensive to our constitution, is one indicted for receiving stolen goods an accessory after the fact within the purview of the above-mentioned Act of Assembly? In *Com. v. Laudermitch*, 1 District Reps. 460, Judge McPherson, in a similar case, instructed the jury that he was, and that the prisoner might be convicted in Lebanon county, although the articles were received by him in the county of Dauphin. But while I have a sincere respect for the opinions of this learned judge, I cannot clearly see upon what basis his judgment rests, and no authority is cited by him except the above-quoted statute to sustain it.

Even at common law the receiving of stolen goods was only a misdemeanor, and it was a substantive offence. The offender was made an accessory to the theft by statute 3 and 4 W. and M., chap. 9, and 5 Anne, chap. 31, and punished as such. The first remedy, however, was not taken away, but the prosecutor then had two methods in his choice, either to punish the receivers for the misdemeanor immediately before the thief was taken, or to wait until the felon was convicted, and then punish them as accessories to the felony. But it was provided by the same statutes that he should only make use of one and not both of these methods of punishment: 4 Blackstone's Commentaries, 132. The same learned author, discussing accessories after the fact, says: "To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions. It was, therefore, at common law a mere misdemeanor, and made not the receiver accessory to the theft:" 4 Blackstone's Commentaries, 38.

The first law upon our statute books relating to this crime is the Act of May 31, 1718, 1 Sm. Laws, 116. The 14th section of this Act provided for the punishment of accessories both before and after the fact in cases of felony, the punishment of which was death. Sections 15 and 16 declared: "That if any person or persons shall receive, harbor or conceal any of the said robbers or burglars, felons or thieves, or shall receive or buy any goods or chattels that shall have been feloniously taken or stolen by any such robbers or burglars, felons or thieves, knowing the same to be stolen, and being so afterwards convicted of either of the said offences, if he or they pray to have the benefit of this Act in lieu of clergy, judgment of death shall not be given against them upon such conviction, nor execution awarded upon any outlawry for such offence, but they shall be burned in their hands, as hereinafter directed, provided, always, that if such principal robber, burglar, felon or thief cannot be taken so as to be prosecuted and convicted for any such offence, nevertheless, it shall be lawful to prosecute and punish every such person or persons buying or receiving any goods stolen by any such principal, knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, or other corporal punishment, as the court shall think fit to inflict, although the principal felon be not before convicted of the said felony. Such punishment shall exempt the offender from being punished as accessory, if such principal felon shall afterwards be taken and convicted." It will be observed that the same common law distinction is made between accessories and receivers, the first class being punished by death and the latter by burning, fine, imprisonment, etc.

Then came the Act of April 11, 1825, P. L. 165, which provided that "in all cases whatsoever where any goods or chattels or other personal property shall have been feloniously taken or stolen by any burglars or robbers, felons or thieves, any person who shall buy or receive any such goods or chattels or other personal property, knowing the same to have been stolen, shall be deemed guilty of, and may be prosecuted for, a misdemeanor, although the principal felon or felons be not before convicted of the said felony, and whether he, she or they is or are amenable to justice or not, and whether the person or persons actually committing such felony shall not be before convicted. Such receiver or receivers shall be exempt from being punished as accessory or accessories if such principal felon or felons shall be afterwards convicted." The 3rd section of this Act expressly applies to accessories after the fact to a felony in buying or receiving stolen goods, etc., and their punishment.

Sections 109 and 110 of the Act of March 31, 1860, are substantially re-enactments of the law as it existed prior thereto; but a comparison will show that the same distinction between the two classes of offenders seems ever to have been in the legislative eye, or at least the same two independent methods of punishment were yet retained.

The term "accessories" particularly applies to that large class who receive, relieve, comfort and assist the felon; and while the receiving of the stolen goods might easily fall within this line, yet the legislature had a perfect right to make a separate and distinct offence, or to give the choice to the prosecutor of two methods of prosecution. If the prosecutor saw fit to pursue one of these methods, he should be excluded from having it interpreted so as to embrace the other, even if such a construction might afterwards appear to him to be most beneficial.

There are very few cases involving this precise question. Most of the States have legislation regulating the jurisdiction, and are therefore governed by such legislation. I, however, have found the case of Allison v. Com., 83 Ky. 255, in which the same point seems to have been involved. The evidence was that a horse had been stolen in Jessamine county, and that it was the next day in the possession of the defendant, in Clark county, when and where he sold it. The defendant never was in Jessamine county. The judge who delivered the opinion of the court said: "In our opinion, the sole inquiry is, whether receiving stolen property, knowing it to be stolen, is a substantive offence, distinct from larceny of the same property; for if it is, then only the Circuit Court held in the county where it may be committed can take jurisdiction. It would seem the general statutes furnish a satisfactory answer to this inquiry, for while the same punishment is prescribed for two offences, they are therein recognized and treated as separate and independent. Receiving stolen property, knowing it to be stolen, is itself a complete offence. It is unnecessary, in order to convict of that offence, that the guilt of the person who stole the property shall be first established, nor his name be known or even stated in the indictment, or to prove the accused to be in any way connected with the larceny. The gist of the offence consists in the guilty knowledge of the property having been stolen:" See also 20 Am. & Eng. Ency. of Law (1st ed.), 452.

I think that in like manner our statutes have given us a satisfactory answer. Under the evidence in this case, the defendant, if he had been indicted as accessory after the fact, might have been prosecuted and convicted in this county. But the Commonwealth saw fit to indict him for the receiving of stolen goods. That crime was committed in the county of Philadelphia, and there it should be answered for.

After a careful examination of the law, I am convinced that the defendant was improperly convicted in this jurisdiction. He, however, should not be

discharged, but should be held under a detainer and taken to the county of Philadelphia and tried there for his offences. We therefore sustain the motion in arrest of judgment, and do order and direct that, so far as the indictments found in this county against him are concerned, the said defendant go without day. Motion sustained.

From George Ross Eshleman, Lancaster, Pa.

Commonwealth v. Hudusko.

Constitutional law—Act of May 27, 1897—Original and amendatory Act, under sec. 3, art. iii—Criminal law.

Under § 3, art. III, of the constitution of Pennsylvania, the title of an original Act of Assembly must not only express the subject of proposed legislation, but also express the same so clearly and fully as to give notice of its purpose to the members of the legislature and others specially interested therein.

When an Act is supplemental to a former Act or amendatory thereto, if the subject of the original Act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is, that the subject of the supplement is covered by a title which contains specific reference to the original by its title, giving the date of the approval and declaring it to be a supplement thereto.

Where the title of an amendatory Act does not give the date of the approval of the original Act and the original Act cannot be found, the above distinction does not obtain, and the Act will be treated, for the purpose of considering its title, as though original. In such case, however, should the title be found sufficient, under § 3, art. III, to cover the subject of the Act, its constitutionality will also be tested as an Act amendatory or supplemental under § 6, art. III.

The Act of May 27, 1897, P. L. 111, entitled "An Act to amend an Act, making it a misdemeanor to levy blackmail or extort money or other valuable thing by threats, charges or accusations and fixing the penalty therefor," in so far as it relates to the injury to another in person, property, or reputation in business, by means of threats, charges, accusations, etc., is in conflict with § 3, art. III, of the constitution of Pennsylvania, since such subject does not appear in the title; and inasmuch as it purports to be an amendment of a former Act, is in conflict with § 6, art. III, since such former Act is not published at length therein, and the whole Act, therefore, is unconstitutional and void.

Criminal law—Motion in arrest of judgment.

The constitutionality of an Act of Assembly upon which the indictment is based is properly raised by a motion in arrest of judgment.

Motion in arrest of judgment. Q. S. Fayette Co., Sept. Sess., 1900, No. 241.

W. E. Crow, District-Attorney, for Commonwealth.

Sterling, Higbee & Dumbauld, for defendant.

UMBEL, J., Oct. 24, 1900.—The indictment on which the defendant was convicted charges that he "did, with intent to intimidate, annoy, levy blackmail and extort money and other valuable thing, by means of threats, charges and accusations by oral, written and printed communications, injure the reputation and business of one Julia Micardo." Sept. 21, 1900, the defendant made a motion in arrest of judgment, claiming that, "the Act of Assembly of May 27, 1897, P. L. 111, under which the defendant was indicted and convicted, is unconstitutional," for the following reasons:

1. That the title, which is "an Act to amend an Act making it a misdemeanor to levy blackmail or extort money or other valuable thing by threats, charges or accusations, and fixing the penalty therefor," is in conflict with § 3, art. III, of the constitution of Pennsylvania, which section provides that "no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

2. That the Act is in conflict with § 6, art. III, of said constitution, which provides that "no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is

DISTRICT REPORTS.

Commonwealth v. Hudusko.

revived, amended, extended or conferred, shall be re-enacted and published length."

It is not necessary that the title of an Act of Assembly should be a complete index of its provisions, yet the title must not only embrace the subject of proposed legislation, but must also express the same so clearly and fully as to give notice of its purpose to the members of the legislature and to others especially interested. A distinction exists, however, between the title to an original Act and that of a supplement or amendment. When an Act is a supplement to a former Act, if the subject of the original Act is sufficiently expressed in its title and the provisions of the supplement are germane to the subject of the original, the general rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto: *Philadelphia v. R. & A. Ave. Ry. Co.*, 142 Pa. 484; *Mt. Joy v. Lancaster, etc., Turnpike Co.*, 182 Pa. 5.

The title to this Act fails to give the date of the approval of the original Act, well as the volume or page of Pamphlet Laws where it is to be found. We have made diligent search and failed to find any Act with title such as the title to this amendment would indicate the title of the original to be, and, as a consequence, we have no means of determining as to the title and provisions of the original, nor the extent of the amendment, so as to be able to apply the foregoing rule regarding the title to supplementary or amendatory legislation. In view of which, we feel warranted in examining this Act, and determining whether or not it contains any provisions, notice of which is not clearly expressed in its title, in like manner as if it were reported as an original Act.

While the title need not be a complete index to the minutiae and details of the Act, yet it must fairly give notice of the subject so as reasonably to lead to an inquiry into the body of the bill. If it conveys the belief that one subject is the purpose of the bill, while a different one is its real purpose and object, it tends to mislead, and violates § 3, art. III, of the constitution: *Com. v. Greengarden*, 58 Pa. 228; *Allegheny County Home Case*, 77 Pa. 77; *Dorsey's Appeal*, 72 Pa. 192; *Union Passenger Ry. Co.'s Appeal*, 81* Pa. 91.

An examination of this Act shows it to be of a sort of synthetic character, as we understand the legislative intent, under this law, any of the following acts would be a crime:

1. Any person who, with intent to intimidate by means of (a) threats, (b) charges, or (c) accusations, by (a) written, (b) printed, or (c) oral communications, shall injure the (a) person, (b) property, (c) reputation or (d) business of any other person or persons, shall be guilty of a misdemeanor.
2. Any person who, with intent to annoy by means of (a) threats, (b) charges, or (c) accusations by (a) written, (b) printed or (c) oral communications, shall injure the (a) person, (b) property, (c) reputation or (d) business of any other person or persons shall be guilty, etc.
3. Any person who, with intent to levy blackmail by means of (a) threats, (b) charges or (c) accusations by (a) written, (b) printed or (c) oral communications, shall injure the (a) person, (b) property, (c) reputation or (d) business of any other person or persons, shall be guilty, etc.
4. Any person who, with intent to extort (a) money, (b) property or (c) other valuable thing by means of (a) threats, (b) charges or (c) accusations by (a) written, (b) printed or (c) oral communications shall injure the (a) person, (b) property, (c) reputation or (d) business of any other person or persons, shall be guilty, etc.

An application of the foregoing rule to our construction of this Act, it being no notice whatever in the title regarding such crimes as noted in 1 and 2 above, nor anything that would fairly lead to an inquiry along that line, was

of opinion that at least such portion of the Act is in conflict with § 3 of art. III of the constitution. For authority to declare a part of an Act unconstitutional see *La Plume Borough v. Gardner*, 148 Pa. 192.

Quere: If this Act is an original and not an amendment, is not the title deceptive and misleading to the extent of rendering the whole Act unconstitutional? One purpose of the title to an Act is to give notice of the legislative intent to those specially interested, and the first parties in interest in such matters are the legislators who pass the Act, and introducing this bill as an amendment, if it were an original, would tend to mislead and deceive the legislators by, in effect, saying to them, "this matter has heretofore been passed upon and approved by the legislative and executive branches of our government, and you are now merely called upon to amend." Under our view of the case, it is not necessary to answer the above question; if it were, we would doubtless incline to the affirmative.

We do not consider it our duty to examine the title to and provisions of all the statutes that have been passed by our legislature, in order to determine whether this Act is an original or an amendment. Unless error or mistake manifestly appear, we are to take them as they are reported to us by the Commonwealth authorities, and, considering this Act and its title accordingly, we must take it as an amendment to some "Act making it a misdemeanor to levy blackmail or extort money," etc.

In *Titusville Iron Co. v. Keystone Oil Co.*, 122 Pa. 627, the Supreme Court say: "Under the constitution, as it stood prior to 1874, the limits within which legislative power was to be exercised were not as closely drawn as they are now. Many things were then permissible, as to the character and form of legislation, which the present constitution plainly forbids. . . . As the constitution prescribes no form or order into which the legislative expression was to be cast, the court sought to give effect to the purpose, however expressed. But the constitution of 1874, § 6, art. III, requires all statutes to be self-explanatory and complete in their provisions, and forbids the extension, amendment, revival or use of any other method of conferring the benefits of previous legislation short of the re-enactment at length. This effectually closed the old and well-worn short-cut route."

Barrett's Appeal, 116 Pa. 486, is directly in point. The original Act in that case was passed April 16, 1875, P. L. 55; the supplement or amendment thereto was passed May 1, 1876, P. L. 93, without reciting or re-enacting the original, but merely referring to it by its title. The Supreme Court say: "The supplement was manifestly intended to be amendatory to the original Act and nothing else; but, inasmuch as it utterly ignores the constitutional requirement above quoted" (§ 6, art. III), "it is unconstitutional and void;" and they held that things done in pursuance of that supplement or amendment were unauthorized and void: See also *Woodward v. Wilkes-Barre*, 4 Kulp, 125.

The objection in this case is not to any formal defect apparent on the face of the indictment; consequently, the provisions of section 11 of the Act of 1860, P. L. 433, and the decisions of *Com. v. Newcomer*, 49 Pa. 478, and *Com. v. Frey*, 50 Pa. 245, do not apply; and the question of the constitutionality of the Act could properly be raised and passed upon on a motion in arrest of judgment.

We are of opinion that the Act in question offends against and is in conflict with the aforesaid § 6, art. III, of the constitution, and accordingly make the following order:

Now, Oct. 8, 1900, this matter came on to be heard and was argued by counsel; and now, Oct. 24, 1900, upon consideration thereof, and for the reason given in foregoing opinion, it is ordered and directed that the motion in arrest of judgment be sustained and allowed, and judgment is arrested.

From L. H. Frasher, Uniontown, Pa.

Johnson's Estate.

Legacy for particular purpose—Ademption.

Where a legacy is given for a particular purpose specified in the will, and the testator during his lifetime accomplishes the same purpose or furnishes the intended legatee with money for that purpose, the legacy is satisfied and adeemed.

Hence, where a testator, who, as attorney-in-fact, had made an unprofitable investment for his principal, directed his executors to make the loss good out of his estate, and afterwards, in pursuance of an agreement, took the investment and gave his principal a note for the sum invested by him, which was duly paid by his executors, *held*, the bequest was satisfied and adeemed.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1901, No. 153.

Benjamin H. Lowry, for exceptant.

Howard C. Johnson and *Eli Kirk Price*, contra.

HANNA, P. J., April 13, 1901.—After a careful consideration of the question presented by the exceptions, we fail to discover any reason to differ from the conclusion arrived at by the auditing judge and his disallowance of the claim made by exceptant. From the conceded facts, it appears testator, for a number of years, and until a few months prior to his death, was the attorney-in-fact of the claimant, and, as such, invested moneys belonging to her and collected the income arising therefrom. In 1890 or 1891 he invested for her the sum of \$5750 in a bond and mortgage upon certain land at Cape May Point, New Jersey. This proved an unfortunate investment. The interest becoming in arrear, the claimant foreclosed the mortgage and bid in the property at the sale. This was in August, 1892. Not only did the mortgagee lose interest upon her mortgage, but was obliged to pay taxes and costs and expenses of the legal proceedings. Testator was still her attorney-in-fact. And while in no sense was he an insurer of the investment, nor legally liable to reimburse his principal any loss occurring, yet from the nature of their business relations, and the investment no doubt having been made at his suggestion and upon his advice, in good conscience he recognized a duty incumbent upon him to assume and pay any loss suffered by his principal. Accordingly, when he executed his will on May 23, 1893, he included therein this provision, viz.: "Any loss sustained by Mary Merrefield by an investment in Anson H. Hamilton's bond and mortgage on some of his property at Cape May Point, New Jersey, this loss, if possible, I direct my executors to make good to her, the said Mary Merrefield." She was the mortgagee and had become owner of the property before mentioned by her purchase at the sale in foreclosure. Testator was of venerable years, had made his last will and testament, and soon, therefore, became desirous of being relieved from the cares and responsibilities of business. It is evident, also, that while, by his will, he made provision for the payment to his principal of the amount of any loss she might suffer by reason of the investment in the bond and mortgage referred to, yet he was anxious in his lifetime to discharge the moral liability he voluntarily assumed. This desire and intention was doubtless communicated to his principal, and met with her approval. This is manifest from their agreement in writing, dated March 1, 1894, the preamble of which recites the desire of testator to be relieved from further duty as attorney-in-fact, and, in view thereof, he had prepared an account of his transactions and receipts and expenditures. It further recited the covenant and promise of testator to surrender to his principal all property and securities belonging to her, held or controlled by him, and execute and deliver to her his promissory note for \$5750, payable by his executors within one year after his decease. This was the amount his principal had invested in the bond and mortgage upon ground at Cape May Point. The other party to the agreement, testator's principal, in con-

sideration of the promises and covenants by him, agreed to convey to him in fee the real estate she owned at Cape May Point, and purchased by her as before stated. Testator further agreed to pay to his principal any excess of income derived from the property, above the taxes, etc., in lieu of interest upon his promissory note. And, finally, it was set forth in the agreement as follows: "It is understood and agreed between the parties hereto, that upon the execution of this agreement and of said note and deed, all claims and demands that each may have against the other upon any and all cases whatsoever, except as provided for in this agreement, and said note shall cease, end and determine, and be forever barred and extinguished." The intention of the parties, therefore, was unmistakable, viz.: To dissolve the relation previously existing. And on the part of testator to pay his principal the amount she had invested in the bond and mortgage, and in lieu of interest on his note, given and accepted as the consideration, to pay her any excess of income over and above the cost of maintaining the property. In pursuance of this agreement, the conveyance to testator was made and executed, and he delivered to his principal his promissory note. But the agreement was not yet consummated. A settlement of the receipts and expenditures by testator was still to be made. Accordingly, the parties met on the day succeeding the date of the agreement, and, from their amicable settlement, it appears that testator had overpaid his principal the sum of \$1582.97, and she acknowledged the payment of this amount by endorsement upon his promissory note for \$5750 held by her, and thus reduced the amount due thereon to \$4187.03. The position of the parties on March 1, 1894, was simply this: Testator refunded his principal the exact sum she had invested in the bond and mortgage, and she conveyed the property to him, taking as the purchase-money his promissory note, payable within one year after his death, and without interest; content to receive as interest thereon whatever amount of income should be collected by testator from the property in excess of the cost of its maintenance. The actual loss suffered by claimant was the amount she paid for taxes and costs of legal proceedings, and interest upon the amount she invested to March 1, 1894, less the interest and rent she collected prior to that date. No mention of these items is found in the agreement. Testator, in carrying out his intention to reimburse his principal the loss occasioned by her investment, performed not only his part of the moral obligation he recognized, but far more; he repaid his principal the amount she invested and took from her the property.

Again, if she had any claim or demand against testator other than the balance due upon his promissory note, it was barred and extinguished by the express terms of her agreement of March 1, 1894. We think she should be held to this agreement, and the result of the payment by testator to his principal had the effect to satisfy and extinguish the provision made for her benefit in his last will and testament previously made. It is analogous to the destruction or conversion of a specific legacy, and the bequest to the legatee was, therefore, adeemed. The bequest was for a specific purpose, viz., to pay any loss to the legatee from her investment. And the facts admitted show that, prior to testator's death, the claimant was willing to accept and did accept from him the amount of her original investment in full satisfaction and reimbursement. By her own act her loss was liquidated at that sum which was paid in part to her by testator, and the balance since his death by his executors. There is, therefore, no loss to which the claimant is entitled as a legatee. Testator, thus having carried out, in his lifetime, the purpose of his bequest, the law is well settled that the legatee cannot claim the legacy. In 1 Roper on Legacies, 365, it is stated that where a legacy is given for a particular purpose specified in the will, and the testator during his lifetime accomplishes the same purpose or furnishes

10 DIST. R.

Johnson's Estate.

the intended legatee or beneficiary with money for that purpose, the legacy is satisfied. See, also, Theobald on Wills, 2nd ed. 597.

This doctrine and cases in which it is recognized were followed by this court in *Appeal of Ursinus College*, *Keiper's Estate*, 23 W. N. C. 261, affirmed by the Supreme Court. And to the same effect is *Hershey's Estate*, 17 Lanc. 389, and *Ritter's Estate*, 10 Pa. Superior Ct. 352. As the payment by testator to claimant must be considered as a satisfaction and ademption of the bequest to her, and, by force of her agreement and release to testator, all claims against him or his estate, "upon any and all causes whatsoever," are "barred and extinguished." The claim now made was properly disallowed.

The exceptions are accordingly dismissed, and adjudication confirmed.

Boulard's Estate.

Guardian and ward—Maintenance—Presumption.

Where there is nothing in the relationship or circumstances to create the presumption that the guardian was providing for the ward without the expectation of payment, or that the ward's estate was not to be used for that purpose, the estate will be applied to reimburse the guardian for such expenditures.

Guardian and ward—Maintenance notice.

Notice or demand upon the ward is not necessary, as between the guardian and ward, to make the ward's estate liable to reimburse the guardian for her support.

Guardian and ward—Personal decree for deficiency.

The Orphans' Court will not make a personal decree in favor of the guardian against the ward for the difference between the amount of the ward's estate and the amount expended for the ward's support, unless it is clear that such maintenance as the ward received ought to have been given her, instead of putting her out to work or sending her to a charitable institution.

Hence, where the entire sum, principal and income, received by a guardian from the estate for the support of the ward, who was eight years old at her parent's decease, was but \$517.92, and the ward was excused from contributing to the maintenance of the household, and was allowed by the guardian to attend school until eighteen years of age, held, that the whole estate of the ward would be applied in repayment to the guardian of sums expended in necessities, but that as it was not clear that, upon the exhaustion of the ward's estate, she should not have been sent to some charitable institution or placed with some person who would give her her food and clothing in consideration of her services, the court would not make a decree in favor of the guardian for the difference between the amount of the estate and the amount expended for her support.

Exceptions to adjudication. O. C. Phila. Co., April T., 1885, No. 17.

William F. Brennan, for exceptant; *Charles S. Wood*, contra.

PENROSE, J., March 30, 1901.—The father of the ward, after the death of his wife, in 1880, employed his niece, the exceptant, as housekeeper, paying her wages; and in that capacity she acted until his death, in March, 1885. He left six children, all minors, of whom the present ward, who had not yet completed her eighth year, was the youngest; and the exceptant, though herself only twenty-three years old, was appointed their guardian. That the family might be kept together, the guardian gave up the house which came to the children from their father, which thereafter was rented for their benefit, and moved with them into one belonging to her own father, where, with what she was able to make by keeping boarders, the pittance coming from time to time from the wards' estate, and the wages received from all except the present ward, she was able to give them her personal care and attention, and bring them up in a decent, respectable manner,—treating them, as the evidence shows, with the kindness and affection of a mother.

The wages earned by the other wards, averaging during the entire period about \$3 per week, from each, were paid to her by the boys until they had served

Bouland's Estate.

their terms of apprenticeship, after which they each paid her \$5 per week for board and maintenance, retaining all beyond that sum. It would seem that settlements have been made with the other wards as they became of age, but whether this be so or not is quite immaterial so far as the present account is concerned. All of them, however, testified before the auditing judge that the charge against them of \$5 per week was entirely proper and reasonable.

The ward whose estate is now before the court appears to have been a delicate child, subject to frequent spells of illness, and for this reason, perhaps, when she became old enough, instead of being required, as the others were, to furnish something for her own support, in addition to the small amount coming from her property, was sent to school, and thus was able to graduate from the Girls' High School, in 1895, when she had attained the age of eighteen years. After this, for some reason not explained, she left the home in which she had lived with her guardian for more than ten years, and did not return during the succeeding three years of her minority.

It is not easy to understand why the estate of the ward which came to the hands of the guardian was not applicable for the maintenance, clothing, shelter, &c., &c., furnished to her. There was nothing in the relationship or in the surrounding circumstances to create or lead to a presumption that the guardian, who had no means of her own, was providing for her without expectation of payment, or that her estate was not to be used for the purpose. That there was no demand upon the ward, or notice of any kind to her, is without significance; such demand or notice is not only not required, as between guardian and ward, but would be an absurdity. It is manifest, also, that services such as a child eight years of age, or for several years later, could render, would have no appreciable value; and as the entire amount with which the guardian is charged by the adjudication, principal and income (including a surcharge of \$30, which is the subject of exception), is but \$517.92, an allowance for board, maintenance, and clothing, of only \$2.50 per week, would consume the whole of it by the time the ward reached the age of twelve,—leaving nothing for the six subsequent years that the necessary support was furnished by the guardian.

There can be no doubt that the moneys actually received were properly applied to the payment for necessities furnished to the ward, and that no balance is chargeable against the guardian. This result is concurred in by the auditing judge.

That full justice is not done to the guardian by relieving her from this payment is quite evident. As already stated, all the other wards were entirely satisfied with the charge against them of \$5 per week, while what is asked for from this ward is but \$4; in their case, however, the requisite amount was made up from the wages which they earned and paid to her, and this ward, during all these years, was earning nothing. But it is not clear, after the estate coming to the hands of the guardian was exhausted, that the ward should not have been taken from school and placed either in a charitable institution or with some person who, for such services as she could render, would furnish her with food and clothing until she became old enough to earn wages as a domestic or otherwise. Had the guardian been more considerate of herself than of her ward, this course would probably have been taken, but it was not; and the question confronting us is, whether, after furnishing the ward with food and clothing, gratuitously, during a period of six years, in order that she might receive proper schooling, a claim can now be presented as a legal demand upon which a decree capable of enforcement (*Shollenberger's Appeal*, 9 Harris, 337) may be entered in this court. The auditing judge was of opinion that it could not, and we are not convinced, under the principles and authorities relating to the subject, that this was error.

Boulard's Estate.

The ward is now a well-educated young woman, quite satisfied, as she testified, with the course that was thus pursued. Her obligation to her guardian is very great; and if she is willing to recognize it merely in its moral aspect, and as creating no legal liability, she ought at least to show her grateful appreciation.

To the extent indicated by this opinion the exceptions are sustained; as to anything beyond they are dismissed.

Counsel will prepare the necessary decree.

Adams's Estate.

Wills—Testamentary incapacity—Physical debility.

A testatrix who died at the age of sixty-eight from inanition rather than from any specific disease, but who knew the contents of her will and the value of her property, having retained the draft for several days for reflection, as she declared, finally signing it in the presence of subscribing witnesses, of whom one, at least, was an indifferent spectator, cannot be said to be in that extreme physical debility which diminishes the will power to a point where the victim succumbs to importunities against which, in her normal vigor, she would be proof.

Wills—Undue influence—Mistake.

There can be no reasonable doubt as to the presence of full testamentary capacity and as to the absence of mistake or undue influence, where it appears that testatrix lived for twenty years in the home of the woman whom she made her sole legatee and to whom she paid a small weekly sum for board, that during all that time she was estranged from her nearest relatives, and that she had formerly made a will of exactly the same tenor as that admitted to probate.

Decedents' estates—Confidential relation—Physician and patient.

The fact that the will was drafted at the request of testatrix by the attending physician, who was the son of the sole legatee, *ipso facto*, raises no presumption of undue influence.

Appeal from register. O. C. Phila. Co., July T., 1900, No. 112.

J. B. Rettew, for appellant; *A. H. Wintersteen*, for appellees.

ASHMAN, J., March 30, 1901.—It has been said that undue influence necessarily presupposes some degree of testamentary incapacity. If this aphorism is universally true, it can apply to this case only in the sense that extreme physical debility may diminish the will power to a point where the victim succumbs to importunities against which, in his normal vigor, he would be proof. This testatrix appears to have died at the age of sixty-eight from inanition rather than from any specific disease; but she knew the contents of her will and the value of the property which it conveyed; she retained the draft for several days, as she declared, for reflection; and she finally signed it in the presence of subscribing witnesses, of whom one, at least, was an indifferent spectator. We need, therefore, address ourselves only to the circumstances out of which the charge of undue influence was evolved. The testatrix lived for twenty years and died in the home of the woman whom she made her sole legatee. She paid a small weekly sum for board, but she had the freedom of the house, and she shared in all the intimacies and confidences of the family. Besides herself, the household consisted of the legatee, her husband and son, and another boarder. The son, who was quite young when the testatrix began her stay, studied medicine and became a practicing physician, and in that capacity attended the testatrix in her last sickness, and at her request drew the will by which the testatrix bequeathed her estate to his mother. It is, perhaps, straining legal terms to hold that one who had grown up from boyhood at the side of the testatrix, stood towards her when he wrote her will in a confidential relation because he prescribed for her as her doctor. But passing this, the draftsman of the will took nothing directly under it, and he was certainly not the confidential adviser of the testatrix in any other sense. On the single occasion when he ventured to counsel her in a money transaction, she refused to listen to him.

Adams's Estate.

The incident requires to be noted, because the contestants themselves used it as a handy method of fomenting distrust in the mind of the testatrix. Her estate was invested in the stock of a trust company. In 1899 a new issue was ordered, with the privilege to the old shareholders to subscribe in proportion to their holdings at a certain price in the new stock. When the doctor advised the testatrix to sell the option, she replied with some warmth that it would be morally wrong to do so; and she actually allowed the time-limit to expire without attempting to avail herself of the offer. It was not until the trust company as an act of courtesy sent her a registered letter, offering to sell the option in her interest, that she acknowledged her error and concluded to accept the sum of \$2210 for her right to subscribe. The money was immediately deposited in bank to her credit. It was distinctly in evidence that the contestants urged her to reject the doctor's suggestions on the ground that he was seeking to defraud her. This was the beginning and end of his financial relations with the decedent. Indeed, there was nothing else of a pecuniary character to advise about; the securities comprising her small fortune remained as they were when they came to her under the will of her aunt, and the dividends they earned were sent by check to her periodically by the trust company.

The decedent had as her next of kin a half-brother and his daughter, a niece, who are contestants. She, at one time, lived with the brother, but left him by reason of some disagreement, and for twenty years had been totally estranged from him. There was some little proof that at the time of the stock transaction, and, as a consequence, of the suspicions which her ignorance regarding it engendered, she expressed a desire to return to her brother; but the wish was never carried out, and was certainly not encouraged by the brother. He, himself, testified that, although he lived in Philadelphia, he had not seen the decedent for twenty years before her death. The fact that the testatrix had made another will of exactly the same tenor as the present, seems to have been generally known, and to have been commented on in her presence. When she became seriously ill, she requested the doctor to bring her the instrument from among her papers. It could not, however, be found, and she then directed the drawing of a new one. This is the whole history of the case. It is free from any reasonable doubt as to the presence of full testamentary capacity, and as to the absence of mistake or undue influence. The will was properly admitted to probate, and the exceptions to the ruling on preliminary hearing, dismissing the appeal from the register, are dismissed.

Maguire's Estate.

Wills—License to sell liquor—Real estate.

A license to carry on a saloon has a two-fold operation: First, as conferring upon the individual upon whose application it is granted the privilege of selling liquor: and second, as an adjudication that the place in which the privilege is to be exercised is necessary for the accommodation of the public. The first is purely personal and dies with the licensee; the second relates to the realty, and, where the licensee is owner, enures to the benefit of the heir or devisee.

Hence, the proceeds of a sale of real estate by the executor under a power in a will are to be regarded as realty, although greatly enhanced by the fact that the property had a retail liquor license.

Exceptions to adjudication. O. C. Phila. Co., April T., 1898, No. 89.

Charles Hunsticker and Francis S. Brown, for exceptants.

Alfred R. Haig and James M. Beck, contra.

PENROSE, J., March 30, 1901.—A license to carry on a saloon has a two-fold operation: first, as conferring upon the individual upon whose application it is
10 DIST. R.

Maguire's Estate.

granted the privilege of selling liquor; and second, as an adjudication that the place in which the privilege is to be exercised is "necessary for the accommodation of the public" desiring to purchase. The first is purely personal, and, necessarily, dies with the licensee; but the effect of the second continues, with a greater or less degree of permanency. It relates to the realty,—enhancing the value of an unexpired term, if the licensee was merely tenant for years (the enhancement in such case, of course, being of personal assets), but enuring to the benefit of the heir or devisee if the licensee was himself the owner. The incident is an inseparable one, following the real estate through all changes of title, so long as the effect of the adjudication continues; and there is no principle upon which the enhancement of value can be treated as part of the personal estate of the owner in fee of the accredited realty. Certainly the agreement with the purchaser, in the present case, that his bid should not be binding if he should not succeed in obtaining from the proper court a transfer of the license, cannot work any change in this respect, nor could the joinder of the other parties in interest in the request for transfer have any such operation,—even if such parties had not been, as they were, benefited by the more advantageous sale. They might, perhaps, have defeated the sale by preventing the transfer, but by so doing they could not have derived any benefit to themselves or deprive a subsequent purchaser of anything that concerned or related to the place sold.

Nor is the result changed by the fact, if it be the fact, that the real estate was sold by the executrix. The sale was directed by the will, but without designation of the person by whom it was to be made, and the duty, therefore, devolved upon her in that capacity under the Act of Assembly; but this does not affect or in any way deprive her of her rights as an individual under the terms of the will.

It is true that the sale included the stock and fixtures used in carrying on the business of the decedent, but as these were fully accounted for in the former account of the executrix, no question with regard to them can arise now—even if it be conceded that as between executrix and devisee the fixtures are to be regarded as personal property: 2 Kent's Com., 345.

It may be remarked that the adjudication of the first account shows that debts of the decedent and expenses of administration to the amount of \$4974.40 (increased by \$1738.19—\$6712.59, by the present adjudication), in excess of personal property not specifically disposed of by the will, were paid from proceeds of sale of real estate; so that even if there should be an allowance to personal property for increase of value by reason of the license, it would be applicable to the repayment of this amount to the fund produced by sale of the real estate, the proceeds of which are specifically bequeathed,—inasmuch as such debts and expenses are primarily payable from property not otherwise disposed of.

That the pecuniary legacies, including those given to the daughters of the testator, were not payable from the proceeds of sale of the real estate, was expressly decided by the adjudication of the first account, and the question, therefore, is not now an open one: but if it were, we do not think there is enough in the will to show that the view then taken was erroneous. Such proceeds are specifically given,—one-half to the designated daughter and the other half to the other six children of the testator in equal shares. The will, it is true, is very informally and irregularly drawn, but there is nothing to indicate, unequivocally or at all, that the testator supposed his personal estate was not sufficient to pay all his pecuniary legacies as well as his debts. He makes no disposition of his general personal property except to this extent, and the presumption is against intestacy. Moreover, it is an established canon of interpretation that "a clear gift cannot be cut down by any subsequent words unless

Maguire's Estate.

they show an equally clear intention:" Kiver v. Oldfield, 4 DeG. & J. 30; Sheetz's Appeal, 1 Norris, 213; Reichard's Appeal, 1 Crumr. 232; 1 Williams on Executors, Perkins's Edition, 221; &c., &c., &c.

Exceptions dismissed, and adjudication confirmed absolutely.

Keeler et al. v. Westgate et al.

Constitutional law—Bicycle tax—Act of April 11, 1899.

The Act of April 11, 1899, P. L. 36, providing for the appointment of sidepath commissioners, and the construction and maintenance of sidepaths from funds raised by the county commissioners from taxes on bicycles owned by resident taxables, is in conflict with art. III, § 20, of the Constitution of Pennsylvania, and void. Com. ex rel. Dare v. Smith, 9 District Reps. 350, followed.

Bill in equity to restrain collection of bicycle tax by county commissioners under Act of April 11, 1899. C. P. Bradford Co., Feb. T., 1901, No. 1.

John C. Ingham, for plaintiff; William Maxwell, for defendant.

FANNING, P. J., Feb. 20, 1901.—(After reviewing the bill.) From the bill and admissions, I find the following facts:

Findings of fact.

1. That the plaintiffs are residents and taxpayers of the borough of Wyalusing, county of Bradford and State of Pennsylvania, and all of the plaintiffs and many others, citizens and taxpayers of said borough, are the owners of bicycles, and were during the years 1900 and 1901.

2. That the defendants, B. H. Westgate, F. J. Kingsley and C. E. Mills, call themselves and claim to be sidepath commissioners of Bradford county, and, by virtue of said office, claim the right and authority to receive taxes to be levied by the county commissioners on all bicycles owned by resident taxpayers in said county, and to expend the amount received in constructing and maintaining sidepaths along the sides of highways in townships, between the roadway proper and the land abutting thereon.

3. That the defendants, H. M. Spalding, E. M. Pitcher and J. H. Murray, Jr., are the county commissioners of Bradford county; the defendant, H. P. Gaylord, is the assessor of the said borough of Wyalusing, and the defendant, Volney Homet, is the collector of taxes of said borough.

4. That during the year 1899 or 1900, the said H. P. Gaylord made an assessment of the bicycles owned by the plaintiffs and of the bicycles owned by the other citizens of said borough, and returned the said assessment to the county commissioners.

5. That the said county commissioners in the year 1900, at the instance and request of the alleged sidepath commissioners, levied a tax upon all the bicycles assessed, and returned to their office as aforesaid, of \$1 each, and issued their warrant for the collection thereof to the said Volney Homet, the collector of taxes for said borough, and directed him to collect the same.

6. That said collector has made demand upon your orators for the taxes severally levied against their bicycles as aforesaid, and upon the other owners of bicycles in said borough, which had been assessed and against which the tax had been levied as aforesaid, and now threatens and is about to collect the same by distress and levy of the plaintiffs' property, or seizure and imprisonment of their persons, if sufficient property be not found to pay the said tax.

Discussion.

The defendants claim to derive their authority to do the things complained of in the bill from the Act of April 11, 1899, P. L. 36, which provides for the construction and maintenance of sidepaths, for the appointment of three resi-

Keeler et al. v. Westgate et al.

dent wheelmen as sidepath commissioners, for the assessment of resident taxables with all bicycles owned by them, for the levying of a tax on such bicycles by the county commissioners, and for the expenditure of the sum so raised in constructing and maintaining sidepaths. Plaintiffs contend that this Act is inoperative, being in conflict with the provisions of the Constitution of the State of Pennsylvania. Art. III, § 20, of the Constitution, ordains that "the General Assembly shall not delegate to any special commission, private corporation or association any power to make, supervise or interfere with any municipal improvement, money, property or effects, . . . or to levy taxes or perform any municipal function whatever."

That the sidepath commissioners provided for by the Act of April 11, 1899, constitute a special commission is too clear for argument. They cannot be placed in any other class of officials authorized by the constitution. In the exercise of the powers delegated to them by the Act, will they "make, supervise or interfere with any municipal improvement," or "exercise any municipal function whatever?" They are to have general "supervision of the construction and maintenance of the sidepaths in the townships of their respective counties."

Townships are clearly municipalities. Sidepaths along the highways in townships are certainly municipal improvements, and the construction and maintenance of such sidepaths are municipal functions: Com. ex rel. Dare et al. v. Smith et al., 9 District Reps. 350.

The learned judge in deciding the above case, lays down so clearly the principles controlling this question, that there can be no question of the correctness of the conclusion reached, viz., that this Act is in conflict with the section of the constitution quoted.

No bicycles can be assessed except where sidepath commissioners have been appointed. No bicycle tax can be levied or collected except on the initiative of the same body. As this commission cannot legally exist, the entire Act becomes inoperative, and any action taken thereunder by assessors, sidepath commissioners, county commissioners or tax collectors is illegal and void. Accordingly, we find the following

Conclusions of law.

1. That the Act of April 11, 1899, is in conflict with art. III, § 20, of the Constitution of Pennsylvania.

2. That there are no such officers as sidepath commissioners authorized by law and with power to receive funds raised by a tax on bicycles, to be used in constructing and maintaining sidepaths along the sides of highways in townships, between the roadway proper and the land abutting thereon.

3. That the assessor, H. P. Gaylord, had no right, power or authority to assess the said bicycles and make return of the same to the county commissioners.

4. That the said county commissioners had no right, power or authority to levy a tax on said bicycles to raise money for the purpose aforesaid, nor to issue their warrant for the collection of the same to the tax collector, Volney Homet.

5. That the tax collector, Volney Homet, has no right, power or authority to collect the said taxes levied upon said bicycles as aforesaid, and that the collection of the same would be illegal.

And now, to wit, Feb. 20, 1901, the preliminary injunction heretofore granted, restraining Volney Homet, collector of taxes of Wyalusing borough, from collecting a bicycle tax from the complainants and others, is hereby continued, and as, in the meantime, the bill has been taken *pro confesso* for want of an answer, it is ordered, adjudged and decreed that said injunction shall be perpetual.

From R. H. Williams, Towanda, Pa.

Reams v. Fye.

Ejectment—Lease—Clause of amicable ejectment.

A clause in a lease, "which said rent so reserved the said lessee agrees to pay regularly as it may fall due, or within five days thereafter; in default of which the said lessor may, without notice, re-enter upon and take possession of the premises, or, at his option, enter judgment against the lessee, or any sub-tenants, in an action of ejectment to be brought to recover possession of the premises," held, to authorize the entry of an amicable action and confession of judgment in ejectment.

Amicable action of ejectment for possession of premises under ejectment clause in lease. Rule to strike off judgment. C. P. Clearfield Co., May T., 1900, No. 321.

W. C. Arnold, for rule; W. C. Pentz, contra.

GORDON, P. J., Dec. 6, 1900.—In my opinion this rule must be discharged. The entry of the amicable action of ejectment, and judgment therein, may not be in the most approved technical form, but they are sufficient, and are authorized by the lease between the parties. The lease is for a store-room and dwelling in the borough of Du Bois, for the term of one year, with a privilege of four more, "at the option of both parties," at the rate of \$420 per year, payable \$35 in advance, monthly, for the store-room, and \$180 per year, payable \$15 in advance, monthly, for the second story or dwelling. The ejectment clause is as follows: "Which said rent so reserved the said lessee agrees to pay regularly as it may fall due, or within five days thereafter, in default of which the said lessor may without notice re-enter upon and take possession of the premises, or, at his option, enter judgment against the lessee or any sub-tenants, in any action of ejectment to be brought to recover possession of the premises." This did not contemplate the commencement of an action of ejectment by a writ, but authorized the entry of an amicable action and confession of judgment as was done. The paper filed contains a statement in ejectment by W. C. Pentz, Esq., as attorney for the plaintiff, setting forth the demised premises, the terms of the lease, with a copy appendant, and alleging the default in the payment of rent for the month of April, 1900; and also a confession of judgment by him as attorney for the defendant for the demised premises, on account of the default in the payment of the rent for the said month of April for more than five days; with an affidavit appended by the plaintiff that the facts are true. In my opinion, the judgment cannot be attacked for irregularity. The question remains, can this forfeiture clause be enforced? Of forfeitures, Strong, J., in *McKnight v. Kreutz*, 51 Pa. 237, says: "Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such will make it a provision upon which the continuance of an estate granted depends." And Paxson, C. J., in *Hand v. Suravitz*, 148 Pa. 207, says: "While forfeitures are not favored in the law, I apprehend no one will dispute the right of a landlord to forfeit for non-payment of rent where words of forfeiture are embodied in the lease. Here the forfeiture clause is clear and unequivocal. It is claimed on the part of the defendant that the judgment is irregular, for the reason that 'the lease shows that the store-room is first rented at \$35 per month, and authority follows for amicable action in ejectment in case of default for five days in payment of rent. Further on, in written lease, the dwelling part, second floor of same building, is rented at \$15 per month, but no authority for an amicable action is given for default of this rent.' The two clauses for the lease of the two portions of the building are thus separate, with the ejectment clause following the first as stated; yet, as I view it, the contract must be judged of from its four corners and as an entirety, and the ejectment clause applies to all the property that was covered by the lease. The rent in the ejectment clause, default in the payment of which was

Reams v. Fye.

to work a forfeiture of the term, is the rent reserved for the entire demised premises. There is no dispute as to the facts that default was made. The dispute as to the form of the receipt to be given for the April rent was no excuse for its non-payment or legal tender, and the tender made after the forfeiture and the lessors' election to take advantage of it by the suit brought, was too late, as the term had then ended; a tender of the rent would not revive it.

The rule is, therefore, discharged, and exceptions noted to the defendant.

From Benjamin F. Chase, Clearfield, Pa.

Beresford v. Susquehanna Coal Company.

Minors—Wages—Debts of parent.

The wages of a minor child cannot be held by the employer for the debts of the father without the minor's consent, unless the contract between the employer and the father expressly stipulates for such application.

Assumpsit. C. P. Schuylkill Co., Nov. T., 1900, No. 253.

W. B. Durkin and J. O. Ulrich, for plaintiff; M. M. Burke, for defendant.

BECHTEL, P. J., Jan. 21, 1901.—The question presented in this case is, whether there is anything shown in this case that will permit the defendant to apply the wages of Charles Beresford to the payment of his father's store account. The only ground urged at the trial is a writing signed by Joseph Beresford, the father, and dated Jan. 21, 1899. The instrument is silent as to the son, Charles Beresford, and in no way refers to him, or any wages he may earn, is in the singular, as the words "I" and "me" and "my," and the expression referring to money, "to which I was individually entitled," show. It is signed by the father, and does not purport to be signed by him for his son, and in no way refers to the son. In addition to this, there is the statement in the evidence that, upon different occasions, the son's wages have been credited upon his father's store account. This is about the whole of defendant's case.

The other side contends that the written instrument makes no reference to the son, but to the father only; that it is accepted by the William Penn Supply Company upon condition that the defendant agrees to the terms thereof, and there is no evidence that it did, except it is to be found in the act of the defendant in applying the wages to the store account in the settlements of the father.

There is no evidence to show how the son was employed by defendant, whether by a contract made by the son or the father. There is nothing to show whether or not the son was emancipated by the father, and though the son lives in the family, this does not establish that he was not. The "emancipation of the son may be as perfect when they live together, under the same roof, as if they were separated." *McCloskey v. Cyphert*, 3 Casey, 220; *Rush v. Vought*, 5 P. F. Smith, 437; *Beaver v. Bare*, 104 Pa. 58. The fact that the father applied the son's wages previously does not give him the right to do so permanently, but leaves the son to object whenever he desires as to any month not settled and accepted by him. He cannot for any months that are settled and as to which he accepted and received the balance. This is not the case of *Showalter v. Ehlan*, 5 Pa. Superior Ct. 242. In that case the facts agreed upon placed the plaintiff in the position of having dealt with the store for months, and applying his own wages, and then suing to recover back wages after accepting the balance shown by the monthly checks, as well as other wages.

The continued course of dealing by himself, and his acceptance of balances shown, established a course of dealing that, it was held, bound him until he gave notice. Why should this rule be applied to the son, who did not deal with the supply company, who received nothing from the store, who did not

Beresford v. Susquehanna Coal Company.

contract to apply his wages to his father's indebtedness? "Children are not mere servants of the fathers, nor is he bound to work them as such for the benefit of his creditors." The wages of the father have already been applied under the written contract, but as no intention is made apparent by it to apply the son's, we resolved the question in the son's favor, upon the ground and for the reasons above given.

It is easy for the supply company to set forth the intention to hold the son's wages in the writing, or have it signed by both, or by the father for himself and son. It seemed but just that the wages of the minor should not be thus applied by means of a forced construction, but rather that the contract should expressly provide for and require such application in order to justify such ruling.

For the reasons given, we think the rule for new trial should be discharged.

Houck v. Whitaker.

Justices of the peace—Appeals—Suit for wages—Bail—Act of April 20, 1876.

Where, on appeal by the defendant from the judgment of a justice of the peace in a suit for wages, the defendant fails to sign the appeal, and gives bail for costs only, instead of costs and debt, as required by the 1st section of the Act of April 20, 1876, P. L. 43, such appeal will be stricken off unless perfected in ten days.

Rule to strike off appeal. C. P. Lancaster Co., Sept. T., 1900, No. 41.

W. T. Brown, for rule; *William D. Weaver*, contra.

LANDIS, J., Jan. 19, 1901.—In this case, suit was begun before a justice of the peace to recover wages of manual labor alleged to be owing by the defendant to the plaintiff. After a hearing duly had, the justice entered judgment in favor of the plaintiff for \$6.37½, with costs of suit. The defendant appealed from this judgment, and entered into a recognizance, with security, in the sum of \$25, conditioned that he would "pay all costs accrued or that might be legally recovered against him." He also failed to sign the appeal, though he made and signed the affidavit attached thereto. Counsel for the plaintiff then moved to strike off the appeal, because the recognizance given was defective, and because the appeal had not been signed, and the court, on motion, granted this rule.

By the Act of April 20, 1876, § 1, P. L. 43, it is provided that, "in all cases in which judgment shall have been rendered by any justice of the peace or alderman in this Commonwealth for wages of manual labor, before the defendant shall be entitled to an appeal from the judgment of the justice or alderman, he, or his agent or attorney, shall make oath or affirmation that the appeal is not intended for the purpose of delay, but that he believes that injustice had been done him, which affidavit shall be attached to, and sent up with, the transcript of appeal, and the said defendant shall be required to give good and sufficient bail for the payment of the debt and costs, to be paid when finally adjudged to be due to plaintiff by the court in all cases for labor." It is, therefore, very evident, from an inspection of the recognizance, that it is not in conformity with the Act of Assembly, and, if not corrected, the appeal must necessarily fall. In all cases of this character, however, it is, in the first place, the duty of the court to give the party appellant an opportunity to perfect his appeal within a certain specified time, and, only in case of a failure to do so, to strike it from the record.

Therefore, we now order that, if the defendant perfects his appeal, in all respects, within ten days from the filing of this opinion, the above rule will be discharged as of course; but in case he fails to comply with this order, then the same to become absolute and the appeal to be stricken from the record.

Rule discharged on condition.

From George Ross Eshleman, Lancaster, Pa.

10 DIST. R.

Notes of Treasury Department Decisions.

From March 21 to April 22, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes: "[The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Amended Tax List, Act of March 2, 1901.

No. 325, April 17, 1901. 4 Treasury Decisions, No. 17, page 41.

Bonds of Notaries, etc.

Stamp tax. Bonds of notaries public and other State officers, made as a condition to the exercise of their duties, are exempt from stamp tax. No. 314, March 28, 1901. 4 Treasury Decisions, No. 14, page 30.

Bonds of State Officers.

Stamp tax. Official bonds of State, county and municipal officers exempt from stamp tax. No. 304, March 21, 1901. 4 Treasury Decisions, No. 13, page 44.

Broker, Second Class.

Special tax. No. 317, April 1, 1901. 4 Treasury Decisions, No. 14, page 37.

Special tax. No. 320, April 3, 1901. 4 Treasury Decisions, No. 15, page 14.

Brokers, Class 2—Book.

No. 324, April 13, 1901. 4 Treasury Decisions, No. 16, page 28.

Bucket Shops.

Stamp tax. Closing of transactions in stocks at bucket shops. Books to be kept. No. 308, March 25, 1901. 4 Treasury Decisions, No. 13, page 60.

Stamp tax. Opinion of the United States Circuit Court of Appeals that no stamp tax accrues on a presumptive resale of stock where bucket shop transactions are settled by payment of differences. No. 311, March 26, 1901. 4 Treasury Decisions, No. 13, page 64.

Dummy Packages.

Packages put up in imitation of statutory packages of tobacco or cigars and bearing statutory labels and imitation stamps are unlawful packages and subject to forfeiture. A manufacturer should not use dummy packages which are a counterpart of his statutory packages. No. 312, March 26, 1901. 4 Treasury Decisions, No. 14, page 29.

Export Bills of Lading.

Stamp tax. Stamp tax on export bills of lading declared unconstitutional by the United States Supreme Court, and stamps no longer required on such instruments. No. 328, April 19, 1901. 4 Treasury Decisions, No. 17, page 43.

General Bonded Warehouses.

Regulations concerning the bonds, Form 351, and the order, report, entry, certificate and receipt, Form 352, used in transfers to general bonded warehouses. No. 326, April 17, 1901. 4 Treasury Decisions, No. 17, page 42.

Legacy Tax.

Legacy taxes under the Act of June 13, 1898, as amended, due and payable in one year after the death of the testator. Taxes are to be deducted from the legacy. The notice required to be given to the collector by the executor, etc.,

Notes of Treasury Department Decisions.

within thirty days after he qualifies, must be in writing. No special form is prescribed. No. 330, April 22, 1901. 4 Treasury Decisions, No. 17, page 44.

Legacy to Philadelphia School of Design for Women.

Legacy tax. A legacy for literary, charitable or educational uses, on which tax has not been paid prior to March 1, 1901, is exempt from tax. No. 309, March 25, 1901. 4 Treasury Decisions, No. 13, page 61.

Liquor Dealer—Offering for Sale.

Special tax. No. 310, March 25, 1901. 4 Treasury Decisions, No. 13, page 61.

Memoranda of Brokers—Paragraph 3, section 8, Act of March 2, 1901.

No. 329, April 20, 1901. 4 Treasury Decisions, No. 17, page 44.

Special tax. No. 331, April 22, 1901. 4 Treasury Decisions, No. 17, page 45.

Modification of the Definition of Mixed Flour.

No. 322, April 9, 1901. 4 Treasury Decisions, No. 15, page 15.

Orders for the Payment of Money.

Stamp tax. No. 323, April 11, 1901. 4 Treasury Decisions, No. 16, page 27.

Passage Tickets.

Stamp tax. No. 303, March 21, 1901. 4 Treasury Decisions, No. 13, page 43.

Rebates and Redemption of Stamps.

No. 327, April 18, 1901. 4 Treasury Decisions, No. 17, page 42.

Receivers and Assignees.

Special tax. No. 316, March 30, 1901. 4 Treasury Decisions, No. 14, page 36.

Rectification—Manufacture of Prune Juice.

A manufacturer of prune juice who adds proof spirits in excess of 10 per cent. of the whole quantity of the fruit juice and spirits combined is a rectifier. No. 313, March 28, 1901. 4 Treasury Decisions, No. 14, page 30.

Redemption of Documentary and Proprietary Stamps.

No. 305, March 22, 1901. 4 Treasury Decisions, No. 13, page 44.

Unlawful Assignment of Storekeepers and Storekeeper Gauges.

No. 306, March 22, 1901. 4 Treasury Decisions, No. 13, page 46.

Rules and Regulations Concerning Taxes on Tobacco, etc.

Rules and regulations concerning taxes on tobacco, snuff, cigars and cigarettes, and relating to rebate of taxes on tobacco, snuff and cigars held by manufacturers and dealers on July 1, 1901, under Act of March 2, 1901. No. 307, March 23, 1901. 4 Treasury Decisions, No. 13, page 47.

Special Tax Return—Broker, Class 2.

No. 315, March 28, 1901. 4 Treasury Decisions, No. 14, page 35.

Special Taxes of Brokers, etc.

Special taxes of brokers, dealers and traders, and taxes on transactions set out in paragraphs 2 and 3 of Schedule A, Act of March 2, 1901. No. 318, April 3, 1901. 4 Treasury Decisions, No. 14, page 38.

Strawberry Cider.

Special tax. No. 321, April 6, 1901. 4 Treasury Decisions, No. 15, page 14.

Unlawful Use of Penalty Envelopes.

No. 319, April 4, 1901. 4 Treasury Decisions, No. 15, page 13.
10 DIST. R.

Shields et al. v. Philadelphia et al. Prettyman et al. v. Philadelphia et al.

Streets—Paving—Bids—Compliance with requirements of advertisement.

Where samples of the materials to be used are required by the advertisements and specifications to be deposited by the parties bidding for the paving or repaving of the streets of a city, the official who has the awarding of the contracts does not exceed his authority when he declines to schedule a bid unaccompanied by the deposit of a sample of the material to be used.

Good reason appeared for believing that S. and the W. Q. A. Co. had made a business arrangement with the intention of bidding upon paving contracts. S., however, ordered the bonds which accompanied the bids prepared with his name as obligor, and the receipts for the samples of the materials deposited, as required by the advertisement and specifications, were also in his name, although there was some contradiction as to what was said at the time of the deposit in regard to the samples being those of the W. Q. A. Co., in whose name the bids were made. Held, that as the contemplated arrangements between S. and the W. Q. A. Co. had not reached such a point on the day the samples were deposited, that they could be regarded as deposited on its behalf, the bid of the W. Q. A. Co. was properly rejected.

Motions for injunctions. C. P. No. 4, Phila. Co., March T., 1901, Nos. 1668 and 1669, in Equity.

George S. Graham, for plaintiffs.

John G. Johnson, M. H. Todd, E. L. Tustin, and *Jas. Alcorn*, assistant city solicitor, and *John L. Kinsey*, city solicitor, for defendants.

WILLSON, J., May 3, 1901.—The bills in these cases were filed for the purpose of preventing the awarding of contracts by the city authorities to certain of the defendants for the paving or repaving, with sheet asphaltum, of various streets named in the bills. In view of the character of the cases as they were developed at the hearing, it is not necessary to enter into further particulars as to the contents of the bills or the prayers for relief. The two cases were heard together, and after the testimony was taken and all proofs submitted, the whole matter was left to the court without argument.

Careful consideration has been given to it, and we purpose now to state the conclusions reached by us.

In each case it is, in substance, averred as a fundamental part of the plaintiffs' cause of action that samples of asphalt and other materials were deposited with **William H. Brooks**, Chief of the Bureau of Highways, on April 6, 1901, by **W. S. P. Shields**, acting for and on behalf of the **Warner-Quinlan Asphalt Company**. The testimony heard by us related primarily and almost exclusively to this point.

The depositing of samples of the materials referred to was required by the advertisements and the specifications which led to the bids made by all the competitors. Whether the main object to be served by such a requirement was to furnish information before the awarding of a contract, or to provide a test for comparison after work was entered upon, it cannot be questioned that the demand was reasonable. At any rate, it was made a substantive condition for a valid bid, and it seems to have been regarded by all parties as necessary that proper samples should be furnished before the status of a bidder would be complete. In that opinion we concur. The effort of the plaintiffs at the hearing was to make out a case upon this point, which would justify the conclusion that samples had been in proper time deposited by or on behalf of the **Warner-Quinlan Asphalt Company** in the office of the Bureau of Highways. If they have failed in that regard, they have failed to lay sufficient grounds for asking the court to interfere in their behalf by issuing the injunctions prayed for. There appears to be good reason for believing that **Mr. Shields** and the firm

Shields et al. v. Philadelphia et al. Prettyman et al. v. Philadelphia et al.

known as the Warner-Quinlan Asphalt Company had entered into some sort of a business arrangement, with the intention of entering into competitions for paving contracts in this city. We think, however, that it is equally clear that these arrangements had not reached such a point on April 6, 1901, the day when the samples are claimed to have been deposited on behalf of that company, that the said firm was prepared to present its bids, or to take definite steps in that direction. Mr. Charles M. Warner, of that firm, was not in Philadelphia, and Mr. Shields set about the matter apparently as best he could under the circumstances. By his representative, he ordered the bonds which would accompany bids to be prepared at the office of the city solicitor, and, according to the understanding of the order in that office, they were prepared with his name as obligor—a form which indicated that he, Mr. Shields, personally, was to be the bidder. It does not appear that any contrary instructions were given upon the subject at that time. Indeed, it is unquestionably true, unless one is to disregard all ordinary rules of interpreting human conduct, that it was then intended that the bids should go into the office of the highway department in the name of Mr. Shields. While it is doubtless, also, evident now, in view of the light subsequently thrown upon the transaction, that he expected to give to the Warner-Quinlan Asphalt Company, in connection with himself, the benefit of any contract which might be awarded to him, there is nothing before us which would warrant the inference that even so much as that was known to the authorities of the city.

Under the circumstances just mentioned, the samples in question were deposited in the proper office by an agent of Mr. Shields. There is some contradiction in the testimony as to what was said at that time in regard to the samples being those of the Warner-Quinlan Asphalt Company. One of the packages had on it this inscription: "Warner-Quinlan Asphalt Co., Asphaltic Cement." Walter J. Warner was the agent of Mr. Shields, who took the articles to the office, and he is not altogether clear in his recollection or statements of what was said. Mr. Brady testified that the clerk who received them was told that the samples were those of the Warner-Quinlan Asphalt Company. That is denied by the clerk and others who were in the office. It is, however, to be noted that the receipt which was given for the samples was made out in the name of Mr. Shields as the depositor, and that fact was stated by the entry upon the stub of the book from which the paper was taken. The receipt was made to describe each sample in detail by the particular request of Walter J. Warner, who not only must have known, but actually did know, that the paper called for Mr. Shields as the depositor of the samples before he left the office. It is hardly credible that, if it had been understood or intended that the depositing of these specimens should accompany a bid of the Warner-Quinlan Asphalt Company, the receipt would have been made out or taken in the name of Mr. Shields. In point of fact, it was not until the Monday following—April 8—that the plans were changed and the intention arrived at to put in bids in the name of the company. By some oversight, probably, the persons interested failed to alter the character of the deposit of the samples. When, therefore, the bids were opened to be scheduled, and the chief of the bureau inquired, as he testified he did, for samples accompanying the bids, he had a right to disregard bids which had no corresponding samples. Neither he nor the director of public works exceeded his authority, under such circumstances, in declining to schedule any such bid, or in awarding the contracts to other bidders. The plaintiffs in each case must fail in their suit for that reason.

It ought not to be necessary to say that our conclusion would be radically different, if it appeared that the conduct of the public officers who were concerned in the matter was fraudulent, or based upon improper motives or

10 DIST. R.

Shields et al. v. Philadelphia et al. Prettyman et al. v. Philadelphia et al.

considerations. There is, however, absolutely nothing in the evidence before us that would warrant such a conclusion, and in a court of justice nothing less than strong evidence would justify it.

For the reasons stated, the injunctions must be refused.

Collins's Estate.

Decedent's estate—Widow's election—Sequestration.

Where the election of a widow to take against the will does not affect the legatees, but takes away, during her lifetime, one-third of the income of the real estate, to which the devisees would have been entitled immediately upon the testator's death, a fund, whose income was given to the widow for life and which she parted with when she made her election, will be sequestered during her lifetime for the benefit of the devisees.

Practice, O. C.—Review—Distribution—Act of Oct. 13, 1840.

A distribution which has not changed the actual custody of the fund, so that it remains intact and under the control of the court, is not within the Act of Oct. 13, 1840, P. L. (1841), 1, and does not prevent a review.

Petition for review. O. C. Phila. Co., Jan. T., 1899, No. 179.

W. H. Hepburn, for petitioner.

I. H. Mirkil, F. E. Brewster and T. M. Daly, for respondent.

ASHMAN, J., April 13, 1901.—To render as little embarrassing as possible the change which the widow's election to take against his will necessarily produces in the purposes of the testator, the period of her election is held to be equivalent to that of her death, and the vesting of the interests which were to follow the latter event, or so much as after her choice remains to them, is accelerated. At law, as Judge Story has shown, a will which is thus broken must be regarded as destroyed so far as the party who has been disappointed by the election is concerned, and the benefit intended for him falls into the residue. Equity, however, by the aid of the legal fiction of the death, endeavors to work out the testamentary intent which, at the actual death, was to go into effect. In doing this, it will ordinarily follow the order which was mapped out by the will, simply advancing the gifts in respect to time, and leaving the loss to fall upon the residuary legatee as the last in the estimation of the testator: *Ferguson's Estate*, 138 Pa. 208, and *Vance's Estate*, 141 Pa. 201, are illustrations of this course of procedure. In both of these cases the general legacies were advantaged, because they became payable at the date of the election instead of being postponed to the date of the death; but the symmetry of the will was preserved and only the time at which its provisions were to come into play was shifted. The several beneficiaries took by the terms of the will at the same time, and were equally benefited in point of time by the widow's repudiation of the will. But where there are two sets of beneficiaries and two periods of vesting, equity adopts another rule, and it regards the moneys which were given to the widow, but which her election has released as a trust fund, to be administered for the benefit of those whom her election has disappointed: *Story's Equity*, § 1083. In the present case, the testator gave to his widow the use of his dwelling-house and the furniture therein, and the income of \$20,000 for life, and at her death the income, including the rental, to his two children for their lives; and he devised certain real estate to grandchildren in fee. By her election the widow receives one-third of the personal estate absolutely, and one-third of the rent of the realty for life. The personal estate is sufficient for the payment of the widow and the legatees. The election, therefore, has not affected the legatees, because their interest in the \$20,000 will not accrue until her death, but it will take away

during her life one-third of the income of the real estate to which the devisees became entitled at once on the death of the testator. To accelerate the legacies and make no provision for the diminished devisees will frustrate the scheme of the testator in two directions; it will take from those to whom the testator gave, and will give to those to whom, during the life of the widow, he bequeathed nothing. If, however, the fund whose income was given to the widow for her life, shall be set apart during that period for the benefit of the devisees, both sets of beneficiaries will receive precisely what the will gives them, and at the very dates fixed by the will for the vesting of their interests. This will follow the practical application of the rule stated by Judge Story, that "courts of equity will assume jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his intention disappoints" (Equity, § 1083), which was made in Sandoe's Appeal, 65 Pa. 314; Young's Appeal, 108 Pa. 17, and Portuondo's Estate, 185 Pa. 472. The decisions in Ferguson's Estate and Vance's Estate (*supra*) are not in the way of this adjustment. The question in them lay between the general and the residuary legatees, and it was held that the interests of both shared equally in the acceleration, and that the income which accrued to the favored beneficiaries during the widow's life ought not to be sequestered to benefit those who were to take only what was left after all prior gifts had been paid in full.

The petition of the minor grandchildren, devisees, alleges that they were not represented at the audit, and that, in consequence, their claim for relief was not considered. The technical distribution which was made is not sufficient to overthrow their equities; it was not such a distribution as was contemplated by the statute, because the fund remains intact in the hands of the trustee and under the control of the court. We think that the adjudication should be opened, and the widow's life-estate in the trust fund and in the rents of the dwelling-house sequestered. The petition goes further and asks that enough of the residuary estate shall be sequestered to secure the full payment of the claim of the disappointed devisees. No proof was furnished, however, that the income from the liberated fund and from the rental of the dwelling-house would not make good the losses to the petitioners and all other devisees; on the contrary, the answer distinctly asserts that the income of the trust fund will, of itself, furnish ample compensation. We, therefore, grant the petition so far as to decree that the said fund of \$20,000 and two-thirds of the net rents of the dwelling-house be set apart, and the income of said fund, with the rents aforesaid, or so much as shall be necessary, be appropriated to make up the loss to the devisees occasioned by the widow's election to take against the will.

Counsel will furnish a statement, showing the amount of the income and rentals and the amounts to be paid thereout, to the several devisees.

PENROSE, J. (concurring), April 13, 1901.—Where a testator has undertaken to dispose of property belonging to another to whom the will gives something owned by himself, such person is put to his election either to take what belongs to him and renounce what the will gives, or to accept the latter and relinquish what is his own. If he should prefer the former course, the plainest principle of justice demands that the testamentary provision which he gives up shall be applied or "sequestered," so far as it will go, to the compensation of the legatee or devisee who has been deprived, in whole or in part, by reason of such election, of what the will gave to him. If, for example, the testator devises to A a house belonging to B, to whom he gives a legacy of \$5000, the election of B to keep the house and give up the legacy deprives A of the devise, and unless the renounced legacy be given to him in place of it, B's election would inure to the benefit of the residuary legatee, who would thus take that much more than the

Collins's Estate.

testator intended, and A would be the only sufferer. Precisely the same principle applies when the testator's disposition of his estate is thwarted or interfered with by the election of his widow to assert her rights under the intestate laws, and give up the provisions which the will has made for her. In such case the question is, who is the person injured by reason of this election, and that being determined, the application of the renounced benefits for the relief of such person or persons follows as a matter of course. It is true that it was held in Vance's Appeal, 26 Crumr. 201, that this could not be done in the case of residuary legatees, no matter how manifest it may be that they are the only sufferers and that all other legatees will take precisely what the testator has given them—the theory being that by her election the widow is regarded, not “*as if*” dead, for that is similitudinary only, and *nil simile est idem*, but as actually dead, and thus the interests taking effect at her death are accelerated with such irresistible force that equity is paralyzed, and prevented not only from relieving, but even from seeing the injury. How far the later cases of Evans's Estate, 150 Pa. 212, and Portuondo's Estate, 185 Pa. 472, are in conflict with this doctrine, need not be considered, for here the parties injured are specific devisees, not residuary legatees, and there can be no doubt that they are entitled, to the extent of what the widow has renounced, to the relief asked for. The will devises certain real estate to the petitioners and others, in fee, and after providing a fund of \$20,000, the income of which is to be paid to the testator's widow, for life, to whom also is given an equitable estate for life in his residence and the furniture which it contains, gives the residue of the estate as there set forth. The widow has elected to take against the will, and thus so long as she lives the devisees of the real estate lose one-third of the rents of the properties devised to them, unless the income of the \$20,000 and of the other property given to her be sequestered during the same time to make good their loss.

But sequestration can only be of that which the person taking against the will refuses, by so doing, to accept,—thus leaving it undisposed of. It cannot apply to what is given to a third person. Nor can a loss sustained by a devisee of real estate be compensated at the expense of the residuary legatee of personalty. Personal estate, of course, is applicable in the first instance to the payment in full of pecuniary legacies, and nothing passes to the residuary legatee until this has been accomplished, even if a deficiency has been caused by the election of a widow to take against the will; but there the liability of the residuary personal estate ceases, and it can no more be called upon to compensate the loss or disappointment of a devisee than it can be to make good the loss of a specific legatee,—though in either case sequestration of what the widow refuses to accept may be demanded.

It is supposed, however, in the present case, that the application comes too late, because of the distribution awarded by the adjudication which is the subject of the review: but the distribution has not changed the actual custody of the fund sought to be sequestered, which has simply been transferred from the trust intended for the widow to the trust taking effect at her death, the trustee being the same individual in each case. This is not the sort of distribution which, under the Act of 1840, prevents a review. There has been no expenditure of any part of the principal of the fund, and its restoration to the original trust for the purposes of limited sequestration does no possible injustice to any person or interest.

It was asked that the adjudication be referred back to the auditing judge for the purpose of having the decree corrected in conformity with the prayer of the petition: but this is no part of the functions of an auditing judge, and there is no reason why he should be thus burdened. The proper decree may be

Collins's Estate.

entered in this proceeding, if we are furnished with statements showing the amount of loss to the devisees by reason of the widow's election, and how far the income of the relinquished fund will be required to compensate such loss.

Keim's Estate.

Partition—Right thereto—Smallness of petitioner's interest.

Ordinarily, the smallness of a petitioner's interest is no bar to his proceeding for a partition, but when he has only a one forty-eighth interest in the estate, and his request for an inquest is opposed by all the remaining interests, he should show a clear and undoubted right to the writ asked for.

Partition—Filing petition within year of death.

The executors are entitled to at least one year in which to administer the estate before a forced settlement of the same can be compelled by partition proceedings. Hence, a petition for an inquest filed only five months after the death of the testatrix is prematurely filed.

Partition—Right thereto—How affected by direction to sell.

Where the will contains a direction to executors to sell for the purpose of distribution, such direction supersedes the statutory proceeding in partition.

Will—Real estate—Conversion—Construction of will.

Conversion is a question of intention, and to effect it there must be: 1. A positive direction to sell; or 2. An absolute necessity to sell in order to execute the will; or 3. Such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund in money.

Testatrix provided in her will as follows: "All the rest, residue and remainder of my estate, real and personal, of which I may die seized, possessed or entitled to, I direct shall be divided into four equal parts or shares," and she authorized her executors, in their discretion, "to make public or private sale or sales of any or all of my real estate." *Held*, as there was an absolute necessity to sell to execute the will, and a blending of realty and personalty for the purpose of distribution, the direction worked a conversion.

Petition for an inquest in partition. O. C. Phila. Co., Jan. T., 1901, No. 386.

T. A. Tack and A. E. Peterson, for petitioner.

Wm. Grew, J. C. Bell, J. A. Toomey and Leonard Myers, for respondents.

FERGUSON, J., April 27, 1901.—The petitioner in this case represents a one forty-eighth interest in this estate, and requests an inquest for the partition thereof. This is opposed by all the remaining interests. While ordinarily the smallness of a petitioner's interest is no bar to his proceeding for a partition, yet the overwhelming opposition to it in this case requires that he should show a clear and undoubted right to the writ asked for. There are a number of reasons assigned why this petition should not be granted, but we do not think it necessary for this decision to consider them all. In the first place, the petition is prematurely filed, as only five months have elapsed since the death of the testatrix. The executors are entitled to at least one year in which to settle the estate (Act of Feb. 24, 1834), and creditors are entitled to the same time in which to present their claim: Gallen's Estate, 26 W. N. C. 308. Besides, under the Act of June 8, 1893, the debts of the testatrix are a lien upon her real estate for two years. How, therefore, is it practicable to divide the real estate until it is ascertained whether the debts are all paid and it is clear of the lien thereof? As there is a mortgage for \$57,500 on this land, perhaps, when the other debts are paid, there may be nothing left for partition. Be this as it may, the executors are entitled to at least one year to ascertain the facts, administer the estate and liquidate and settle the indebtedness of the testatrix, before a forced settlement of the estate can be compelled by partition proceedings.

Under the will of the testatrix, is this petitioner entitled to partition at any time? The testatrix herself provides the manner in which her residuary estate

10 DIST. R.

Keim's Estate.

is to be parted and divided. This she undoubtedly had the right to do. "All the rest, residue and remainder of my estate, real and personal, of which I may die seized, possessed or entitled to, I direct shall be divided into four equal parts or shares. For the purpose of division of my said estate or otherwise, I hereby authorize and empower my executors hereinafter named, at any time after my decease, in their discretion, to make public or private sale or sales of any or all of my real estate for the best price or prices that can reasonably be had or gotten for the same, and to make deed or deeds for the same to the purchaser or purchasers thereof, his, her or their heirs or assigns." The testatrix thus directs the division of her estate, and designates the persons who are to perform this duty, limits the number of shares into which it is to be divided, and authorizes a sale in order to accomplish this purpose. Under these circumstances, must we not consider that her will is paramount to the statutes providing for partition, which should only be invoked in case there is no remedy otherwise? *Baum's Appeal*, 4 Pennyp. 1.

Moreover, in this case, is there not such an equitable conversion of this real estate into personalty as would be a complete bar to any proceedings in partition? In *Hunt's and Lehman's Appeals*, 105 Pa. 141, Paxson, C. J., said: "A conversion is always a question of intent," and "it ought to be settled by this time that in order to work a conversion there must either be: 1. A positive direction to sell; or 2. An absolute necessity to sell in order to execute the will; or 3. Such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund in money. In each of the two latter cases an intent to convert will be implied." To the same effect see, also, *Dundas's Appeal*, 64 Pa. 325; *Roland v. Miller*, 100 Pa. 47; *Fahnestock v. Fahnestock*, 152 Pa. 56; *Reid v. Clendenning*, 193 Pa. 415; *Stallman's Estate*, 2 District Reps. 265. Now, in this case, while there is not a positive direction to sell, there is an absolute necessity to sell in order to execute the will, as the testatrix directs that her estate is to be divided into four equal parts, and that from the share of the children of her son George is to be deducted the sum of \$85,000. They are to take for their one-fourth part or share only the excess over said sum. As there is very little personal estate, if any, this result could not be accomplished without a sale of the real estate. Besides, the blending of her real and personal estate in the residuary clause shows that she intended to create a fund out of both and distribute the same as money. We think this case is clearly within the decisions of the Supreme Court, and that there has been an equitable conversion of the real estate of the testatrix into personalty.

The petition for partition is dismissed.

Com. ex rel. Stein, Inspector, v. The Brookwood Coal Co.

Mines—Washery—Act of June 2, 1891.

A washery is a coal mine or colliery within the meaning of the Mine Law of June 2, 1891, P. L. 176, and subject to its provisions.

Bill in equity. C. P. Schuylkill Co., May T., 1901, No. 6.

S. H. Kaercher, for complainant; *Breckons and Berger*, for respondents.

BECHTEL, P. J., April 22, 1901.—It is unnecessary to make extended reference to the bill and answer in this case, as the result of the matters therein contained is the presentation of the single question, does the Act of June 2, 1891, P. L. 176, entitled an Act "to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection

Com. ex rel. Stein, Inspector, v. The Brookwood Coal Co.

and preservation of the property connected therein," include within its provisions a "washery?" The plaintiff answers this question in the affirmative, and the defendant in the negative. The defendant's position may be briefly stated by saying a washery is not covered by the terms, "anthracite coal mine or colliery," "coal mine or colliery," or "mine or colliery." These expressions are found in the different sections of the Act. While we cannot say that the answer to the question presented is to be found in the consideration of these expressions alone, yet we are led to consider them as having important bearing upon the subject. The more important of the terms used is "mine or colliery." To mine is defined to dig a pit or mine, to dig in the earth for minerals, &c., and appears to apply more especially to underground work. Hence, it is claimed, that a mine must refer to digging or mining below the surface. Suppose this be conceded, still we have the term colliery. The term collier is defined to be a "digging of coal—one who works in a coal mine"—"a coal merchant or dealer in coal." Colliery is said to be "the place where coal is dug," "the coal trade." It is evident from these definitions that the term "colliery" is more comprehensive than the term "mine." In fact, if they are not to be so understood, then the use of one or the other is simply superfluous. "Colliery" appears to include "mine" and other or additional works, appliances, buildings, &c., used in about the preparation of coal.

In the 9th section we find the language: The inspector shall examine all the collieries in his district. Here "collieries" evidently covers the entire operations, or includes the term mines as above defined. An examination of these definitions, and the statutory definitions given us, will show that they are practically identical, and the term colliery simply covers the whole operation. The term "mine," says the 18th article, includes all underground workings and excavations, and shafts, tunnels and other ways and openings; also, all such shafts, slopes, tunnels and other openings in course of being sunk or driven, together with all roads, appliances, machinery and materials connected with the same below the surface. While this is the definition of "mine," yet when "coal mine or colliery" is defined, the term "coal mine" covers the entire operation. The Act says: "In this Act, unless the context otherwise require, the term "coal mine or colliery" includes every operation and work, both under ground and above ground, used or to be used, for the purpose of mining and preparing coal."

From this it would seem that "mine" and "coal mine" have legislative definitions, and the one cannot, for the purposes of this Act, be regarded as the equivalent of the other. We have thus referred to these terms because it is contended that the term mine must be accepted in its restricted sense, and as it means an underground working or digging a "washery" should not be regarded as included. But the language above quoted shows that "coal mine or colliery" includes everything that may be considered an "operation or work," whether above or below ground. Nor do we believe the term "mining" restricts this language to an operation wherein coal is mined from beneath the surface, for it is not alone mining, but also "preparing coal." Hence, under the legislative definition of terms, we are inclined to believe a "washery" may be regarded as included.

We have, however, other language in the Act, which appears to have special reference to the case in hand. In art. v we have: "It shall not be lawful to place any boiler or boilers for the purpose of generating steam under nor nearer than 100 feet to any coal breaker or other structure in which persons are employed in the preparation of coal." It will be noticed the expression now is, "preparation of coal" and "coal breaker or other structures." Under the Act, "breaker" means "structure containing the machinery used for the preparation

10 Dist. R.

Com. ex rel. Stein, Inspector, v. The Brookwood Coal Co.

of coal." We cannot understand how the structure, in which the coal in a washery is prepared, can be denied the title of breaker. Whatever coal a washery finds it necessary to break, is broken therein, as well as washed, and it seems but reasonable to conclude that the structure of a washery is included in the expression "any coal breaker or other structure."

The object of the Act of 1891 is to protect life, and if the language thereof was of doubtful meaning it should receive that construction which is best calculated to carry out its evident purpose. To adopt the defendant's construction, would be to say that washery, although it prepares coal in its structure, may have boilers within the distance mentioned in the Act, because it does not dig from the earth, while other structures may not, because the coal is dug from the earth. From this, it would seem to follow that the life of the employee in the one should be guarded and protected, while the other should not, although both are subjected to like danger. We cannot accept this construction, and, consequently, conclude that a washery is within the Act of 1891. It may also be mentioned that this conclusion appears to be in accord with the first article of the Act, which says: "This Act shall apply to every anthracite coal mine or colliery in the Commonwealth, provided the said mine or colliery employs more than ten persons."

And now, April 22, 1901, injunction continued, but upon the express condition that defendants promptly remove the new boiler to the requisite distance, permission is given to work the plant with the old boiler in the meantime, thus enabling the owners and employees to continue without loss of time during the removal of the new boiler.

From J. O. Ulrich, Tamaqua, Pa.

Miller, Administrator, &c., v. Black.

Bankruptcy law—Exemptions—Waiver.

After a debtor's discharge in bankruptcy, a creditor whose claim was provable against the bankrupt's estate cannot levy upon his exempt property, although the note upon which the judgment was entered contained a waiver of the benefit of the present and any future bankrupt law that might be passed by the United States.

Rule to show cause why the execution should not be set aside. C. P. Erie Co., Feb. T., 1901, No. 10, *Fi. Fa.*

Frank Gunnison and D. R. Cushman, for rule; Rilling & Fish, contra.

LINDSEY, P. J., 37th judicial district, specially presiding, April 15, 1901.—From the affidavit of defendant, George J. Black, and the answer thereto, filed by the plaintiff, we learn that on April 23, 1900, the plaintiff issued *fi. fa.*, No. 61, May Term, 1900, upon a judgment, No. 18, May Term, 1897, for \$1065.70, upon which there was a credit of \$445.07, which he held as administrator of the estate of Volney Bull, deceased, against George J. Black and John Black.

The note on which said judgment was entered contained a waiver of all relief from any and all exemption laws of any State now in force or hereafter to be passed, and also waiving the benefit of the present and any future bankrupt law that may be passed by the United States.

Each of the defendants presented petitions to the District Court of the United States for the Western District of Pennsylvania, and on April 26, 1900, were duly adjudged bankrupts. A restraining order was then issued by the referee in bankruptcy, restraining the plaintiff from selling the personal property of defendants, under the execution issued April 23, 1900, then in the hands of the sheriff, defendants claiming the exemption of \$300 in personal property by virtue of the Act of April 9, 1849, of the State of Pennsylvania.

The plaintiff proved his debt in the bankruptcy court, and resisted the right of the defendants to the exemption before the referee, for the reason that defendants had waived the benefit of the Act in the original notes on which said judgment was entered. The referee, however, allowed the defendants their exemptions, and, on request, certified his decision to the District Court in Bankruptcy for review. Hon. Joseph Buffington filed an opinion Oct. 22, 1900, holding, substantially, that the property claimed as exempt under State laws constitute no part of the assets in bankruptcy, and that the trustee in bankruptcy acquired no title thereto; that by the Act of Congress the property claimed as exempt is expressly excepted from the jurisdiction of the bankruptcy court.

On Nov. 23, 1900, the plaintiff issued the above-entitled *alias fi. fa.*, by virtue of which the sheriff levied on and advertised for sale property claimed as exempt by the defendants, and over which the court in bankruptcy has decided it had no jurisdiction. The bankruptcy law operates not only upon debts proved, but upon all debts provable under the bankrupt law at the time of the filing of the petition of the bankrupt in court. This debt was undoubtedly provable under the bankrupt law. There can be no question, therefore, as to the jurisdiction of the bankruptcy court over the debt, not only by virtue of the Act of Congress, but by the voluntary appearance and proof of his debt by the plaintiff. Having gone into the bankruptcy court, and resisted there the defendants' right to their exemptions, for the reason, as he says in his answer, that they had waived the right to claim the benefit of the same in the note on which judgment is entered, can he now return to this court and proceed on the same judgment against the exempt property? It has been adjudicated by the bankruptcy court that plaintiff cannot resist defendants right to their exemption in the bankruptcy court. Is not that a bar to his proceeding here?

But, further, the defendants interpose their discharges granted by the said District Court of the United States, on Feb. 14, 1901, as a bar to any further proceedings on the execution. They had not been granted at the time this rule was obtained, but they were presented to the court on the argument by agreement.

The plaintiff interposed objections to the granting of these discharges by paper filed in said court, a copy of which was also presented to this court on the argument, setting up as a reason why the defendants should not be discharged, the fact that an *alias* execution had been issued in said judgment, and a levy made on the exempt property of defendants, and waiver of the exemption, notwithstanding which the District Court of the United States entered decrees discharging the defendants.

I cannot resist the conclusion that these decrees effect an extinguishment of the personal liability of the defendants for the plaintiff's debt, and, therefore, are a bar to any further proceedings on this execution.

In *May v. Merchants and Mechanics' Bank*, 109 Pa. 145, Justice Sterrett, delivering the opinion of the court, in a case quite similar to this, speaking of the discharge in bankruptcy of the defendant in that case, says "that absolved the bankrupt from all debts provable against his estate, and claims existing on the day his petition for adjudication was filed, the validity of that decree cannot now be questioned, the matter is *res adjudicata*, and cannot be reviewed in this collateral proceeding."

The effect of the above-cited decision, as we understand it, is to render inoperative the waiver of exemption as against the bankrupt law. So understanding it, we are obliged to make the rule absolute in this case.

Rule absolute.

From Joseph M. Force, Erie, Pa.

Lessing Building Association of Philadelphia v. Lentz.

Practice, C. P.—Scire facias—Entering judgment for want of an appearance.

If a *scire facias* is served less than ten days before the return-day, and the defendant does not appear ten days after the day of service, judgment may be entered for want of an appearance at any subsequent day in the term, according to the rules of court.

Rule to show cause why the judgment, assessment of damages and writ of *levari facias* should not be stricken off and set aside. C. P. No. 5, Phila. Co., March T., 1901, No. 641.

Isaac C. Yocum, for plaintiff; James Rich Grier, for defendant.

MARTIN, P. J., May 4, 1901.—On May 27, 1896, defendant executed and delivered to the Lessing Building Association, the plaintiff, a bond and mortgage in the sum of \$3000, secured upon premises at the southwest corner of 7th and Girard avenue, in the city of Philadelphia, subject to a prior mortgage.

It was stipulated in the building association mortgage that if the mortgagor should make default in the payment of interest on the prior mortgage, the principal of the building association mortgage should become due and payable, and the building association be authorized to sue out forthwith a writ of *scire facias*.

A writ in the usual form, reciting the mortgage and setting out the default in payment of interest on the prior mortgage, was issued on March 23, 1901, returnable on the first Monday of April, which fell upon April 1.

The sheriff's return, endorsed upon the writ, indicated a service upon defendant on the same day that the writ issued. On April 10 judgment was entered against the defendant by the prothonotary for want of an appearance, damages assessed and a *levari facias* issued.

On April 23 defendant filed an affidavit, averring that the judgment was prematurely, improvidently and unlawfully entered, and a rule issued to show cause why the judgment, assessment of damages and writ of *levari facias* should not be stricken off and set aside.

On April 28 plaintiff filed an answer, under oath, denying the facts set forth in the affidavit for the rule.

Section 39 of the Act of June 13, 1836, P. L. 579, enacts that in the case of a writ of *scire facias*, judgment for default of an appearance may be taken at the same time and in the same manner as in the case of a summons.

The 34th section of the same Act, P. L. 578, provides for the entry of judgment for default of an appearance, where there is a return of service, in the case of a writ of summons served less than ten days before return-day. If the defendant shall not appear ten days after the day of service, judgment may be entered at any subsequent day in the term according to the rules of court. This section requires that the plaintiff should have filed his declaration, but the *scire facias* takes the place of the *narr*: Association v. Gardiner, 10 Phila. 361.

It was held in Fisher v. Potter, 2 Miles, 147, that the plaintiff is entitled to judgment where the writ issued less than ten days before return-day, if an appearance be not entered at the expiration of ten days after service and the usual *dies gratie*; and in Foster v. Reynolds, 1 Phila. 146, Sharswood, P. J., said: "A judgment by default (for want of an appearance) can be entered after the writ has been served fourteen days, although it may not have been served ten days before the return-day." 3 Blackstone's Commentaries, *277; 1 Troubat & Haly's Practice (5th ed.), 275, 276; 2 Troubat & Haly's Practice (5th ed.), 1961.

While the better practice since the passage of the new procedure Act would seem to be, in all cases, to enter judgment for want of an affidavit of defence, in accordance with the law and rules of court (1 Brewster's Prac. (2nd ed.), § 23, it was said by Allison, P. J.: "Neither the Act of May 25, 1887, nor the rules

Lessing Building Association of Philadelphia v. Lentz.

of court adopted to carry out its provisions, in any way alter, nor do they abolish, the right of a plaintiff to have judgment for default of an appearance : " *Humphrey v. Smith*, 4 Pa. C. C. Reps. 169 ; 1 *Brewster's Prac.* (2nd ed.), § 23.

The proceeding by *scire facias* was in no way affected by the passage of the Act of 1887, P. L. 270.

The Act of April 22, 1889, P. L. 41, empowers the courts of this Commonwealth, "by rule or standing order, to authorize the prothonotary to enter judgment upon *præcipe* for want of an appearance, for want of a declaration or plea, or for want of an affidavit of defence, and to enter judgment thereon with the same effect as if moved for in open court "

Rule 23, § 1, page 109, of the rules of court, provides that "judgment for default of any kind may be moved before and entered by the prothonotary, who shall assess the damages in all cases in which the amount thereof is set forth with certainty in the statement of claim filed : " 1 *Troubat & Haly's Prac.* (5th ed.), 276.

The *scire facias* in this case sets forth with certainty the amount of the principal of the mortgage sued upon, and alleges default in the condition, whereby it became due and payable, and the assessment of damages was within this sum.

No irregularity, therefore, appearing upon the face of the record, the rule is discharged.

Singerly's Estate.

Decedent's estate—Accountant's commissions—Real estate—Personalty.

A lower rate of commissions will be awarded to accountants where the principal of the fund consists of the proceeds of sale of realty than where it is composed exclusively of personalty.

A commission of two per cent. is adequate where a fund of \$11,000 was derived from the sale of real estate, no special labor having been shown to have attended the sale, which was made by a broker, to whom a commission of one per cent. was paid by the estate, the accountant himself being appointed in the room of deceased executors simply as the instrument for making the sale.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1880, No. 426.

George L. Crawford, for exceptant.

John G. Johnson and *E. B. Seymour*, contra.

ASHMAN, J., April 27, 1901.—In *Sharp's Estate*, 9 District Reps. 727, reference was made to the practice which has uniformly prevailed of awarding a lower rate of commissions to accountants where the principal of the fund consists of the proceeds of sale of realty than where it is composed exclusively of personalty. No adequate reason for the distinction appears ever to have been given, and, under existing financial conditions, many strong reasons might be urged against it. It would be useless, however, to discuss the merits of a revision which we have no power to make. The auditing judge, bound as he was by precedents, properly refused to allow the commission of five per cent. which was demanded in this case by the administrator. The fund of \$11,000 was derived from the sale of a farm owned by the decedent. No special labor was shown to have attended the sale ; in point of fact, it was effected by a broker, to whom a commission of one per cent. on the amount of the purchase-money was paid by the estate ; and the accountant himself was appointed in the room of the deceased executors simply as the instrument for making the sale. The adjudication awarded him compensation at the rate of two per cent., and this, upon a consideration of all the facts, we think was a just allowance.

The exception is dismissed.

10 DIST. R.

Fleming's Estate.

Decedent's estate—Inventory—Purpose—Effect of filing on executor or administrator—Including real estate.

The obvious purpose for which an inventory is required to be filed within thirty days after the grant of letters testamentary or of administration is that the parties in interest may be informed, while knowledge on the subject is recent, of what the estate with which the executor or administrator is chargeable consists, and thus be enabled to see, when the time for accounting arrives, that no part of it has been lost through his act or default. Its effect is to make him liable, *prima facie*, for all that it contains, and to throw upon him the burden of discharging himself.

Lands which the will directs to be sold should not be included in the inventory, but no great harm can result from their introduction.

Practice, O. C.—Adjudication—Distribution.

Where distribution, in whole or in part, has been made, there should be appended to the account filed, or presented to the auditing judge to be annexed to the adjudication, a distribution account which can be regularly vouched. It is no part of his duty, nor would it be practicable, to set forth in the adjudication the items of partial distribution so made, though he may properly award distribution "subject to payments already made"—such payments being afterwards specified in the schedule of distribution prepared by counsel in conformity with the directions of the adjudication.

Practice, O. C.—Facts found by auditing judge—Correction of clerical errors.

Facts found by an auditing judge and not shown to be erroneous will not be disturbed, and purely clerical errors in the adjudication may be corrected by a restatement to be prepared by counsel, to be presented to the auditing judge, which, when approved by him, may be annexed to and made a part of the adjudication.

Legacies—Specific and demonstrative.

A legacy given with reference to a particular fund, only as pointing out a convenient mode of payment, is considered demonstrative; but where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific. *Quære*, whether a legacy found only in the provision creating the fund, viz., the proceeds of the testator's "interest in or seat in the Philadelphia Stock Exchange," and what he called his life insurance policy," is not specific.

Decedent's estate—Accepting provisions of will—Validity to bequest otherwise void.

An election by the widow to accept the provisions of the will in her favor gives validity to a bequest of the proceeds of a sale of testator's seat in the Philadelphia Stock Exchange and of a life policy, payable only to her under the rules of the stock exchange and the terms of the policy.

Exceptions to adjudication. O. C. Phila. Co., April T., 1900, No. 535.

G. L. Crawford, for exceptions; E. B. Seymour, contra.

PENROSE, J., April 27, 1901.—The obvious purpose for which an inventory is required to be filed within thirty days after the grant of letters testamentary or of administration is that the parties in interest may be informed, while knowledge on the subject is recent, what the estate with which the executor or administrator is chargeable consists of, and thus be enabled to see, when the time for accounting arrives, that no part of it has been lost through his act or default (*Com. v. Bryan*, 8 S. & R. 131). Its effect is to make him liable, *prima facie*, for all that it contains, and to throw upon him the burden of discharging himself (*Reliff's Appeal*, 2 Barr, 256). Hence, it is more likely to omit what it ought to contain, than to contain what ought to be omitted. It is, as the Act of Assembly (March 15, 1832, P. L. 139) declares, to be "of all the goods, chattels, and credits of the deceased so far as he may know or can ascertain them," and should not include anything with which the executor or administrator, as such, is not chargeable,—as, for example, real estate, which, in fact, not being "goods, chattels, or credits," is excluded by the language of the Act; and while it is true that lands which the will directs to be sold are regarded in

equity as personal estate, as they cannot be distributed until actually converted, and the ownership of the decedent is shown by the public records, there seems to be no reason for setting them forth in the inventory, and still less for bringing them into the account. After all, however, *utile per inutile non vitiatur*, and no great harm can result from their introduction—especially as the additional expense in the preparation of the inventory and appraisement, thus caused, will fall upon the executor or administrator, himself.

Even if the inventory and appraisement contained only what properly belonged to it, the court is without authority, in the face of an objection, to allow more to the appraisers than the fees fixed by the Act of Assembly (Feb. 24, 1834, P. L. 73).

There is nothing in the account now before us to indicate in any manner that distribution has been made of any part of the balance appearing to be in the hands of the accountant. Where distribution, in whole or in part, has been made, there should be appended to the account filed, or presented to the auditing judge to be annexed to the adjudication, a distribution account which can be regularly vouched. It is no part of his duty, nor would it be practicable, to set forth in the adjudication the items of partial distribution so made, though he may, properly, award distribution "subject to payments already made"—such payments being afterwards specified in the schedule of distribution prepared by counsel in conformity with the directions of the adjudication.

The exceptions to the disallowance of the claim for \$240, for services in the lifetime of the decedent, relate to matters of fact as to which it has not been shown that the findings of the auditing judge are erroneous. The errors in his restatement of the account, if they exist, are purely clerical, and as such can be corrected by a restatement to be prepared by counsel for the accountant in connection with a schedule of distribution, to be presented to the auditing judge, and, when approved by him, annexed to and made part of the adjudication. The restatement and schedule so to be prepared will allow interest on the claims of the Pennsylvania Company for Insurances on Lives, &c., trustee under the will of Joseph Singerly, to the time of payment, instead of to the date of the adjudication—an error probably induced either by the statement of the claims presented by counsel to the auditing judge, or by the failure to present any statement or calculation at all,—the practice in this respect being lamentably loose.

It is far from clear that the legacies given by the second codicil are not specific, and payable exclusively from the fund appropriated for that purpose. They are not given generally, with a superadded provision that they shall be payable from or out of a designated fund, which is the ordinary form of a demonstrative legacy; but the gift is found only in the provision creating the fund, viz., the proceeds of the testator's "interest in or seat in the Philadelphia Stock Exchange," and what he calls his "life insurance policy." In *Walls v. Stewart*, 4 Harris, 275, where the subject is exhaustively considered by Judge Bell, it is said, "If a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fail. But where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to ademption by the alienation or destruction of the object."

The leaning of the courts, however, is against construing legacies to be specific, and the intention of the testator with reference to the thing bequeathed must be clear. Moreover, there is here very considerable doubt whether the testator in making this disposition of his seat in the stock exchange and his life insur-

10 DIST. R.

Fleming's Estate.

ance did not intend to include the moneys payable at his death, under the rules of the stock exchange, to his wife or children. He never had, it would seem, any other life insurance; and as it grew out of his membership, and as he speaks of it in immediate connection with his seat in the stock exchange, as something actually existing at the date of the codicil,—“my life insurance,” it is a natural inference that this was the “life insurance policy” intended. *Noscitur a sociis*. Of course, he had no right to divert this policy from his wife to whom, under the rules of the exchange, it was payable; but her election to accept the provisions of the will in her favor gave validity to the disposition which, otherwise, he could not have made. In this view of the case, there was no abatement of the legacies even if they were specific, and not, as the auditing judge considered them, demonstrative.

The exceptions are dismissed; a restatement of the account and schedule of distribution to be prepared by counsel and submitted to the auditing judge as hereinbefore directed.

Evans's Estate.

Powers—Vested and contingent legacies.

Gifts over, in default of the exercise of a power of appointment, vest at once on the death of the donor, subject to be divested by the execution of the power.

Hence, where the donee exercises the power in favor of the devisees and legatees of the donor's will, to whom the gift over had been made, the interests of the appointees under the will of the donor are not divested by the fact that they died before the donee.

Exceptions to auditor's report. O. C. Phila. Co., July T., 1900, No. 241.

James F. Hagen, for exceptions; *E. A. Anderson*, contra.

ASHMAN, J., April 20, 1901.—It was claimed that the legacies given by the testator, in default of appointment, to the cousin and to the niece of testator's wife, were contingent upon the exercise of the power, and failed by reason of the death of the legatees in the life of the donee. The gift to the wife was of the whole estate for life, with power to expend the whole or any part in her lifetime, and to appoint the unexpended balance by her will. In default of appointment, the donor bequeathed the legacies in question. The donee, after reciting the power, declared as her will that “after my death all the said residuary estate of my said husband, which shall then remain undisposed of or unexpended, shall be paid and distributed to and among the legatees and devisees mentioned in my husband's will,” except as to certain modifications which do not affect these legatees; and she formally ratified the distribution of her husband's estate as directed by his will. The legatees survived the testator, but died before his wife.

The will of the donee may be viewed under two aspects: Its ratification of the legacies given by the donor meant either that the donee intended to exercise the power in favor of the legatees, or it meant that by failing to specifically appoint to them, she intended that they should take in default of appointment. It is immaterial which view is adopted, because both lead to the same conclusion. The will of the donee is written into that of the donor, and the appointees are, therefore, legatees of the donor. In recognition of the principle which favors, whenever practicable, the vesting of estates, the best text-writers have declared that a legacy bequeathed in default of appointment, vests at once on the death of the donor, subject to be divested by after-contingencies: Gray on Perp., § 112; Fearn on Rem., ch. 1, 226; 4 Kent's Comm., 324. One of these contingencies is an appointment to others than the legatees named by the donor, and another is the failure to appoint altogether. The only remaining possible contingency is the death of the legatee before the appointor. In the present

Evans's Estate.

instance it is clear that neither of the first two contingencies worked a divestiture, because, if it be held that the power was exercised at all, the legatees took by virtue of the power, and if it was not exercised they took by virtue of the donor's gift in default of appointment. "When the power is void, or when no appointment is made under it, the estates limited in the instrument creating the power take effect in the same manner as if the power had not been inserted." "The estates so limited are vested, subject, nevertheless, to be divested by the execution of the power. The plain reason is, that there is no estate limited under the power until the appointment be made:" Kent, *supra*. The only doubt which can be conjured is that which is occasioned by the death of the legatee in the donee's lifetime. As to this, some of the English cases hold that the instrument executing the power, being ambulatory, the interest of the appointee must, of necessity, be contingent upon his surviving the donee: *In re Vizard's Trusts*, L. R., 1 Eq. 667; *Sweetapple v. Horlock*, L. R., 11 Ch. Div. 745; *Vanderzee v. Aclom*, 4 Ves. 771; *Marlborough v. Godolphin*, 2 Ves., Sr., 61. These cases, however, lose their claim to be regarded as authoritative when we consider that in such essential doctrines as those relating to illusory appointments and the right of creditors to confiscate the appointed estate by holding the appointee a trustee for their benefit, the English law has been distinctly repudiated here: *Graeff v. DeTurk*, 44 Pa. 527; *King's Estate*, 14 W. N. C. 77; *Swaby's Appeal*, 14 W. N. C. 553. Their effect is to favor contingent at the expense of vested interests, and to reverse the principle that the appointee takes primarily under the will of the donor of the power. In the case in hand the wills, not only of the donor, but of the donee, would be equally frustrated. If the donee had died intestate it would scarcely be doubted that the gifts under the original will would have stood, for the reason that the power to which they were subject had never been attempted to be exercised, and it was so held in *In re Jackson's Will*, L. R., 13 Ch. Div. 189. But the argument now made for the exceptants is, that when the donee actually appointed in favor of the legatees, she placed them in a worse position than they would have held if she had made no appointment at all.

The exceptions are dismissed.

Gallen's Estate.

Set-off—Indebtedness of distributee to accountant.

An administrator cannot set off against an award by an adjudication, duly confirmed, a debt due himself in his own right from the person to whom the award was made.

Petition for an order to pay and answer. O. C. Phila. Co., Oct. T., 1897, No. 105.

Simpson & Brown, for petitioner; *A. A. Hirst*, for respondent.

FERGUSON, J., April 27, 1901.—In this case there was a petition for an order upon the respondent as administrator to pay to the petitioner the sum of \$193.79, which had been awarded to her by an adjudication duly confirmed. The answer sets up that the petitioner is indebted to the respondent personally in a much larger sum of money, and that he had applied the said award on account of this indebtedness. This he cannot do, as the debts are not in the same right. This principle has been held in numerous cases to apply where an executor, administrator or trustee attempted to set off a personal indebtedness against the person entitled to distribution. It must now be considered as settled law: *Chew v. Rawle*, 2 Phila. 282; *Lorenz v. King*, 38 Pa. 93; *Russell v. First Presbyterian Church*, 65 Pa. 9; *Bradshaw's Appeal*, 3 Grant, 109; *Tagg v. Bowman*, 108 Pa. 273. The petition for an order to pay is granted.

10 DIST. R.

Com. ex rel. Elkin, Attorney-General, v. Industrial Building and Loan Association of Pittsburgh.

Com. ex rel. Elkin, Attorney-General, v. The Cash Building and Loan Association of Pittsburgh.

Building Associations—Insolvency—Reorganization—Costs.

Where, by reason of the defalcation of a trusted officer of a building and loan association, it becomes insolvent, but nothing appears to indicate that the manner of conducting its business was improper or contrary to public interest, the association may reorganize by reducing the value of the consenting shareholders' stock such per cent. as may be necessary to place its affairs in a sound and solvent condition.

The shareholders assenting to the plan of reorganization may surrender the shares of stock held by them, and receive instead from the association new certificates to an amount equal to the value of the stock, less the deduction agreed upon, and the association may pay out of the earnings, when it winds up its business, to the assenting shareholders, a sum equal to the value of the stock, less the deduction agreed upon, and to the non-assenting shareholders a sum equal to the full value of their stock, the surplus to remain in the hands of the treasurer as security for any losses which may arise from investments theretofore made.

The costs of the proceedings in each case, including reasonable counsel fees, are to be paid out of the funds of the association, but not the expenses incurred in carrying out the plan of reorganization.

Petition to discharge receiver. C. P. Dauphin Co., Commonwealth Docket, 1900, Nos. 125 and 124.

Stephen Stone, for temporary receiver.

Charles D. Gillespie, A. C. Stamm and Lyman D. Gilbert, for defendants.

WEISS, J., March 15, 1901.—The commissioner of banking communicated to the attorney-general the fact that he had reason to conclude that the defendant associations were each in an unsound and unsafe condition to do business, and that the manner of conducting the same was injurious and contrary to the interest of the public, who, thereupon, made suggestion and complaint of the premises, and prayed that an order be made that they appear and show cause why their business should not be closed and a receiver appointed to take charge of their property respectively and wind up their business.

It was made to appear by the reports of the examiners of the banking department that the associations were insolvent, and the commissioner appointed temporary receivers to take possession of their property and business pending the proceedings.

Answer was made by each of the associations that when information of the proceedings reached them, the board of directors called a meeting of the stockholders, before whom was laid the condition of the affairs of each association, and at which it was resolved, "that the book value of each shareholder's shares in this association be reduced twenty per cent., or as much more as may be necessary to place the affairs of this association in a sound and solvent condition, that a committee of three stockholders be appointed by the chair to audit the association books, in order to determine the exact status of the association's affairs, and to accurately ascertain the percentage to be deducted from each share, that when this is ascertained by said committee, it is hereby authorized to calculate each shareholder's percentage and reduce the value accordingly, that when the association is thus rendered solvent said committee take whatever steps, legal or otherwise, may be necessary to take the property and affairs of this association out of the present temporary receiver's hands into its own, and to enable it to resume business, and that the necessary expenses of said committee be paid out of the association's funds now or hereafter in the treasury."

Com. ex rel. Elkin, Attorney-General, v. Industrial B. & L. Ass'n of Pittsburgh et al.

Over ninety per cent. in value of the stockholders agreed to the terms of the resolutions.

The answers further disclosed the fact that, in consequence of the defalcation of the secretary, who appears to have acted in that capacity on behalf of both associations, the book value of the Industrial Association exceeded its actual value \$12,788.38, and that of the Cash Association in the sum of \$25,031.71; that neither was indebted to any one, and had no liabilities other than those to its own stockholders "on such stock," and that, pursuant to the resolutions, the committee appointed by authority of its terms, "reduced the book value of the stock held by the assenting stockholders to its actual value by fixing its value twenty per centum below the apparent book value," of which doings each assenting stockholder was notified and advised in detail.

The answers further make known that the total number of shares in the Industrial Association is 1273, and that the total number of shareholders is 149; that the total number of shareholders assenting to the plan of reorganization is 144, and the total number of shareholders not assenting is 5.

That the value of the shares owned (1234) by the assenting stockholders is.....	\$79,998.47
And that of the shares (39) owned by those not assenting is.....	4,732.21

Or a total value of all of.....	\$84,730.78
---------------------------------	-------------

That the total assets of the association, including stock notes, bonds, mortgages, real estate and cash, amount to.....	\$71,181.42
---	-------------

And that the liabilities, which embrace the deduction of 22 per cent. of the value of the shares of the assenting shareholders from the total value or amount due to the stockholders, viz., \$84,730.78; and sundry credits, which represent payments of \$1850.74, made by members for July and August, 1900, but not yet credited, amounting to \$68,981.84, to which is added a surplus of \$2200.58, which is an excess embraced in the 22 per cent. of the total value of the stock of the assenting shareholders over the total deficit, amount to..... \$71,181.42

And further, that the total number of shares in the Cash Association is 3234, and that the total number of shareholders is 273; that the total number of shareholders assenting to the plan of reorganization is 254, and the total number not assenting is 19.

That the value of the shares owned by the assenting shareholders (3102) is.....	\$157,299.04
And that of the shares (132) owned by those not assenting is.....	10,705.86

Or a total of all of.....	\$168,004.90
---------------------------	--------------

That the total assets of the association, including stock notes, bonds and mortgages, real estate, purchase-money mortgages and cash, amount to.....	\$144,483.57
--	--------------

And that the liabilities, which embrace the deduction of 20 per cent. of the value of the shares of the assenting shareholders from the total value or amount due to the stockholders, viz., \$168,004.90; and sundry credits, which represent payments of \$2007.66, made by the members for July and August, 1900, but not yet credited, amounting to \$137,345.10, to which is added a surplus of \$5130.81, which is an excess embraced in the 20 per cent. of the total value of the stock of the assenting shareholders over the total deficit, amount to..... \$144,483.57

Com. ex rel. Elkin, Attorney-General, v. Industrial B. & L. Ass'n of Pittsburgh et al.

The liabilities of the Industrial Association at the time of the discovery of the defalcation exceeded the value of the assets in the sum of \$12,788.38. It is proposed by the assenting stockholders to reduce the book value of the shares held and owned by them twenty-two per centum, so that the actual value shall be less by that per centum than the apparent or book value. Thus the actual value of those assenting becomes fixed at \$62,398.79. The deficit is \$12,788.38, and the difference between it and the amount of the reduction represents a surplus which is \$4811.30.

The liabilities of the Cash Association at the time of the discovery of the defalcation exceeded the value of the assets in the sum of \$25,030.71. It is proposed by the assenting stockholders to reduce the book value of the shares held and owned by them twenty per centum, so that the actual value shall be less by that per centum than the apparent or book value. Thus the actual value of those assenting becomes fixed at \$125,839.24. The deficit is \$25,031.71, and the difference between it and the amount of the reduction represents a surplus which is \$6428.00.

Assuming that the assets of the associations are good and available, and that the liabilities are correctly ascertained—which is not gainsaid—the conclusion must be reached that the associations are not in an unsafe and unsound condition, financially, to do business.

Nothing is made to appear indicating that the manner of conducting the same is injurious and contrary to the interest of the public. There was a defalcation, it appears, by a trusted officer, which was discovered after the associations were conducting their business for a number of years. Nor does it appear that they are insolvent upon the basis of the reorganization proposed, notwithstanding an item of \$6900 due from the Globe Mutual Building and Loan Association of Pittsburgh—which is admittedly unable to continue its business properly—is among the assets enumerated by the Cash Association. It is not shown whether this sum is collectible or not.

The shareholders in each association assenting to the plan of reorganization may surrender the shares of stock held and owned by them, and receive instead from the association having issued the stock new certificates, or evidences of ownership, to an amount equal to twenty per centum below the value of the stock, aggregating \$125,839.24, instead of \$157,299.24 in the Cash Association; and to an amount equal to twenty-two per centum below the value of the stock, aggregating \$62,401.79, instead of \$79,998.47, in the Industrial Association; and subject to the ensuing, the said associations may resume and conduct business, and out of the earnings, when the Cash Association closes and winds up its business, pay to the holders of shares therein who assent to the reorganization a sum equal to \$200 on each share, diminished by twenty per centum thereof, and out of the earnings, when the Industrial Association closes and winds up its business, pay to the holders of shares therein who assent to the reorganization a sum equal to \$200 on each share, diminished by the twenty-two per centum thereof, and out of the earnings when the said associations close and wind up their business pay to the holders of shares therein who do not assent to the reorganization the full sum of \$200 on each share.

The surplus in each of the two associations, as herein ascertained, may remain in the hands of the treasurer of each one, as security for any losses which may arise from any investments made heretofore by them and enumerated in the assets specified in the answers. The costs of the proceedings in each case, including a reasonable amount for counsel fees, may be paid out of the funds of each association. No expenses incurred in and about the plan of effecting a reorganization may be paid by, or out of the funds belonging to, the associations.

The assenting shareholders may, within thirty days, signify their assent

Com. ex rel. Elkin, Attorney-General, v. Industrial B. & L. Ass'n of Pittsburgh et al.

thereto, and the associations may, within that time, effect a reorganization on the basis named, which is, in effect, mainly what is proposed, as we are made to understand the matter, whereupon an order will be made upon the temporary receiver of each one, directing him to deliver over the property, effects and securities in his or their possession belonging to each association, and such further order as the interest of the parties and that of the public may require.

From William M. Hargest, Harrisburg, Pa.

Adams v. The Lancaster Paper Mills Company.

Foreign corporations—Justice of the peace—Appeals—Bail—Evidence.

A foreign corporation, on appealing from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest and costs.

No evidence is necessary to support the plaintiff's petition for the rule on defendant to enter new bail where the transcript shows the two essential facts that the defendant is a foreign corporation and that the bail entered is only for costs.

Rule to show cause why defendant should not enter into a new recognizance or the appeal be stricken off. C. P. Lancaster Co., June T., 1900, No. 53.

H. Frank Eshleman, for rule; J. W. Johnson, contra.

LANDIS, J., Jan. 19, 1901.—The question involved in this case is neither a new nor a novel one. It therefore, at this time, only requires brief consideration. On May 3, 1900, the plaintiff entered suit before Alderman Halbach to recover \$72.01 on a promissory note given for goods sold and delivered to the defendant, and on a book account of \$27.09. A hearing was duly had on May 10, no one appearing for the defendant. After due proof, judgment was entered in favor of the plaintiff for \$99.45, being the plaintiff's full claim, with interest. On May 30, 1900, defendant appealed and entered into a recognizance with E. S. Wolf as security in the sum of \$50 for costs accrued or that might be legally recovered against the defendant. On Nov. 11, 1900, the plaintiff presented his petition, setting forth, among other things, the above facts, and thereupon he obtained the present alternative rule.

In *Dreibelbis v. The Lancaster Paper Mills Co.*, 17 Lanc. Law Rev. 399, this court has lately held that "a foreign corporation, on appealing from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest and costs." The plaintiff's petition sets forth that the defendant is a foreign corporation, incorporated under the laws of the State of New Jersey, and the alderman's transcript shows that it was sued as such a corporation. In addition, no answer has been filed denying the truth of this allegation. The record discloses that bail absolute was not entered for debt, interest and costs, but for costs only. It is therefore evident that the bail thus given is insufficient.

But counsel for the defendant contends that the plaintiff having taken no depositions, the petition itself is not sufficient to sustain the rule. Even if this position were tenable, it is to him of no avail. As we have before stated, the transcript, which is part of the record, shows the two essential facts that the defendant is a foreign corporation and that the bail is only for costs. We have a right to use our organs of vision, and, in doing so, we see before us elements of imperfection on the face of the record, and there is therefore no necessity for further proof. We will, however, give the defendant an opportunity to perfect its appeal, if it desires to do so, and we do now order that, unless it enters bail absolute within ten days of the filing of this opinion, the appeal shall be stricken from the record; otherwise, the rule will be discharged.

Rule made absolute on condition.

From George Ross Eshleman, Lancaster, Pa.

Sprigg v. Commonwealth Title Insurance and Trust Co.

Equitable estoppel—Construction of written instruments.

Where the treasurer of a trust company, in the performance of his official duties, writes to one known to him to be about to make a loan on bonds secured by a first mortgage or deed of trust, under which the company is trustee, that the bonds are in fact so secured, and the company will hold a specified number of them, pursuant to the mortgagor's instructions, subject to the order of the person addressed, who thereupon becomes accommodation maker on certain promissory notes for the benefit of the mortgagor, in reliance upon the letter, and sustains a loss by reason of the failure of the mortgagor to meet the notes, the company is estopped from denying, upon a bill filed against it by the person addressed, that the bonds, at the time the letter was written, had been duly certified by the trustee as required by the mortgage or deed of trust, and that all conditions precedent to their execution and certification under the deed had been performed.

Hence, where the mortgage or deed of trust provided that, before any of the bonds were issued, there should be deposited with the trustee a sum of money sufficient to pay the first four coupons or two years' interest thereon, *held*, that the trust company, on the facts set forth in the foregoing paragraph, was estopped from denying that the money to meet the interest had been duly deposited.

It seems also that the mere fact that one of the members of the firm to which the letter had been addressed had been told by the treasurer of the trust company some days before the date of the letter, when he had called upon him in regard to another transaction, that no money had been deposited by the mortgagor to meet the first four coupons, was immaterial, since, to affect the firm with notice of that fact, the information must reach such member while engaged with the trust officer in regard to the same transaction as that in which the letter was written.

Deed of trust—Duty of trustee—Liability.

A trust company accepting a trust under a mortgage is not liable to the holders of the bonds secured thereby, by reason of failure of the security through an after-discovered defect in the mortgagor's title, if, before accepting the trust, it exercised due diligence in investigating the title and was guided by the opinion of counsel in the state where the lands lay.

Equity jurisdiction—Remedy at law.

A party cannot maintain a bill in equity against a trustee under a mortgage or deed of trust, to recover the value of coupons and interest thereon, for having falsely certified to him that it held bonds, duly executed under a mortgage and moneys deposited to meet the coupons, as, in such case, the action of trover for the conversion of the bonds or of *assumpsit* for breach of contract to deliver them, affords an adequate remedy, since the jury would be instructed to find the market value of the bonds, assuming a deposit to have been made to secure the coupons as represented.

Bill in equity, answer and replication. C. P. No. 2, Phila. Co., Dec. T., 1898, No. 381.

Thos. Leeming, for plaintiff; *I. H. Mirkil* and *F. E. Brewster*, for defendant.

WILTBANK, J., April 15, 1901, after a careful analysis of the averments of the bill and answer, omitted from the report, made the following

Findings of facts.

1. On June 6, 1892, the Commonwealth Title Insurance and Trust Company, the corporation defendant, duly acknowledged its acceptance of a trust created by a deed of the Standard Coal and Timber Company of West Virginia, dated May 2, 1892, which was in the course of a transaction of pledge of real estate to that corporation by way of security of bonds to be issued to creditors.

2. The deed conveyed lands, minerals, franchises, timber, buildings, mills, machinery, tools, engines, mining and lumbering equipment, comprising or being upon a tract of 204,000 acres in the State of West Virginia; and it recited the creation of 1000 coupon bonds for \$1000 each to represent \$1,000,000, which were thereafter to be issued, and which this conveyance was intended to secure. The bonds were to be payable to the company defendant or bearer on May 21, 1922, with interest in the meanwhile, and they were not to become obligatory till duly certified by the trustee according to a form endorsed thereon.

3. The more important provisions of this deed of trust, those bearing upon

Sprigg v. Commonwealth Title Insurance and Trust Company.

the present inquiry, may be stated in substance as follows: The timber company, mortgagor, covenanted that the lien of the mortgage was and remained the first lien and encumbrance upon all the premises, properties and franchises described; and that before the issue of any of the bonds there should be deposited with the trustee a sum of money to cover the first four coupons, or two years' interest on each bond, and after the issue of bonds the interest was to be duly provided for from time to time.

4. It was on this last provision that the plaintiff in this cause founded his demand, which was, that the defendant account for eighteen months' interest, that is to say, for payment alleged to be due on three out of the four coupons, to wit, the second, third and fourth on one hundred bonds, as will be hereafter particularly shown. This was the only demand advanced by the plaintiff in the cause. It is to be observed that he made no claim whatever for an order touching the bonds themselves or their value.

5. A large part of this volume of 1000 bonds was in the custody of the defendant by April 29, 1893, with deeds, plans, maps and the like, but none of the bonds then at that date in hand was executed or certified by the defendant, or complete and ready for delivery.

6. Prior to that day, and after that day, bonds were executed and delivered, but with these the plaintiff had nothing to do, nor did any right attach thereto in his behalf.

7. On that day the defendant wrote and delivered a letter, addressed to Rice Brothers, of Providence, Rhode Island, which will be hereafter set out in full, because it is on this that the plaintiff relies.

8. And on Sept. 18, 1893, the defendant resigned the trust, pursuant to a provision of the mortgage, which enabled it to do so upon three months' notice to the Standard Coal and Timber Company, or upon such shorter notice as that company should accept. The cause of its resignation was the ascertainment that, contrary to the covenant of the mortgagor, the lien of the mortgage was not a first lien and encumbrance upon any part of the premises, properties and franchises described.

9. In fact, the mortgagor had not had title to the land described when the mortgage was executed, and no lien whatever had been created by that mortgage. This was due to a fraud practiced upon the mortgagor, of which the defendant trustee had notice only some months after it had written the letter of April 29, 1893.

10. The circumstances which led up to this letter just mentioned must now be narrated. On Feb. 21, 1893, a copartnership known as Rice Brothers, lumber merchants, trading in Providence, in the State of Rhode Island, entered into a contract with one Benjamin F. Howland for the purchase of certain timber, to be cut from the lands described in the mortgage above spoken of. Howland's position has not been more particularly defined than to make it appear that he was in some manner connected with, and, probably at that time, acting for the Standard Coal and Timber Company, which company was certainly interested in the contract with Rice Brothers, and guaranteed to Rice Brothers Howland's performance of his part thereof.

11. The proofs show that at the time of that negotiation the Standard Coal and Timber Company was not in a situation to supply this timber, and they justify the conclusion that Howland was acting in behalf of the company with a view to procuring for it a plant for the cutting of timber, as well as a market for its product. It needed saw mills, machinery, appliances, and for these objects a loan of \$15,000 was desired.

12. After the contract with Rice Brothers had been executed the Standard Coal and Timber Company, by one C. C. Cokefair, an officer who represented it

10 DIST. R.

Spring v. Commonwealth Title Insurance and Trust Company.

in the business throughout, applied to the corporation defendant for a loan, but was unsuccessful, and then Cokefair negotiated with Rice Brothers for the use of their name and credit by the delivery by them of their paper to the Standard Coal and Timber Company, to be discounted for account of the latter, the proceeds to go, as already indicated, to the erection of a plant. Before delivering this paper, which was by way of accommodation only, Rice Brothers had insisted upon security, and had received from the Standard Coal and Timber Company an order upon the Commonwealth Title Insurance and Trust Company for 100 of the bonds of the former, which order it had caused to be delivered to that company, and in return for which the Commonwealth Title Insurance and Trust Company addressed to Rice Brothers the letter of April 29, 1893.

13. Relying upon this letter as showing that the bonds were of value, and were held subject to their order, Rice Brothers delivered their six several promissory notes, representing a sum of \$15,000, for accommodation of the Standard Coal and Timber Company; that company used them for its own purposes; they were not protected at maturity, and Rice Brothers were obliged to take them up; no timber was ever delivered under the contract with Howland.

14. The order from the Standard Coal and Timber Company, and the letter of the Commonwealth Title Insurance and Trust Company were as follows:

15. The letter of C. C. Cokefair, Assistant Secretary of the Standard Coal and Timber Company was as follows:

"PHILADELPHIA, April 29, 1893.

"A. A. STULL, Esq., Secretary Commonwealth Title Insurance and Trust Company, Philadelphia, Pa.

"Dear Sir: You will please hold in trust or deliver to the order of Rice Bros., Lumber Dealers of Providence, R. I., one hundred (100) First Mortgage One thousand dollars (\$1000) Bonds of the Standard Coal and Timber Company, in accordance with the terms of Mortgage or Trust Deed held by you to secure said bonds. Respectfully yours, C. C. COKEFAIR, Assistant Secretary."

16. The letter of the company defendant to Messrs. Rice Brothers was as follows:

"PHILADELPHIA, April 29, 1893.

"Messrs. RICE BROTHERS, Providence, R. I.

"Gentlemen: We are in receipt of an order from the Standard Coal and Timber Company of West Virginia, instructing us to hold in trust for you One hundred First Mortgage \$1000 Bonds of said Company, the same being part of an issue of 1000 bonds, \$1,000,000, all of which are equally secured by a first mortgage or Deed of Trust, dated May 2, 1892, made to the Commonwealth Title Insurance and Trust Company of Philadelphia, as Trustee by the said Standard Coal and Timber Company of West Virginia, covering 204,000 acres of Mineral and Timber lands, located in McDowell County, in said State of West Virginia.

"The Company is incorporated under the laws of the State of West Virginia, and the bonds are secured by the first mortgage or deed of trust, now held by us as Trustee. Said mortgage or deed of trust, together with certified abstract of title, opinions as to the value of property covered by said mortgage or deed of trust, maps, surveys and other papers relating to the same, have been carefully examined and approved by us, and are now in our possession.

"We will hold the one hundred (100) bonds subject to your order.

"Respectfully yours, A. A. STULL, Treasurer."

Conclusions of Law.

It is difficult to believe that, whatever its technical efficiency, this letter could have produced any other effect than that of a representation to Rice Brothers

Sprigg v. Commonwealth Title Insurance and Trust Company.

that the 100 bonds referred to were what was purported in the words of general description, to wit, 100 duly executed and certified bonds; that they were secured by a valid and effective pledge of a large tract of land, the existence of which was indicated by maps, surveys and other papers, the title to which was good, according to a certified abstract thereof, and the value of which was stated in competent opinions, and that moneys had been deposited to meet the interest to accrue on coupons according to the covenant of the mortgagor. It was claimed at bar that this last conclusion must be held to have been involved in the general accrediting of the bonds, which, according to the published terms of the mortgage, were not to go out till such deposit had been made. Whilst the effect of the general tenor of the letter will seem to be as here stated, and hardly in any particular open to question, it is certainly clear that the engagement of the company to hold these bonds subject to the order of Rice Brothers was a definitive and unquestionable engagement, and one on which Rice Brothers, under the circumstances, might proceed as business men. In fact, they did proceed on the faith of the representations made by this letter, and delivered their obligations as already recited.

It is to be noted that the negotiation thus sketched was conducted apparently by the parties interested therein in entire good faith. In endeavoring to procure an advance of \$15,000 for the development of its tract, the Standard Coal and Timber Company acted through Cokefair, and the Messrs. Rice Brothers were represented by the plaintiff, Carroll Sprigg, an attorney and counsellor-at-law of the city of New York, to whom they had confided their interests in the premises. It may be that all these parties regarded the venture as a promising one. Cokefair was urgent for the accommodation notes, and he described to Rice Brothers and their attorney the bonds and the mortgage held by the Commonwealth Title Insurance and Trust Company defendant, and, in consequence, Mr. Sprigg, in his office in New York City, wrote out the letter of April 29, 1893, in a rough draft, and entrusting it to Cokefair, told him that if Rice Brothers received a communication of that tenor from the Commonwealth Trust Company, the six notes would be delivered. Cokefair carried to the Commonwealth Trust Company the order of the Standard Coal and Timber Company in favor of Rice Brothers for the 100 bonds, and also the draft thus made by Mr. Sprigg. The latter was approved by the trust company, adopted and reproduced on the paper of the company, and was then signed by its treasurer, and given to Cokefair for delivery to Rice Brothers. Cokefair carried it from Philadelphia to New York, and there delivered it to Mr. Sprigg, as the attorney for Rice Brothers, and received from Mr. Sprigg the six notes for discount.

On the part of the Commonwealth Trust Company, it was testified that when Cokefair got the letter of April 29, 1893, he had actual knowledge that the bonds in hand were not executed, and that no funds had been deposited for the payment of the first four coupons of the 100 bonds proposed to be held for Rice Brothers. The president and treasurer of the Commonwealth Trust Company testified also that Mr. Addison B. Rice, one of the firm of Rice Brothers, was present at an interview on April 20, 1893, at the office of the trust company, within nine days before the giving of the letter, when he and Cokefair were both in direct terms informed by the president and treasurer that no funds were in hand to meet coupons on bonds not as yet issued. Cokefair, as an officer of the Standard Coal and Timber Company, must be presumed to have had this knowledge, whether or not it was imparted to him, as claimed by the defence; and although Mr. Addison B. Rice denied that the information was given him, the weight of the evidence is the other way. But I find that at the interview referred to, Mr. Rice appeared merely as the friend of Mr. Cokefair, and not as a party to any negotiation, the scheme in hand at that time being the project of the Standard Coal

Sprigg v. Commonwealth Title Insurance and Trust Company.

and Timber Company to borrow \$15,000 from the Commonwealth Trust Company, and not that which was later adopted of the use of the accommodation paper of Rice Brothers. It is unimportant, therefore, whether or not Mr. Addison B. Rice was informed as claimed. The knowledge of Cokefair, unless conveyed by him to Rice Brothers, cannot be imputed to that firm, as Cokefair was not their agent in this dealing; and there was no evidence that it was so conveyed.

The defendant has urged that the remedy in this case, if any, is at law, and the proofs show that an action at law is now pending in the Circuit Court of the United States, for the Third Circuit, to October Sessions, 1894, No. 41, founded upon the transaction here described, and charging the defendant as charged in the bill filed, and claiming damages for the loss suffered by Rice Brothers in relying upon the representations of the letter of April 29, 1893. Other facts than those above found have been established by the proofs, but whether or not it is essential to state them here depends upon the conclusion reached at this stage upon the contention of the defendant as to the remedy at law, because they are incidents of the assignment of the claim by Rice Brothers to Mr. Sprigg, the plaintiff, which need not be discussed if the claim is not within the jurisdiction in equity.

It appears clear that there is a cause of action as to which the defendant may be put to an answer in the proper tribunal. The representation of April 29, 1893, was not made, it is true, in the performance of any prescribed duty owing to the firm of Rice Brothers, nor did that firm give any consideration for it to the Commonwealth Trust Company, yet we must have regard to the situation of the parties. The Commonwealth Trust Company was in position to accredit, and the writing of the letter must have been intended to accredit, the bonds precisely as Rice Brothers solicited. Cokefair obtained that letter when he delivered the order of the Standard Coal and Timber Company, and the president of the Commonwealth Trust Company has testified, in substance, that the letter may be taken as having been written for commercial purposes. The failure of the security of the bonds shown by the discovered defect in the title to the land is not a ground of liability in the trustee, for two reasons: first, because in relying upon the evidence of title and of the value of the property, which evidence was offered in opinions of professional men in West Virginia, and, as we also find, in New York, the trust company used due diligence; and, second, because it was not the mortgage which was accredited by the letter of the trust company, but the bonds, and the bonds remain as obligations of the Standard Coal and Timber Company, no matter how unavailable was the mortgage as a conveyance of land. It is to be noted further that the covenants of the mortgage, so far as they related to the bonds, remain binding upon the obligor, to wit, the Standard Coal and Timber Company. The representation on which the liability here arose was that of the existence of the 100 bonds, and their retention by the Commonwealth Trust Company, subject to the order of Rice Brothers. On the faith of this representation, Rice Brothers delivered obligations which involved them later in heavy loss, and the facts show that the Commonwealth Trust Company was informed sufficiently that its letter would be relied upon, to what extent it is not now necessary to ascertain. It would seem difficult to escape the conclusion that Rice Brothers became entitled to redress.

Why is there not an adequate remedy at law, and is there any reason why, there being such remedy, not the less a court of equity will take cognizance of the case? Such reason does not appear. Discovery is not required; an accounting is not due: *Paton v. Clark*, 156 Pa. 49; whether or not funds to meet the first four coupons were in hand at the time of the writing of the letter or since is immaterial. The defendant, if liable, has become liable in trover for conver-

Sprigg v. Commonwealth Title Insurance and Trust Company.

sion of the bonds: *Neiler v. Kelley*, 69 Pa. 403; or in *assumpsit* for breach of contract to hold the bonds subject to the order of Rice Brothers: *McCullough v. McCullough*, 14 Pa. 295; and the measure of damages, it may be suggested, would be the market value of the bonds at the time of the conversion, or of the breach of contract, according to the form of action chosen, with interest: *Neiler v. Kelley*, *supra*; the market value to be ascertained upon the assumption that the defendant had in hand at the time of the wrong committed the 100 bonds, and also funds to meet the coupons referred to. The action at law already instituted in the Circuit Court of the United States involves a demand for these damages.

It is necessary to refer to the contention of the plaintiff against this view. It is declared for him that whilst it may be assumed that the action at law in the Circuit Court of the United States rests upon the failure of the trust company to make good its representations of the letter of April 29, 1893, yet it involves an allowance of damages for the loss of the bonds themselves, and does not reach the right of the plaintiff to proceed in a court of equity for an accounting in respect of interest falling due on those bonds. Evidence has been offered to show that the trust company defendant received from the Standard Coal and Timber Company deposits of money which a chancellor would appropriate to the coupons attached to the 100 bonds set aside for Rice Brothers. That this evidence established the fact of the receipt of the moneys has been denied on the part of the defendant; but, as already intimated in the course of this finding, it would seem proper to assume that, no matter what the fact, the trust company was, at the time of the alleged breach, in position of a depositary of the necessary funds by reason of the representation which must be assumed to have been made to that effect. It has been argued that an action at law may proceed as to the bonds, whilst a proceeding in equity is instituted as to the interest, and that the plaintiff may recover here the accretion upon the debt, whilst he recovers in the Circuit Court of the United States damages for the deprivation of the obligation upon which that accretion arose. This contention, however, cannot be supported. It is clear that at law, if the plaintiff were allowed to recover, he would obtain compensation for the loss of the bonds, and of interest thereon, in the sense that a jury would be instructed to find the market value of the bonds, assuming a deposit to have been made to secure interest thereon for the period of two years.

For these reasons the bill must be dismissed. The order should be without prejudice to any action at law, now or hereafter to be instituted in respect of the transaction described. Let an order be drawn accordingly.

NOTE.—No exceptions filed. May 24, 1901.—ED.

Finley's Estate.

Decedent's estate—Trusts and trustees—Purchase by trustee of trust property.

Where the testator devised his real estate directly to his widow for life, and at her death to his children, etc., in fee, and the executors, acting under the advice of counsel, permitted a sheriff's sale of the real estate, in order to discharge the land of a trust set up by a third person, and purchased the real estate themselves, they obtain the legal title only, and can make no valid conveyance without the joinder or consent of the beneficial owners and to the prejudice of other real estate acquired under the will.

Petition to confirm sale. O. C. Phila. Co., Jan. T., 1882, No. 231.

J. A. Develin, for petitioner; *Monaghan & Phillips*, for respondents.

PENROSE, J., April 27, 1901.—Had the property in question been bought in by the executors under proceedings in foreclosure of a mortgage belonging to 10 Dist. R.

Finley's Estate.

the decedent's estate, it would, unquestionably, have been held by them as personality, with the right to sell for the purpose of reconversion without asking the aid of the court, though, to relieve doubts of a purchaser, the sale so made might be confirmed on due application (*Fell's Estate*, 9 W. N. C. 382; *Johnson v. Bliss*, 11 W. N. C. 293): but this was not at all the character of the transaction. The real estate was devised by the testator directly to his widow, for life, and at her death to his children, &c., in fee, the executors having nothing whatever to do with it. Their duty to pay debts, however, not only imposed by law but expressly enjoined by the will, required them, so far as personal assets came to their hands, to relieve the real estate of the burden of the mortgage given by the testator to secure payment of his bond; and the fact that the executors, acting under the advice of counsel, permitted a sheriff's sale in order to discharge the land of a trust set up by a third person, does not change the result. This was merely another method of wiping out the mortgage debt, and their purchase gave them the legal title only—the beneficial ownership remaining in the devisees. Whether after claiming, and being allowed, credit in an account subsequently filed for what they had thus paid to protect the realty, the executors can set up their legal title as against the actual owners in order to compel payment of expenses incurred in defending or prosecuting litigation in the interests of the general estate, is a question not now arising: it is clear that they can make no valid conveyance without the joinder or consent of the beneficial owners, and still clearer that they cannot do so against their consent and to the prejudice of other real estate acquired under the will.

Petition dismissed.

Devine's Estate.

Wills—Construction—Specific and demonstrative legacy.

A clause in testator's will read as follows: "I direct my executor to sell . . . my two properties numbered 1721 and 1723 Reed street, without any liability on the part of the purchaser to see to the application of the purchase-money, and to hold the proceeds of sale in trust until my granddaughters, Emily and Florence, shall respectively reach the age of twenty-one years, when he shall pay to each of them the sum of \$2000, and the balance of said sum, if any remain I direct to be paid into the residuary fund." *Held*, that the legacies were specific as distinguished from demonstrative.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1901, No. 334.

J. P. McCullen, for exceptant; *J. M. Yeakle*, contra.

PENROSE, J., April 27, 1901.—The auditing judge has shown very clearly, as we think, that the gift to the exceptants was specific. It is found only in the following clause of the will, viz.:—"I direct my executor to sell . . . my two properties numbered 1721 and 1723 Reed street, without any liability on the part of the purchaser to see to the application of the purchase-money, and to hold the proceeds of sale in trust until my granddaughters, Emily . . . and Florence . . . shall respectively reach the age of twenty-one years, when he shall pay to each of them the sum of \$2000, and the balance of said fund, if any remain, I direct to be paid into the residuary fund."

It cannot be doubted that if the properties had been sold in the lifetime of the testator the gift would have been adeemed. It is not a general legacy with a direction as to the fund from which it is to be paid, but simply a disposition of the fund itself, viz., \$4000 of it to the granddaughters and "the balance if any" to the residuary estate. If the entire proceeds of sale had been given to the granddaughters it would not have been questioned that the gift was specific: it

Devine's Estate.

is not easy to see why it is less so because what is given is, or may be, only a part.

The conclusion of the auditing judge is fully sustained by the authorities to which he refers: Cryder's Appeal, 1 Jones, 72; Walls v. Stewart, 4 Harris, 275; Balliet's Appeal, 2 Harris, 451. See, also, Page v. Leapingwell, 18 Ves. 463; Newbold v. Roadknight, 1 Russ. & M. 677.

In Hammer's Estate, 168 Pa. 632, cited and relied on by the exceptants, the legacy was held to be demonstrative, and therefore not adeemed by the loss or insufficiency of the fund, simply because the intention of the testator that it should not be was clearly shown by the fact that the purpose of the gift was to equalize the legatee with other children who had received advancements; and it was on this ground that the case was decided.

Exceptions dismissed and adjudication confirmed absolutely.

Richards v. Conneaut Township.

Roads—Liability of township for opening roads—City streets distinguished.

The opening of a public road in a township does not constitute a taking of private property for public use within the meaning of art. xvi, § 8, of the Constitution of Pennsylvania, and the allowance of damages, in such a case, is a matter of grace and not of right; hence, the property owner has such remedy, only, as is provided by statute.

The opening of a township road and of a city street distinguished—Roads—Erie county—Appeal from road commissioners—Art. xvi, sec. 8, of Constitution—Act of June 13, 1874.

In Erie county, under Act of March 28, 1846, P. L. 175, damages to a property owner, caused by the opening of a road by a township, are to be assessed by the road commissioners. From their assessment, since the passage of the repealing Act of June 13, 1895, P. L. 199, there is no appeal.

Neither art. xvi, § 8, of the Constitution, nor the Act of June 13, 1874, P. L. 233, passed to give effect thereto, has any application to land taken by a township for a public road.

Motion to strike off appeal, etc. C. P. Erie Co., May T., 1900, No. 178.

G. H. Higgins, for plaintiff; D. A. Sawdey and J. W. Sproul, for defendant.

WALLING, P. J., April 15, 1901.—In this county the authority to lay out and open public roads in townships is vested in the road commissioners of the respective townships. And in this case the road commissioners of the defendant township laid out and opened a public road through plaintiff's land. And said road commissioners, together with the township auditors, made an assessment of plaintiff's damages, caused by the opening of said road, as provided by the Act of May 8, 1876, P. L. 145. From which assessment the plaintiff took an appeal to this court. The question here is, has the property owner in such case a right of appeal? In my opinion he has not. In the original grant of every man's land from the Commonwealth there was an allowance of six per cent. added for roads. That is, each purchaser received six per cent. more land than he paid for. And the opening of a highway by the Commonwealth, or its agents, is the using of said allowance for the purpose for which it was intended, and not the taking of private property for public use. Such seems to have been the law of this State for a hundred years: McClenachan v. Curwen, 6 Binney, 514; Com. v. Fisher, 1 P. & W. 462; Plank Road Co. v. Thomas, 20 Pa. 91; Wagner v. Salzburg Township, 132 Pa. 636.

The allowance of any damages in such cases is a matter of grace and not of right. And the property owner has such remedy only as is provided by statute: Township of East Union v. Comrey, 100 Pa. 362; Workman et al. v. Mifflin, 30 Pa. 370.

10 Dist. R.

Richards v. Conneaut Township.

In this county, under the Act of 1846, P. L. 175, the damages to the property owner were assessed by the road commissioners, from which the party aggrieved might appeal to a trial before a justice of the peace and a jury of six. And such was the practice for many years; but the sections of said Act providing for such trial were repealed by the Act of June 18, 1895, P. L. 199. Since which time there appears to be no local law providing for an appeal from the assessment of damages in opening a township road in this county.

It is, however, urged on behalf of plaintiff, that such appeal as was taken in this case is allowed by the constitution and general laws of the State. And our attention is called to art. XVI, § 8, Constitution of Pennsylvania.

But the cases cited in this opinion show that the opening of a public road in a township does not constitute a taking of or injury to private property within the meaning of the constitution.

The Act of May 14, 1874, P. L. 164, relating to the assessment of damages arising from the opening of roads, etc., is a general law, and does not, in my opinion, apply to this county; but, in any event, that Act only provides for such appeal "as may be provided by existing laws in the different counties of this Commonwealth." Then the supplement to said Act, to wit, the Act of May 8, 1876, P. L. 145, which provides, as above stated, for assessment of damages by the road commissioners and township auditors, provides "that any person interested, who may feel aggrieved by the assessment of damages to him, may at any time after said reports have been filed and within thirty days after said road has been opened, appeal from said assessment of damages to him in the manner now provided by law." But since the repeal of the said sections of the Act of 1846 above referred to, there has been no manner provided by law for appeal in Erie county from the assessment made by the road commissioners and township auditors.

In the case of Warriorsmark Township Road, 126 Pa. 315, the Supreme Court, after quoting the provision relating to appeal in said Act of May 14, 1874, say: "We hold that the true intent and meaning of the language above quoted is this, that the damages ascertained and assessed by the jury of review are conclusive, unless an appeal, review or modification thereof is provided by the laws existing in the particular county at the time."

The Act of June 13, 1874, P. L. 283, entitled "An Act for further regulation of appeals from assessments of the damages to owners of property taken for public use," does not apply to proceedings to open a township road: *Lamoureux v. Luzerne County*, 116 Pa. 195; *Freeze v. Columbia County*, 8 W. N. C. 145.

The reason seems to be that the opening of a township road is not the taking of property within the meaning either of the constitution or of said last-cited Act.

A township is not liable for damages to a property owner caused by the change of grade of a public road; it not being such a corporation as falls within art. XVI, § 8, of the constitution: *Shoe v. Nether Providence Township*, 3 Pa. Superior Ct. 137; see, also, *Wagner v. Salzburg Township*, 132 Pa. 636.

The above referred to Act of June 13, 1874, P. L. 283, was drawn in the language of the constitution and manifestly intended to give effect thereto, and, in my opinion, does not extend the right of appeal to cases where there has been no taking, injury or destruction of private property within the meaning of the constitution.

In the case of *In re Road in Springdale Township*, 91 Pa. 260, the question as to whether or not the opening of a public road in a township was a taking or injury of property within the meaning of the constitutional provision and said Act of Assembly was not discussed nor decided. There the case was decided against the appellant because no proper appeal had been taken to the Common

Richards v. Conneaut Township.

Pleas court; and what the court there say has reference to the manner of taking the appeal and not to the cases to which the said Act applies.

The opening of a city street is a different matter, and to that the constitutional provision and said Act apply. The question we are considering was first raised on a motion for a non-suit; but it is a question of jurisdiction, which might be raised at any stage of the proceedings. If there were no right of appeal, then the whole proceedings in this court are void.

If an appeal and trial by jury be desirable in this class of cases, the legislature can so provide. It would seem that, in this kind of a case, each party must pay his own costs.

And now, April 15, 1901, the appeal in the above case is stricken off, and all proceedings had thereon are set aside for want of jurisdiction.

From J. M. Force, Erie, Pa.

Thompson's Estate.

Decedent's estates—Gift to a class—When distribution per stirpes and per capita.

Where a testatrix gave a share of her estate to her sister and the sons of a brother living at the time of her decease, held, that the latter designated a class and the distribution must be *per stirpes*.

Exceptions to adjudication of auditing judge. O. C. Allegheny Co., Nov. T., 1900, No. 48.

J. Charles Sheriff, for exceptant; I. L. Jones, contra.

OVER, J., Feb. 27, 1901.—The testatrix, Nancy W. Thompson, divided her estate into four equal shares, and disposed of one of the shares as follows: I give, devise and bequeath one share of my said estate to my sister, Charlotte Taylor, and the sons of my brother, Hugh Thompson, living at the time of my decease.

Three sons of Hugh Thompson survived the testatrix, and the auditing judge distributed this share of the estate *per stirpes*, to which exceptions are filed, it being claimed that the distribution should be *per capita*.

In Scott's Estate, 163 Pa. 169, Mr. Justice Fell, in distinguishing between cases where the gift is to persons or classes who stand in the same degree of relationship to the testator, and where they did not, said: "Where there is a testamentary gift to one person and to the children of another who stand in the same relation to the testator, the donees take *per capita*. This rule, under English authorities, yields to slight indication of a contrary intent, and in Pennsylvania the contrary intent is inferred where, under the intestate laws, which are always resorted to in case of doubtful interpretation, the distribution would be made *per stirpes*, as in the case of a gift to the son or brother of the testator, and to the children or heirs of a deceased son or brother. When, however, the gift is to persons or classes of persons who stand in the same relation to the testator, the analogy furnished by intestate laws indicates a division *per capita*." In Penney's Estate, 159 Pa. 346, where the gift was "to my sister M. one share, and to my stepdaughter O. one share, and to each of my nephews and nieces then living one share," it was held that the distribution was *per capita*. But Mr. Justice Mitchell said, "had the testator mentioned them as a class, nephews and nieces then living one share," he would undoubtedly have indicated a division *per stirpes*.

Here the gift is to the testatrix's sister as an individual, and to her nephews, the sons of her brother, as a class; therefore, the distribution must be *per stirpes*, and the exceptions be dismissed. From Edwin L. Mattern, Pittsburgh, Pa.

Commonwealth v. Ivory.

Jurors—Disqualifying opinion.

The fact that one summoned as a juror has formed and expressed an opinion as to the guilt of the defendant does not disqualify him from serving as a juror, when it appears from his examination that, notwithstanding such opinion, he has the ability and disposition to render a verdict upon the evidence alone.

Criminal law—Evidence—Relevancy.

On a trial for homicide, evidence of the acts of the police authorities in searching for the persons suspected of the crime is admissible on behalf of the prosecution, for the purpose of tallying with and corroborating self-incriminating statements made by the defendant at the trial.

Criminal law—Confessions—Statements in hearing of defendant.

A voluntary confession, made by the defendant after he has been cautioned that whatever he may say will be used against him, is admissible; as also are statements by one implicated in the same homicide, made in defendant's presence and to the correctness of which he has expressly assented.

Motion for new trial. O. and T. Phila. Co., July Sess., 1900, No. 30.

P. F. Rothermel, Jr., district-attorney, and *S. M. Clement, Jr.*, assistant district-attorney, for plaintiff.

Francis Chapman, for defendant.

ARNOLD, P. J., Nov. 17, 1900.—The defendant was indicted with Amos Stirling and Charles Perry for the murder of Roy Wilson White, an Instructor in the Law Department of the University of Pennsylvania, on the evening of May 19, 1900, on Thirty-second street south of Powelton avenue, in the city of Philadelphia. He demanded and was accorded a separate trial, at which it was proved that the murder took place shortly after ten o'clock on the evening of May 19, in the perpetration of a robbery. There was evidence that Ivory and Stirling were seen together a short distance from the place of murder, a short time prior to its commission, and that after the murder, which Ivory says was committed by Stirling, Ivory had the watch of the deceased man in his possession and gave it to Perry. Ivory was arrested on Sunday morning, May 20, about twelve hours after the murder, while walking along the line of the Pennsylvania Railroad towards New York, and was taken to the police station at City Hall. On the evening of that day, May 20, he asked to be taken before the Superintendent of Police, where he made a confession, in which he stated that Stirling struck the blows which killed White, and that Stirling afterwards robbed White and that he, Ivory, demanded a portion of the proceeds from Stirling, but failed to get anything but the watch, which he gave to Perry the same night. The murder was a peculiarly outrageous one; it was committed in the perpetration of a robbery. In order to rob the victim, he was struck several blows on the face and side of the head with an iron bar about twenty inches long, which Stirling had picked up on the railroad prior to the murder, with the remark that it might come in handy. Beside the confession which Ivory made on May 20, he made another about a week later, and still another before the coroner at the inquest. It was testified, and Ivory admitted in the statements which he signed, that he was cautioned that whatever he might say would be used against him, and that he voluntarily made the statements which implicated him in the robbery and murder. The defendant did not go on the stand to retract any of the statements made in his confessions, nor did he allege and testify that the confessions were obtained by duress, promises, or any other unlawful means. After a careful trial, he was convicted, and now his counsel has moved for a new trial.

The principal objection urged was to the acceptance of a man named Mooney

as a juror. Mooney testified that he had formed an opinion as to the guilt of the two defendants who were first arrested, to wit, Stirling and Ivory, but he also testified in answer to the questions propounded by the court, that notwithstanding the opinions he had formed and expressed, he could lay aside those opinions and decide the case upon the evidence only. The question raised upon this point has been so often considered and decided by the Supreme Court of this State, that I will do no more than refer to the last case on the subject, the *Com. v. Crossmire*, 156 Pa. 304, in which the present chief justice said that the competency of a person to serve as a juror is to be determined upon the whole of his examination. "Opinions formed upon what persons have heard or read about a murder are not disqualifying if they do not deny to legal evidence its legitimate effect. Intelligent men receive impressions as to the nature and character of any transaction from what they hear and read of it, and it is not unusual to speak of those as opinions. If the mere existence of such opinions constituted a bar to the performance of jury duty by the persons entertaining them, it would be well nigh impossible in the judicial investigation of a murder to draw from a panel composed of sober, intelligent and judicious persons of the county the name of a person qualified to serve as a juror. Hence, if from the examination of the juror it appears that he has the ability and disposition to render a verdict on the evidence alone, the law adjudges him to be competent, notwithstanding it would require evidence to change the impressions or opinions formed from what he had heard or read about the fact under investigation." In a previous case, *Clark v. Com.*, 123 Pa. 555, a talesman stated (page 558) that he had read an account of the coroner's inquest and heard the subject discussed by his neighbors; that he had formed an opinion as to the guilt or innocence of the defendant, but it was not a fixed opinion and the evidence would change it, but it would take pretty strong evidence. The Supreme Court said "A careful study of the evidence has failed to convince us that this talesman had a disqualifying opinion."

Other reasons for a new trial concerned the evidence as to the arrest of Stirling and Perry, the admissions of the bolt in evidence and proof of the tracing of the watch of the deceased into the possession of the defendant Perry, it being alleged by the counsel for the defendant that this was proof of acts and declarations of co-defendants after the conspiracy, so-called, to rob was at an end. But that was not the purpose for which the evidence was offered and received, nor was it proof of the acts or declarations of co-defendants. It was proof of the acts of the police authorities in searching for the persons suspected of the crime and the evidence of their participation in it, and it was offered and received also for the purpose of tallying with and corroborating the statements made by the defendant, Ivory, on trial. The evidence being legal evidence, was properly received, and if from it there arose an inference of flight by any of the persons accused of the crime, that is no reason why the evidence should not have been received.

Other reasons for a new trial concern the admission in evidence of the statements of Ivory made May 20 and May 28, 1900, and, also, the statement of Charles Perry made in the presence of Ivory, and which it was testified he, Ivory, expressly assented to as being correct. It would have been manifest error to have rejected any of these statements. Having been received in evidence, I read them to the jury without comment, and dwelt at considerable length upon that portion of one of the statements in which the defendant Ivory stated that he tried to stop Stirling from striking White, even to the extent of tearing Stirling's coat. I say I dwelt at considerable length upon that part of the statement, and told the jury that if they believed that Ivory recanted before the murder took place and did what he could to prevent it, then he ought not to be

Commonwealth v. Ivory.

convicted of the murder, although he might be guilty of a participation in the robbery. In determining whether or not he had recanted, I told the jury they should consider all the evidence in the case, his subsequent conduct, his demand for a portion of the proceeds of the robbery, his actual possession of the deceased's watch for a time, and his flight, telling them still further that flight was not conclusive proof of guilt, but only evidence from which the jury might infer guilt. On the question of doubt the jury were charged also at sufficient length to make the matter entirely plain to them, and it is not surprising that the jury convicted the defendant. While I might have told the jury that the evidence pointed plainly to the guilt of the defendant, that it came from his own lips and was not contradicted by any witness, still, I refrained from an expression of any opinion or even comment upon the evidence furnished by the prisoner himself.

The murder was a most dastardly and outrageous murder, such a one as is denounced in express words in the Act of Assembly, a murder committed in the perpetration of a robbery, a murder which excites our indignation when told of it, a murder which should be properly punished when legally proven.

A new trial will be refused.

*Commonwealth v. Perry.**Criminal law—Evidence—Confessions.*

A voluntary confession by defendant in a homicide case, after he has been duly cautioned that his statements may be used against him, is admissible, although some time before he had been told by the police detectives that he had a good mammy and had been brought up to believe in the Bible, and that whatever he said in regard to the homicide should be the truth.

Criminal law—Homicide—Accessory before fact.

A charge in a homicide case, that if the jury believed that the defendant left the man who struck the fatal blow with the intention of going home, and that he did go home, he should not be convicted of complicity in the robbery and murder, but that if, as requested by the man who struck the fatal blow, he went on guard and watched for persons coming, and subsequently, after the murder had been committed, participated in the proceeds of the robbery, then he was equally guilty with the person who struck the fatal blow, is free from error.

Criminal law—Evidence—Cross-examination—Confessions.

A question put by defendant's counsel, on cross-examination, to the superintendent of police, as to what the superintendent thought when he asked questions of the prisoner which elicited a confession, and what his efforts were to make the defendant feel the responsibility of the situation and the possible danger to himself or others, is objectionable and properly excluded.

Criminal law—Evidence—Relevancy.

On a trial for homicide, evidence of the acts of the police authorities in searching for the persons suspected of the crime is admissible on behalf of the prosecution, for the purpose of tallying with and corroborating self-incriminating statements made by the defendant at the trial.

Criminal law—Evidence direct and circumstantial.

A confession made by a defendant is direct as distinguished from circumstantial evidence.

Motion for new trial. O. and T. Phila. Co., July Sess., 1900, No. 30.

P. F. Rothermel, Jr., district-attorney, and *S. M. Clement, Jr.*, assistant district-attorney, for plaintiff.

D. W. Amram, for defendant.

ARNOLD, P. J., Nov. 17, 1900.—This defendant was indicted with Amos Stirling and Henry Ivory for the murder of Roy Wilson White, an Instructor in the Law Department of the University of Pennsylvania, on the evening of May 19, 1900. The circumstances of the murder have been stated in the opinion filed this day on the motion of Henry Ivory for a new trial, and need not be repeated

here. This defendant, Charles Perry, also had a separate trial. He was not arrested until May 28, when a colored man named Charles Smith attempted to pawn a watch, which turned out to be the watch which belonged to the deceased, Mr. White. Smith testified that he got the watch from Perry, with direction to pawn it and return the proceeds to Perry. There was proof that Perry, Stirling and Ivory were together the day of the murder, about one o'clock in the afternoon, in a restaurant about half a mile from the place of the murder, and Perry, after his arrest, made two statements admitting his connection with Stirling and Ivory, but alleging that he had nothing whatever to do with either the robbery or the murder; that just immediately prior to the murder he left Stirling, who made a remark when he saw the deceased, Mr. White, "There comes a guy who looks as if he had money," and Perry said that he was going to go home, but that Stirling told him to go ahead and if he saw anybody coming, to whistle. Perry also admitted in his statement of confession that he went ahead, sat on the curbstone, heard blows struck, heard a man cry out, "Oh, lawdy," looked back and saw a man leaning down over another man. He also stated that the two men, Stirling and Ivory, came down towards him, and that the three walked away from the place of murder, and that Ivory gave him the watch of the deceased. This watch he kept for more than a week, when he tried to pawn it through the agency of Smith, which led to his detection. He admitted in his statements that he was cautioned that his statements might be used against him, and he did not go on the stand and deny that he made his statements voluntarily and without any duress or illegal promises held out to him. It was argued by his learned and astute counsel that his statements should not be received in evidence, because sometime between the dates on which those statements were made some of the police detectives had told Perry that he had a good mammy and had been brought up to believe in the Bible, and that whatever he said in regard to this matter should be the truth. But no such statements were made by detectives at the time he made his confessions, and it is exceedingly doubtful whether, if they had been, it would have made any difference, as they held out no inducements and contained no threats. In charging the jury I dwelt at some length on his statement in his confession that when Stirling told him to go ahead and if he saw anybody coming, to whistle, he said he was going home, and I told the jury if they believed that he did depart with the intention of going home and did go home, he ought not to be convicted of complicity in the robbery and murder, but that if he did as requested by Stirling, and did go on guard and watch for any persons coming, and subsequently participated in the proceeds of the robbery and murder, then he was equally guilty with the person who committed the murder. The jury convicted him, and properly.

Several reasons were urged on behalf of a new trial. One was an objection to a question put by the counsel for the defendant to the Superintendent of Police, in the eleventh reason for a new trial, a highly metaphysical question, as to what the Superintendent of Police thought when he asked questions and when he framed his questions and his efforts to make the defendant feel the responsibility of the situation by making him feel the seriousness of it, and the possible danger to himself or others, that he would then tell the truth. This question was put at the end of a very long and drastic cross-examination, and was manifestly improper. It elucidated no fact, and the thoughts of the Superintendent of Police and the feelings of the defendant as to the seriousness and danger of the investigation were not competent evidence for either side of the case.

Another reason for a new trial concerns the testimony as to the arrest of Stirling and Ivory, it being alleged that this was evidence of the acts and declarations of co-defendants after the crime had been accomplished. I have

10 DIST. R.

Commonwealth v. Perry.

answered this objection in the opinion filed in the case of the *Com. v. Ivory*, and need say nothing further on the subject here, except that nowhere during the trial of this defendant Perry, either in the evidence or in the charge, was the question of flight alluded to.

Other reasons for a new trial are based upon points presented for charge, which I answered. One of them, the thirteenth, is that "There is no direct evidence to show the prisoner's complicity. The evidence is circumstantial and founded on his own statement. He should be given the benefit of every reasonable doubt." I might very well have refused to answer this point as involving three distinct propositions. However, I did say that "So far as some of the evidence is concerned, I affirm it. So far as his statement is concerned, that is not circumstantial evidence, but it is direct evidence." I do not deem it advisable to enter into a discussion of the question whether a confession is direct or circumstantial evidence. My opinion is that it is just as much direct evidence as if it was given by an eye-witness who is not the defendant on trial.

Other points involved the effect of the evidence as to what the evidence proved. There was undoubtedly evidence from which the jury might believe that this defendant aided and abetted and assisted Ivory in the commission of the crime, and as that was a question for the jury to decide, I left it to them without comment. My great difficulty was to avoid the expression of an opinion and to leave the case to the jury without any intimation of my views on the subject. The evidence against the defendant came from his own lips. It was direct, comprehensive, and conclusive. He was with Stirling and Ivory the day of the murder; he admitted that he was with them at the time of the robbery and murder and that he took and kept and tried to pawn a portion of the proceeds of the crime. Evidence like this is irresistible proof of guilt. As I have said in the Ivory case, this was a dastardly and outrageous murder, and one which when proved should be properly punished. If the defendant intended to take no part in the robbery and murder, he would have gone to the relief of White when he heard him cry out "Oh, lawdy," and he would have given notice to the authorities and assisted in the arrest of the guilty parties. He did none of the acts of an innocent man, but he did the acts of a guilty one.

A new trial will be refused.

Heath's Estate.

Practice, O. C.—Petition for account—Laches.

A remainderman is entitled to an account from one who is both life-tenant and executrix, when twenty-six years have elapsed since the filing of the first and only account, showing a balance of \$6702.33 due the estate, which the executrix averred in her answer had afterwards been reduced to less than \$1000.

The right of the petitioner to demand the account is not affected by the fact that the executrix is his mother, and that the other children are all of them averse to his proceeding.

Petition for account. O. C. Phila. Co., Jan. T., 1901, No. 358.

Henry Budd, for petitioner; *Richard Salinger*, for respondent.

ASHMAN, J., April 27, 1901.—The right of this petitioner to demand an account is not affected by the fact that the executrix is his mother, and that the other children are all of them averse to his proceeding. The first and only account which has been submitted was confirmed in May, 1875, and, with that lapse of time behind him, the petitioner cannot be said to be acting precipitately. The respondent relies upon *Seeger's Estate*, 6 W. N. C. 369, but the ruling there

Heath's Estate.

that an account will not be ordered to suit the convenience or the caprice of a creditor, will not apply to a case where the party in remainder refrains for twenty-six years from asking for a second account. The widow, who is both executrix and life-tenant, admits that the account which was filed showed a balance to the credit of the estate of \$8702.33, and she declares that \$1600 of this was embezzled by her co-executor, and that most of the remainder was used in supporting the family and in advances to the children, including the petitioner. She fixes the present value of the estate at a figure below \$1000. We think the petitioner is entitled to the relief prayed for. The petition is granted.

Raeder's Estate.

Executors and administrators — Legacy — Right of attaching creditor of legatee to cite executor to account.

An attaching creditor of a legatee has such an interest in an estate as will entitle him to cite the executor to account.

Petition. O. C. Allegheny Co., March T., 1901, No. 133.

The single question presented for decision in this case is, whether or not an attaching creditor of a legatee has such interest as will entitle him to cite an executor to account.

The whole estate, which consisted of a leasehold, was bequeathed to Sophia and George Huether, subject to the payment of \$225 to Louisa Knoopy; and said Sophia and George Huether were made executors. Katrina Schmidstetter, a creditor of Louisa, having attached this legacy, obtained a citation upon the executors to show cause why they should not file an account. Whereupon, the executors denied the interest of petitioner, and this was the only question presented by counsel.

T. H. Davis, for petitioner; *J. A. Guignon*, contra.

HAWKINS, P. J., April 16, 1901.—The 57th section of the Act of March 29, 1882, expressly provides, amongst other things, that the appearance of a person amenable to the jurisdiction of the Orphans' Court may be obtained on the petition of "any person interested, whether such interest be immediate or remote," and the Supreme Court has said that this means not a speculative but an existing interest, which must certainly fall into possession at some time: *Keene's Appeal*, 60 Pa. 504.

Tested by this rule, there can be no doubt of this petitioner's interest. She is an attaching creditor seeking the satisfaction of her debt; she has a lien on a legacy, which is, ostensibly, her only present means of satisfaction, and is presumptively in process of administration; and as neither the respondents, whose duty, both as executors and legatees of the leasehold, it is to raise the fund out of which distribution shall be made, nor the debtor, have taken any steps toward settlement, she is forced of necessity to take the initiative if she would collect her claim. If she may not do this, she has a right without a remedy, and the executors and legatees have the power, and seem to have the disposition, to dispense with the ordinary course of settlement altogether. No case precisely in point has been found; but in *Reese's Appeal*, 116 Pa. 272, it was held, that attaching creditors had a right to file exceptions to an account. "These creditors," said the court, "were ostensibly interested, and though the issues in their respective attachments had not been tried and determined, they were not bound to stand aloof and suffer an incorrect account to be confirmed, of course, and the interest of their debtor in the estate recovered or decreed to belong to

10 DIST. R.

Raeder's Estate.

other persons," and by a parity of reasoning this petitioner was not bound to stand aloof and suffer loss of her claim because of evasive tactics. The Orphans' Court having exclusive jurisdiction of the fund attached, the creditor has, of course, the right to use the ordinary means of realization. The respondents, as executors, had no reason for delay. In accordance with their oath of office, they should have filed an account without citation, and facilitated the adjudication of claims of *bona fide* creditors, whether of the decedent or of his legatees. It was suggested for the first time in the brief of respondents' counsel, that the party whose legacy is attached being a married woman, attachment will not lie; but the answers to this are (1) that there is no such averment in the answer, and if there were (2) that respondent could not have availed himself of it; for, like usury, limitations, the statute of frauds, etc., the legatee only could plead it for her own benefit: *Woods v. Irwin*, 141 Pa. 278.

It follows that the executors must file an account of this administration.

From Edwin L. Mattern, Pittsburgh, Pa.

Cooke v. Jones.

Married women's separate estate—Joinder of husband in wife's bond and mortgage—His liability on the bond—Parol evidence.

Where a husband joins in the bond of his wife, secured by a mortgage on her separate property, given to secure money loaned to her, he is liable on the bond.

If the husband desired to restrict his liability on the bond to the separate real estate of his wife, described in the mortgage, he should have inserted such stipulation in the bond. The law will not insert any clause of limited or restricted liability in contradiction of the bond as executed.

Rule to show cause, etc. C. P. Columbia Co., Sept. T., 1900, No. 92.

John G. Freeze and John G. Harman, for rule; Clyde Charles Yetter, contra.

LITTLE, P. J., Feb. 4, 1901.—It would appear from the depositions before us that Moore C. Jones and his wife, Sadie, on Sept. 24, 1897, jointly executed their bonds or writings obligatory, some fifteen in number, each in the sum of \$200, conditioned for the payment of the just sum of \$100 each, to J. N. Webb, his heirs, executors, administrators or assigns.

The said bonds, or one of them at least, contained the usual agreement and power of attorney to appear and confess judgment, with costs, etc., without stay of execution, waiving right of inquisition on real estate, and agreement of condemnation, giving right to sell real estate upon writ of *fi. fa.*, also waiving the exemption laws.

The payment of these fifteen several bonds was secured by a mortgage upon the separate property of Sadie, Mrs. Moore C. Jones, consisting of some seventy acres of land, situate in Orange township, Columbia county.

Both the bonds and the mortgage securing their payment were executed by Mr. and Mrs. Jones contemporaneously at their home in Bloomsburg, Pa., in the presence of S. F. Peacock, a notary public, and before whom the acknowledgment of the mortgage was taken.

The mortgaged premises was afterward sold, but there was not enough funds realized from that sale to entirely liquidate the amount of the mortgage debt. But only a small proportion of the amount of the debt was realized upon the sale of the mortgaged premises.

The bond upon which the present judgment is entered bears upon its face

Cooke v. Jones.

the evidence of its transfer to T. H. Edgar, and also his transfer, in turn, to William H. Cooke, the present use-plaintiff.

Neither fraud, accident nor mistake is alleged by Moore C. Jones as a cause for the opening of this judgment.

The evidence appearing by the depositions precludes any inference that he did not know or was unacquainted with the nature of the obligation he was about to assume when he joined with his wife, Sadie, in the execution of the fifteen bonds and the mortgage to secure the payment of them, upon her own separate property; or at least that, by the exercise of common prudence, he could not have been made acquainted with the nature of the obligations he thereby voluntarily entered into.

The only material reason set forth in Mr. Jones's petition, and upon which he asks the intervention of the court, is stated in these words: "That at the time of the executing of said mortgage to J. N. Webb, the property covered thereby was the exclusive property of the wife of your petitioner. That your petitioner received no benefit from the execution thereof, and only joined in the said bonds and mortgage because required to do so by the Act of Assembly of June 8, 1893, entitled 'An Act relating to husband and wife, enlarging her capacity to acquire and dispose of property, etc.'"

The answer of the plaintiff is a substantial demurrer to the petition. In this instance the husband joined with the wife in the execution of the mortgage. The mortgage thereby became the valid security of the wife for the payment of the debt thereby intended to be secured, by the very terms of the first section of the Act of June 8, 1893.

But the husband, the petitioner, also joined the wife in the execution of the bonds, and of this particular bond upon which judgment was entered and the subject of this petition and rule. That bond was the evidence of his contract. Where a person has deliberately executed a contract, it is not only the best, but the only evidence of what the contract is. There is nothing upon the face of this contract or bond that shows any reason why the petitioner should not pay to the obligee, or to his assigns, the present use-plaintiff, the sum of money therein agreed by him to be paid. Before the recent legislation giving greater powers to a married woman to make valid contracts, and to exercise rights and powers over her own property to the same extent as an unmarried person, it was held in the case of *Shallcross v. Smith*, 81 Pa. 132, where a husband and wife both joined in the execution of a bond and warrant, it was held that the bond and warrant, being a nullity as to the wife, it was the husband's bond singly, and it was not error to refuse to strike off the judgment as to him.

If the petitioner desired to restrict his liability on the bond to the separate real estate of his wife described in the mortgage, he should have inserted in the bond such stipulation. The fact that he did not do so, but executed the bond as it is, affords evidence that he thereby intended to incur, and did incur, a personal obligation to pay the debt therein stated.

The law will not insert any clause of limited or restricted liability in contradiction of the bond as executed: *Punxsutawney Mutual Building and Loan Ass'n v. Gallo*, 9 District Reps. 761.

There is nothing set forth in this petition that calls for intervention on the part of the court, and the rule must be discharged.

Now, Feb. 4, 1901, the rule is discharged.

NOTE.—Under the Building Association Act of April 10, 1879, § 7, P. L. 16, it is necessary for the husband to join in the execution of both the bond and mortgage. The case of *Punxsutawney Mutual B. & L. Ass'n v. Gallo*, 9 District Reps. 761, arose under this Act. The Married Women's Act of June 8, 1893, §§ 1 and 2, P. L. 344, require the husband to join in the mortgage, but say nothing about the bond.

From William Chrisman, Bloomsburg, Pa.

Hale v. Capp et al.

Guardian and ward—Suit against ward—Jurisdiction—Common Pleas and Orphans' Courts.

The Court of Common Pleas is without jurisdiction to enter judgment against a guardian, as guardian, to charge the estate of his ward.

An affidavit of defence by a guardian, in which he avers that he had no dealings with the plaintiff, and never purchased any goods from him or authorized the purchase on behalf of the minor, is sufficient to prevent the entry of judgment against him personally.

Rule for judgment for want of a sufficient affidavit of defence. C. P. No. 5, Phila. Co., March T., 1901, No. 16.

Christopher Fallon, for plaintiff; *Charles H. Pile*, for defendants.

MARTIN, P. J., May 4, 1901.—Suit was entered in this case against Seth Capp and Bernard Gilpin, guardian of Katharina Capp, wife of the other defendant, to recover for what are alleged in the statement of claim to have been necessities furnished the said wife at her special request and direction, upon the credit of her separate estate, for the support and maintenance of the family of the said husband and wife.

An affidavit of defence was filed by Bernard Gilpin, guardian, in which it is set forth that he had no dealings with the plaintiff, and has never purchased any goods from him or authorized the purchase on behalf of the minor. This allegation is sufficient to prevent the entry of judgment against him personally: *Call v. Ward*, 4 W. & S. 118; and this court is without jurisdiction to enter judgment against him as guardian to charge the estate of his ward: *Johnstone v. Fritz*, 159 Pa. 378.

The rule for judgment for want of a sufficient affidavit of defence is, therefore, discharged.

The American Steel and Wire Company of New Jersey v. Raleigh Coal and Coke Company.

Practice, C. P.—Corporations registered under the Act of 1874—Service of summons—Presumptions.

It will be assumed that a foreign corporation doing business in Pennsylvania, registered as required by the Act of April 22, 1874, P. L. 108, and that the registration continued, when no evidence is offered of its withdrawal. Hence, when a foreign corporation made a contract while doing business in Pennsylvania, and afterwards ceased operations in the State altogether, held, that the summons in a suit brought against the corporation on such contract might be served on the persons described as directors resident within the county.

Semble, that when the Act of April 22, 1874, applies to a foreign corporation doing business in this Commonwealth, the provisions for service of process of the Acts of March 21, 1849, P. L. 216, and April 8, 1851, P. L. 354, are superseded; and, also, that when registration under the Act of April 22, 1874, is to be presumed (to avoid the alternative presumption of the commission of a penal offence), such registration must be presumed to continue, in the absence of proof on the subject.

Rule to show cause why service of summons should not be set aside, &c. C. P. No. 2, Phila. Co., Dec. T., 1900, No. 715.

John G. Johnson and *J. Wilson Bayard*, for rule; *A. H. Wintersteen*, contra.

WILTBank, J., May 13, 1901.—The Raleigh Coal and Coke Company, defendant, was incorporated in 1898 by the State of West Virginia, and in the same year it commenced to do business in Pennsylvania by virtue of one of its by-laws, which provided as follows: "The principal office of the company in West Virginia shall be at Raleigh Court House, Raleigh county, West Virginia, and the principal office outside of the State of West Virginia shall be in the

The American Steel and Wire Co. of New Jersey v. Raleigh Coal and Coke Co.

city of Philadelphia, State of Pennsylvania." The depositions show that it ceased to do business in this State in the month of May, 1900, and that at no time since has it renewed operations here. Between the dates named, that is to say, on April 19, 1900, it had entered into the contract with the plaintiff now sued on, and after its departure from this State the present action was brought, to wit, on Dec. 26, 1900. Service of the summons was made in Philadelphia on Logan Bullitt and Thomas Robb, described as directors resident within the county, and, thereupon, the present rule was taken to set aside the service on the ground of its irregularity.

The Act of March 21, 1849, P. L. 216, provides as follows: "In the commencement of any suit or action against any such foreign corporation, process may be served upon any officer, agent or engineer of such corporation, either personally or by copy, or by leaving a certified copy thereof at the office, depot or usual place of business of said corporation; and such service shall be good and valid in law to all intents and purposes."

The Act of April 8, 1851, P. L. 354, provides as follows: "In any case when any insurance company or other corporation shall have an agency or transact any business in any county of this Commonwealth, it shall be lawful to institute and commence an action against such insurance company or other corporation in such county, and the original writ may be served upon the president, cashier, agent, chief or any other clerk, or upon any directors or agent of such company or corporation within such county, and such service shall be good and valid in law to all intents and purposes."

These statutes were under consideration in *Branson v. The Trump Brothers Machine Co.*, 16 Phila. 112, and it was then held that the Act of 1849 applied only to such corporations as had an agency or place of business in the State, and that a foreign corporation having no office and no agency in the State, and not carrying on its business here, could not be brought into court by service of a writ upon one of its officers while casually within the Commonwealth. In *Phillips v. The Burlington Library Co.*, 141 Pa. 462, the Supreme Court held that the Act of 1849 above cited, and the cases decided thereunder, contemplate a foreign corporation doing business within this Commonwealth.

On the part of the plaintiff, it was contended that whilst service as made in the case at bar would not have been regular had the cause of action arisen whilst the corporation defendant was not transacting business in Pennsylvania with an office in this county, yet the fact that the contract on which suit is brought was entered into before the corporation left the State, is sufficient to sustain the service here, and *Causey v. The Company*, decided by this court, and reported in 1 District Reps. 557, was cited in support of the contention. An examination of the record in *Causey v. The Company*, discloses ground for discrimination which, perhaps, supports the counter-argument that the decision is not here applicable.

We find, however, that the question thus stated is not reached, because of the provisions of the Act of Assembly of April 22, 1874, P. L. 108, to the effect that no foreign corporation shall do any business in this Commonwealth until it shall have filed in the office of the secretary of the Commonwealth a statement under its seal, and signed by its president and secretary, showing the title and object of the corporation, location of its offices, &c., &c. The third section of the Act provides: "Any person or persons, officer or employee, of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this Act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding \$1000, or either, at the discretion of the court trying the same." As, under this Act, a

The American Steel and Wire Co. of New Jersey v. Raleigh Coal and Coke Co.

foreign corporation doing business in this State must register, and in default thereof subject its representatives to the consequences of a penal offence, we are bound to assume that the defendant company complied with the law upon its entry for business in this State by virtue of the by-law above quoted, and that this registration has continued, inasmuch as no evidence has been offered of its withdrawal. We are not informed by the proofs on this point, and must, therefore, discharge the rule.

Campbell's Estate.

Wills — Construction — Vested and contingent interests — Words importing death.

Testator directed one-ninth of his residuary estate, after the death of his widow, to be held by his executors in trust for the sole and separate use of one of his daughters during her natural life, and from and after her decease the principal of her share "shall go to and be equally divided amongst her children absolutely and forever. Provided, however, that in case of the decease of either or any of my said daughters without leaving any children surviving at the time of her decease, then her share so dying to go to and be equally divided amongst her surviving brothers and sisters and the children of such of them as may then be dead *per stirpes*." The *cestui que trust* had one son, who died before her, but survived the widow, and no other children. She left surviving brothers and sisters and children of deceased sisters and a brother. Held, that the contingency contemplated by testator was the death of his daughter, either in his own lifetime or in that of his widow, without leaving children surviving her, and that the son took a vested interest, subject to being divested by his death before the widow, or the birth of children during the continuance of the life-estates, which became indefeasible on his surviving the widow, and was properly awarded to his executrix on the death of the *cestui que trust*.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1881, No. 505.

J. Campbell Lancaster, for accountant.

M. G. Campbell and William A. Allison, for exceptants.

Joseph W. Hunsicker and Charles Hunsicker, contra.

HANNA, P. J., May 4, 1901.—The sole question in this case is what disposition is to be made of one-ninth part of testator's residuary estate which, after the death of his widow, he directed to be held by his executors in trust for the sole and separate use of one of his daughters during her natural life, and from and after her decease the principal of her share "shall go to and be equally divided amongst her children absolutely and forever. Provided, however, that in case of the decease of either or any of my said daughters without leaving any children surviving at the time of her decease, then her share so dying to go to and be equally divided amongst her surviving brothers and sisters, and the children of such of them as may then be dead *per stirpes*." The *cestui que trust* had one son who pre-deceased her, but no other children. She left surviving brothers and sisters and children of deceased sisters and brother. The fund is now claimed by the executrix of the deceased son of the *cestui que trust* for life, upon the ground that he had a vested interest therein at the date of the death of testator, which was not divested by his death in the lifetime of his mother. And by the brothers and sisters and nephews and nieces of the deceased *cestui que trust*, for the reason that, as she left no child or children surviving her at the time of her decease, they are entitled under the express provision of testator's will. Upon an examination of the will, it is first to be observed there is an absolute gift in remainder to the children of his daughter. And this vested in them as of the date of his death, and subject only to the preceding life-estates and the birth of children during the continuance of the life-estates. As testator's daughter had but one child at the date of the will and of testator's death, his

Campbell's Estate.

share, therefore, would be reduced by the birth of after-born children. Moreover, testator anticipated the death of his daughter without leaving any children surviving her, but he does not explicitly say when the death of his daughter should occur, whether in his lifetime or in the lifetime of his widow, or after the death of his widow. He simply provided for the event of her death leaving no children surviving her, whereupon the share held in trust for her should go to and be divided amongst her surviving brothers and sisters and the children of those deceased. What testator anticipated has occurred. His daughter died without leaving a child or children surviving her. It, therefore, remains to ascertain the intention of testator in the event of this occurrence, which should be carried out. That testator did not mean the death of his daughter at any time is evident. And while his intention was that the share held in trust for her should ultimately go to his surviving children, he had no intention of dis-inheriting her children. The contrary is apparent. And the contingency he contemplated was the death of his daughter, either in his lifetime or during the life of his widow, without leaving children surviving her, upon the occurrence of which the trust-estate then to go to his surviving children, etc. That this is the proper construction to be placed upon the language of testator is not without precedent: *Mickley's Appeal*, 92 Pa. 514; *King v. Frick*, 135 Pa. 575.

As the grandson of testator was entitled to the trust-estate, his death prior to that of his mother will not divest his absolute interest, and it is properly awarded to his executrix.

With this conclusion of the auditing judge we agree, and the exceptions are accordingly dismissed and the adjudication confirmed.

Road in Ashley Borough and Hanover Township.

Road—Luzerne county—Acts of June 13, 1836, and Feb. 24, 1845—Viewers.

"Due process of law," without which private property may not be taken for public use, is, so far as relates to the establishment of roads in Luzerne county, prescribed by the general road law of June 13, 1836, P. L. 551, and the special Act of Feb. 24, 1845, P. L. 52.

A road view, participated in by an alleged viewer, of whose appointment or authorization there is no record evidence, or by a substituted viewer, acting on an order directed to the original viewers, cannot be sustained.

Exceptions to report of viewers. Q. S. Luzerne Co., June Sess., 1899, No. 413.

J. B. Woodward, for road; *A. H. McClintock* and *A. Hillman*, for exceptions.

FERRIS, J., Feb. 4, 1901.—That "due process of law," without which private property may not be taken for public use, is, so far as relates to the establishment of roads in Luzerne county, prescribed by the general road law of June 13, 1836, P. L. 551, and its supplements, and the Act of Feb. 24, 1845, P. L. 52, relating to Luzerne and certain other counties.

The authority of the Court of Quarter Sessions to act in road cases is of statutory origin, and can only be exercised in the statutory way. Otherwise, the court is without jurisdiction: *Liberty Alley*, 8 Pa. 381; *Church Road*, 5 W. & S. 200.

The statutes referred to provide that the premises shall be viewed and report made by three viewers, who shall have been previously appointed by the court. It is too obvious for comment that they are not "viewers" unless they have been thus appointed; and it is equally plain that their authority must be made to appear as a matter of public record. Owners of property have an undoubted right to know authoritatively that those with whom they deal as representatives of the public are such, and the extent of their power to act. That this rule

Road in Ashley Borough and Hanover Township.

should be inflexible, and strictly applied in all road cases, is evident, not only because the powers committed to viewers are in derogation of the common law rights of individuals, but also upon the kindred but somewhat broader ground of public policy, to prevent the unauthorized, and, therefore, unlawful invasion of private property and infraction of private right.

In the present case, the record shows the appointment by court, as viewers, of W. H. Sturdevant, Cyrus Straw and Thomas A. Wright, and the subsequent substitution by the court of Sherman Dilley for Thomas A. Wright. The report of viewers is made by Cyrus Straw, S. B. Sturdevant and S. A. Dilley. Assuming that "S. A. Dilley" is the same person who was, by order of court, substituted for Thomas A. Wright under the name of "Sherman Dilley," the record is still defective, and, in our view, fatally so, in that it fails to show any substitution of S. B. Sturdevant for W. H. Sturdevant as one of the viewers in this case. Nor is this omission helped out in any manner by the customary and necessary order to the viewers under the seal of the court. So far as the record shows, no such order ever went out. Certain it is that no record of exit was made in the usual or in any way, nor is any such order returned by the viewers with the report.

If authority be needed for the plain proposition that a road view, participated in by an alleged viewer, of whose appointment or authorization there is no record evidence, cannot be sustained, it may be found in Cherry Street, 1 District Reps. 41; Metzler's Road, 62 Pa. 151: In re Road in Silver Lake Township, 84 Pa. 131; Bryson's Road, 2 P. & W. 207. These cases hold, substantially, that the authority of the viewers to act must appear in an order issued by the clerk under the seal of the court, and that in case of a substituted viewer, his acting on an order directed to the original viewers would invalidate the proceedings.

Here we are left in ignorance whether the order, if one issued, was directed to the original viewers or those who reported, or to the original viewers, with the substitution of Mr. Dilley for Mr. Wright. Captain Straw testifies, that a paper which he examined and calls an order of court, was dated "in the June Term." Mr. Dilley was not substituted for Mr. Wright until Sept. 27. It is obvious that if the witness is correct in his belief that what he saw was an order to view, and that it bore date in the June Term, it could not have been an order to the viewers who actually reported, as it was made before Mr. Dilley was substituted. It is unnecessary to discuss the questions raised by the other exceptions.

The first exception is sustained and the report set aside.

From Sidney R. Miner, Wilkes-Barre, Pa.

Steelton Planing Mill Co. v. Kunkel.

Practice, C. P.—Statement—Act of 1887.

Where by its statement the plaintiff informs the defendant that he promised to pay the company a certain sum, with interest from April 22, 1900, for lumber sold and delivered by it to him; that he failed to pay that sum or any part thereof; that it seeks a recovery from him for that amount, and attaches thereto and makes part thereof an itemized exhibit of the character, quantity and prices of the lumber sold, together with the dates of sale and delivery of the material furnished. *Held*, that the statement was sufficient to sustain a judgment for want of an affidavit of defence, although there was no specific allegation that amount claimed was believed by plaintiff to be justly due it from the defendant.

Motion to strike off judgment entered for want of an affidavit of defence. C. P. Dauphin Co., Jan. T., 1901, No. 545.

Wolfe & Bailey, for motion; *William H. Middleton* and *A. J. Feight*, contra.
VOL. 10—19

WEISS, J., April 8, 1901.—The plaintiff by its statement informs the defendant that he promised to pay the company the sum of \$788.03, with interest from Aug. 22, 1900, for lumber sold and delivered by it to him; that he failed to pay that sum or any part of it; that it seeks a recovery from him for that amount, and attaches to and makes part of the statement an itemized exhibit of the character, quantity and prices of the lumber sold, together with the dates of sale and delivery of the material furnished.

The Act of 1806 requires that not only the nature of the demand and the date of the promise on which the demand is founded be set forth in the statement, but also "the whole amount that he, she or they believe is justly due to him, her or them from the defendant."

The Act of 1887 provides that the plaintiff's declaration in the action of *assumpsit* shall consist of a concise statement of the plaintiff's demand as provided by the 5th section of the Act of March 21, 1806, which in that action shall be accompanied by copies of all notes, contracts, book-accounts, etc., upon which the plaintiff's action is founded.

When the company says that the defendant promised, but failed, to pay unto it a fixed sum for lumber sold and delivered to him at stated times, and details the kind, quantity and price of the articles furnished at the several dates, during several months, it requires more of an effort to get away from the proposition that he or it believes that the whole amount is justly due than it does to get to it. Where the plaintiff asserts a material fact in his pleadings, and it is not denied by the person charged with the non-observance of the stated duty, it is not extravagant to assume that he believes in the justice of his demand.

Furthermore, an averment of a sale of a designated article at a fixed price, a delivery of it, a promise by the purchaser to pay for it, which becomes enforceable upon delivery in the absence of a specified time for payment, and a failure on his part to do so, comprises about every material element which constitutes a brief or concise statement of a claim. For instance, the plaintiff declares that he sold and delivered on May 22, 1900, "24,000 No. 1 W. Pine Shingles, \$8.90—\$213.60" unto the defendant, and that the latter promised to pay the plaintiff that price for that kind and quantity of shingles. It is not stated that \$8.90 means that much per thousand shingles, but the total leaves no doubt about the meaning, as the simplest effort in arithmetic demonstrates.

The same is true of every article in the "itemized statement."

It is quite likely that the items in the schedule were copied from books kept by the plaintiff, and it is just as probable that the contract was oral. If the plaintiff had sold and delivered unto the defendant a lot of cattle, it is reasonable to believe that he would have made an entry in a book, setting forth the number, date, weight, price per hundred or pound weight, and the product of the multiplication of the total avoirdupois by the price per hundred or pound weight; and it is inerrant that those same items embodied in a statement, without reference to the memorandum, would exhibit brevity, conciseness and completeness, and embrace all matters of substance.

To plead a sale and delivery of a specified article or articles, with the date, kind, quantity and price, a promise by the purchaser to pay and a failure to fulfill that promise, constitutes a substantive statement of a claim or demand, and indeed an attempt at elucidation is apt to degenerate into perplexity and mystification.

Being of opinion that this statement embraces all the essential requisites, there remains only the duty to overrule the motion to strike off the judgment and to authorize such further proceedings as are warranted by law, which is accordingly done.

From William M. Hargest, Harrisburg, Pa.

Wanamaker, to use, v. Fitzpatrick.

Attachment—Garnishee—Counsel fee—Acts of April 22, 1863, June 11, 1885, and April 29, 1891.

In a proceeding in attachment, no counsel fee can be allowed, under the Acts of April 22, 1863, P. L. 527, June 11, 1885, P. L. 107, or April 29, 1891, P. L. 35, to the garnishee, when the attachment was issued April 1, the interrogatories filed April 8, the garnishee answered April 27, denying that he had any funds in his hands, and on May 4 was ruled to plead, which he did the same day.

Under the Act of 1891, no counsel fee can be allowed the garnishee "until final disposition" of the case, and not then if, upon the trial of the issue joined, it shall be ascertained that the garnishee's answer is false. If, however, the case is tried and it is found that he has no funds in hand, the court may allow a fee "of at least \$10."

Rule by garnishee for counsel fee. C. P. No. 1, Phila. Co., March T., 1898, No. 955.

A. J. Wilkinson, for plaintiff; Robert J. Byron, for garnishee.

BEITLER, J., May 9, 1901.—The attachment issued April 1, 1901. On April 8 interrogatories were filed. On April 27 the garnishee answered, denying that she had any funds in her hands. On May 3 she entered a rule to show cause why she should not be allowed a counsel fee. On May 4 the plaintiff ruled the garnishee to plead; and the same day she pleaded.

At the hearing of the rule she asked for a counsel fee of \$50. The judgment on which the attachment issued was entered in 1898, and was for \$410.30.

The Act of April 22, 1863, P. L. 527, provides that where "the garnishee, after issue joined therein, shall be found to have in his possession or control no real or personal property of the defendant, nor to owe him any debt, other than such property or debts as shall have been already admitted by the pleas or answers of the garnishee, or in case, without going to trial, the plaintiff shall take judgment against the garnishee for what shall be so admitted in his plea or answer, then, and in either such case, the garnishee shall be entitled, in addition to the costs already allowed by law, to a reasonable counsel fee out of the property in his or her hands, &c."

The Act of June 11, 1885, P. L. 107, is a supplement to the Act of 1863, and provides that where, in any attachment, "the garnishee shall be found to have in his possession or control no real or personal property of the defendant, nor to owe him any debt, the said garnishee shall be entitled to recover from the plaintiff, in addition to the costs already allowed by law, a reasonable counsel fee, not exceeding \$10, to be determined by the court."

Under this Act, it was decided in *Joseph v. Risley*, 17 W. N. C. 348, that the garnishee who filed an answer denying any indebtedness to the plaintiff was entitled to the counsel fee of \$10, though the plaintiff had, immediately after the answer was filed, discontinued the attachment and paid the prothonotary's costs.

This court, in *Schwartz v. Hall*, 21 W. N. C. 406, where the plaintiff had discontinued after the case was on the trial list, and had paid the prothonotary's costs and a counsel fee of \$3, held that the garnishee was entitled to a counsel fee of \$10, under the Act of 1885. In both these cases, the court treated the discontinuance as a finding that the garnishee was not indebted to the defendant.

The Act of April 29, 1891, P. L. 35, provides that where, in any attachment, "an appearance by attorney shall be, or shall have been, entered by any garnishee or garnishees therein, each said garnishee so appearing shall be entitled to recover from the plaintiff, in addition to the costs already allowed by law, upon any discontinuance or other final disposition thereof, prior to answers filed, a counsel fee of at least \$10."

Wanamaker, to use, v. Fitzpatrick.

This Act has received two judicial interpretations.

In *Swoope v. Brown*, 9 District Reps. 155, an attachment issued, but the plaintiff did not further proceed therein. The garnishee claimed to recover an attorney fee, alleging that the attachment was abandoned after the service thereof and after the garnishee entered an appearance. President Judge Reed, of Jefferson county, held that, as the attachment was not finally disposed of, no attorney fee could be recovered.

In *Lummis v. Big Sandy Land and Mfg. Co.*, 188 Pa. 27, the issues on the attachment were sent to a referee, who found in favor of the garnishee and allowed an attorney's fee of \$250. The allowance of this fee was sustained by the Supreme Court. In that case, of course, the issue on the attachment was determined and at an end.

The Act of 1891 clearly contemplates that the counsel fee shall be allowed "upon final disposition" of the attachment.

The Act of 1863 would not give the garnishee in this case any counsel fee. The Act of 1885 gave none in such a case as we are considering, nor, under the Act of 1891, should the garnishee have any counsel fee, if, upon the trial of the issue joined, it shall be ascertained that her answer is false. If, however, the case is tried and it is found that she has not funds in her hands, then the court can allow a fee "of at least \$10."

Rule discharged.

Quaker City Apartment House Company v. Kirk.

Corporations—Stock subscriptions—Suit for same—Affidavit of defence—Practice, C. P.

An affidavit of defence to an action by a corporation upon a subscription to stock, made after it had obtained its letters-patent and effected its organization, which avers that the subscription was conditional and that the condition has not been performed, is sufficient when it does not appear that any other subscribers were obtained by reason of the subscription of defendant or that the rights of third parties have intervened.

Rule for judgment for want of a sufficient affidavit of defence. C. P. No. 5, Phila. Co., March T., 1901, No. 1413.

Burr, Brown & Lloyd, for plaintiff; *Sloan & Huey*, for defendant.

MARTIN, P. J., May 27, 1901.—It appears by the statement filed in this case that, after the corporation was organized, defendant subscribed for 500 shares of the stock, for which he agreed to pay \$2500. It does not appear that any other subscribers were obtained by reason of the subscription of defendant, or that the rights of third parties have intervened.

In the affidavit of defence it is alleged that the subscription was conditional, based upon an agreement between defendant and the officers of the company, in which it was stipulated that the company had secured an option to purchase a lot, upon which an apartment house was to be erected, and, in the event of the failure to secure a sufficient sum to complete the purchase by subscriptions to the stock prior to the expiration of the option, the project was to be abandoned, and if the property was not purchased, all subscriptions were to be canceled. The affidavit further avers that the purchase-money for the property was not paid and that the option expired, and that, by reason of the failure to purchase the property, defendant was relieved from liability for the amount of the subscription.

Upon the trial of the case, the unconditional written contract may prevail, or defendant may succeed in overthrowing it, but, as the record now stands, it is governed by *Pittsburgh & Connellsville R. R. Co. v. Stewart*, 41 Pa. 54, in 10 Dist. R.

Quaker City Apartment House Company v. Kirk.

which Strong, J., said: "It is no longer to be doubted that an incorporated company, after it has obtained its letters-patent and effected its organization, may receive conditional subscriptions to its stock. It may stipulate with subscribers that they may pay in any manner mutually agreed on, and it can enforce a subscription only according to its conditions:" *Caley v. Philadelphia & Chester County R. R. Co.*, 80 Pa. 363.

It was said by Mr. Justice Gordon, in *McCarty v. Selinsgrove, &c.*, R. R. Co., 87 Pa. 332: "After the organization of the company, a condition is binding and obligatory, and ordinarily this is so, though it rests in parol, if, except for such condition, the subscription would not have been made. The latter part of this proposition is subject, however, to the qualification that the rights of co-subscribers are not affected thereby."

The rule for judgment for want of a sufficient affidavit of defence is discharged.

Unruh's Estate.

Practice, O. C.—Account—Inaccuracies alleged by accountant—Burden of proof—Laches.

An accountant who alleges inaccuracies in his account sustains the burden of proof, and has imposed upon him the duty of moving for a reference to an examiner to take testimony to sustain his petition for review. And where his delay in making such motion is unreasonable the court will enter a rule on him, on motion of distributee, to move for the appointment of an examiner by a day certain or his petition will be dismissed.

Motion for appointment of examiner. O. C. Phila. Co., Oct. T., 1888, No. 86.

J. W. Hunsicker, for motion.

A. N. Keim and G. Harry Davis, for administrator.

HANNA, P. J., May 4, 1901.—It seems to us it would naturally be the desire of the administrator to secure a speedy correction of the account filed by him and relieve himself from the payment of the sums awarded to the distributees. Yet he waited from Nov. 7, 1888, until June, 1896, before taking any steps towards disturbing the confirmation of the account. In November, 1896, he filed his replication to the answers of certain of the distributees, and then rested, making no further effort to correct the account he alleged to be incorrect. In the meanwhile one of the distributees died, and her administrator seeks to collect from the accountant the amount awarded to his decedent. But the bill for a review, so long dormant, is in his way. As the petitioner for the review made no move in this direction, the administrator applied to the court for the appointment of an examiner to take testimony, so that the petition for review might be disposed of. Upon notice to the administrator, as directed by the court, he appears and objects to the appointment of the examiner, for the reason set forth in his answer. The facts averred in the answer are denied, and the replication thereto, being filed by the administrator seeking the appointment of the examiner. The case appears, therefore, to be still further complicated, but the real question is, however, not to be overlooked. And this is simply whether the administrator, who sought to have his account corrected, will proceed or not. If he is sincere in his application for the correction of his account, long ere this he should have proceeded with the effort begun by him looking towards this end. If indifferent or unwilling to accomplish this purpose, then he should discontinue the proceedings inaugurated. Moreover, the burden, in the first instance, is upon him to prove the alleged inaccuracies of his account, and not upon the respondents to establish its correctness. They are not to prove a negative, viz., that no errors exist. For this reason, it is needless at present to impose upon the respondents the costs and expenses with the delay of a

Unruh's Estate.

reference to an examiner. The petitioner is the party who should apply for such a reference, and if he does not within a reasonable time, his petition should be dismissed for his failure to proceed therewith. The motion now pending for the appointment of an examiner is therefore refused, and a rule is entered upon petitioner to move for the appointment of an examiner on or before May 18, 1901; otherwise, his petition to be dismissed for failure to proceed therewith.

Lukens's Estate.

Statute of limitations—Trusts—Bailments.

The trusts intended by courts of equity not to be reached or affected by the statute of limitations are only those technical continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of equity.

Statute of limitations—Deposits—Due bills.

Bailments in the character of deposits differ from due bills payable on demand, the statute of limitations running against the former from the date of demand, and against the latter from the date of the instrument.

Statute of limitations—Receipt for money—Due bill—Construction.

Hence, where claimant deposited her money with the decedent and took a receipt in the following form, "Received from E. \$9000, and deposited the same in the P. Trust Co. in my name as trustee, the said fund to be at the disposition of the said E. only for her use, also a check for \$100 for the purpose of the payment of S. W.'s counsel fee in the E. matter," *held*, that the transaction created a bailment as distinguished from a technical trust, and that the statute ran from the date of the last demand.

Bailment—Change of place and form of deposit—Notice to bailor—Fraud.

Where the bailee deposits the fund in his name as trustee with other sums also held by him in that character, and afterwards removes it to another institution and deposits it in his individual name, and draws checks in his individual name to the order of the depositor, the latter has constructive notice of the change of the place of deposit and of the fact that the account is kept in the trustee's individual name, and no inference arises therefrom against his good faith.

Decedent's estate—Disallowance of claim at audit.

At the audit of the bailee's estate, the claimant alleged that she made no demand of a later date than Jan. 23, 1888, at which time a balance of \$1821.79 was admittedly due her. It was conclusively shown that she demanded and received after that date \$1825, and there was strong presumptive proof that other payments were made to her from which a jury would be justified in finding that she had exhausted the fund. The auditing judge found as a fact that the claimant made three later demands, the last of which was more than six years before the decedent's death. *Held*, that the claim was properly disallowed.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1900, No. 49.

Thomas R. Elcock, for exceptant; Charles H. Burr, Jr., contra.

ASHMAN, J., May 11, 1901.—The claim in this case was for the balance of certain moneys belonging to Mary Y. Eyre, which the decedent deposited in bank in his name as trustee. The deposit was made on April 12, 1887, and amounted to \$9655. Up to Jan. 23, 1888, he had drawn out and paid to her \$7833.21. Subsequent payments were proved, of which the latest was Nov. 26, 1892, and this reduced the balance to \$496.79. It was claimed that the money was a trust fund, and therefore not within the statute of limitations.

The proof of the claim rested upon a receipt, signed by the decedent, under date of March 12, 1887, in these words: "Received from Mrs. Mary Y. Eyre \$9690, and deposited the same in The Provident Life and Trust Company in my name as trustee, the said fund to be at the disposition of the said Mary Y. Eyre only for her use. Also a check for \$100 for the purpose of the payment of Samuel Wakeling's counsel fee in the Eyre matter."

On that date the decedent opened an account in The Provident Trust Company by depositing \$9690 in the name of George W. Lukens, trustee, and on 10 Dist. R.

Lukens's Estate.

April 12, 1887, he withdrew \$9655 and deposited that sum in his individual name in the Second National Bank. On Jan. 23, 1888, he furnished claimant with a statement showing a balance in bank and due her of \$1821.79.

The obligation to which the decedent bound himself by the paper of March 12, 1887, was exactly that which he would have assumed as a mere bailee. It was not, so far as any ordinary meaning is attached to the words, made stronger by the phrase "only for her use." That language implied any use whatever to which the claimant might choose to apply the money, and gave the decedent no power whatever of discrimination in the matter of its employment. The contract, notwithstanding the added words, as trustee, was that of a banker with his depositor, to keep safely and to pay on the depositor's order, and the after-dealings of the parties confirm this view. The depositary had no power to invest, and the depositor was free to draw out, at any time, and in any amount, and she had an absolute and immediate remedy at law. Such a contract does not conform to the definition of a technical trust, and is therefore not exempt from the operation of the statute of limitations. The trusts which are without the statute are such as are not cognizable at law. In *Sturt v. Mellish*, 2 Atk. 610, Lord Hardwicke said: "I agree that, if it is a trust, it could not be within the statute, for a trust is such a confidence between the parties that no action at law will lie, but is merely a case for the consideration of this court; and every bailment might as well be said to be a trust as this."

Chancellor Kent, in *Kane v. Bloodgood*, 7 Johns. Ch. 111, declares, that where a clear and certain remedy exists at law, most cases, even of direct and express trust, are in equity within the operation of the statute. He instances the case of a depositary and the person depositing as a case of direct and express trust: but, he adds, "Are all such cases to be taken out of the statute of limitations, under the notion of a trust, when one of the parties selects his remedy in this court? A review of the decisions will enable us to deduce this rule: That trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical, continuing trusts, which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this court."

In *Robinson v. Hook*, 4 Mason, 139, Judge Story used language almost identical. "As to cases of merely constructive trusts, created by courts of equity, or cases which are treated for some purposes as implied trust, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them."

The deposit in the decedent's name as trustee contained other sums in addition to those held for the claimant, and there was no proof whatever that the claimant knew that the deposit was in that shape. Every inference, indeed, exists to the contrary, because every check which she received, and a number were drawn to her order, was in the individual name of the decedent, and, moreover, was drawn upon the bank to which he had removed the deposit. She had, therefore, full notice both of the place of deposit and of the fact that the deposit was in the individual name of the decedent. It is unjust to suggest fraud where no concealment was made of the removal of the fund from a saving fund to a national bank, where no loss accrued to the owner, and where the removal may have been for prudential reasons.

Viewing the transaction as a bailment, the most favorable view which can be taken of the claim is that which was adopted in *Girard Bank v. Bank of Penn Township*, 39 Pa. 92, and *Finkbone's Appeal*, 86 Pa. 368. In both of these cases, bailments in the character of deposits were, as respects the statute, placed on a different plane from due bills payable on demand, the statute running, in the former one, from the date of demand, and, in the latter, from the date of the

Lukens's Estate.

instrument. See *Taylor v. Witman*, 3 Gr. 138, and *Milne's Appeal*, 99 Pa. 483. The agreement of the bank, and, in this case, the agreement of the decedent, was, as stated in *Finkbone's Appeal*, "not to pay absolutely and immediately, but only when payment should be required." The question is one simply of fact: Was any demand made? The claimant alleges there was none of a later date than Jan. 23, 1888, at which time a balance remained to her credit of \$1821.79. She produced a statement, in the handwriting of the decedent, showing the receipt by him of \$9655, and payments to her between April 15, 1887, and Jan. 23, 1888, of \$7833.21, leaving a balance in her favor of \$1821.79, but it was conclusively shown that she demanded and received after that date \$1325, and there was strong presumptive proof that other payments were made to her from which a jury would be justified in finding that she had exhausted the fund.

A clerk in the employ of the decedent testified that the latter frequently entrusted him with checks payable to bearer, several of them being as large as \$200 each, on which he drew the money and paid it to parties designated by the decedent. In this way, he paid the claimant various sums at different times, but he was unable to give the dates or amounts. The claimant would have us believe that she made no demand for any amount whatever after Jan. 23, 1888, the date at which a balance was admittedly due her of \$1821.79.

The auditing judge, however, has found as a fact that she made three later demands, the last of which was more than six years before the decedent's death. The claimant has not only left unexplained her silence during this long interval, but she has cast more than a shade upon the *bona fides* of her case by claiming as unpaid and still owing moneys which she undoubtedly received from the decedent. We think that, under the evidence, the auditing judge properly disallowed her claim.

The exceptions are dismissed.

 Adams's Estate.

Decedent's estate—Exceptions to adjudications—Party having no interest in estate.

Where the gift to an exceptant to the adjudication was only to take effect in the event of the death of the testator's son, without issue, etc., etc., before reaching the age of thirty, and the son died after reaching that age, the exceptant has no interest in the estate and no standing to except to the adjudication.

Exceptions to adjudication. O. C. Phila. Co., July T., 1899, No. 301.

George Peirce, for exceptant; *W. Righter Fisher*, contra.

PENROSE, J., April 27, 1901.—The gift to the exceptant was only to take effect in the event of the death of the testator's son, without issue, &c., &c., before reaching the age of thirty years: it being directed by the will that if he attained that age, one-half of the estate should be paid to him, absolutely, and the other half held in trust for him, for life, and at his death paid as he should direct by will, or, in default of such direction, to the persons who would take under the intestate laws if he had been the owner in his own right. As the son died after reaching the age of thirty, it is clear that the exceptant has no interest in the estate; and whether the award to the son's administrator should have been of the whole of the balance shown by the account or of one-half only,—the other half being awarded directly to the person or persons entitled under the original limitation, viz., those who would take his estate under the intestate laws,—is a matter with which it has no concern whatever.

The exceptions are dismissed and the adjudication confirmed absolutely.

10 DIST. R.

Acheson's Estate.

Decedent's estate—Parties—Addition of—Practice, O. C.

A contestant in an appeal from the register who avers in his petition that he is the only party interested in the estate, but subsequently admits that there are other parties, cannot make them parties to the suit upon his petition. The practice in such case is for such parties to file their own petition, asking leave to join in the appeal, or else the contestant should bring them into court by a citation to show cause why the appeal should not be sustained and the will set aside.

Appeal from register. O. C. Phila. Co., April T., 1900, No. 337.

M. B. Elwert, for contestant; *L. H. R. Nyce*, for proponents.

HANNA, P. J., Feb. 5, 1901.—This matter was submitted without argument, but, from an examination of the record, it appears it is not in proper form for disposition by the court. The contestant alleged he was the only party interested in the estate, and a citation issued to the proponents to show cause why the appeal should not be sustained. The answer of the proponents, however, denies contestant is the only party interested in the estate, should the will be set aside, and avers testatrix left also two grandchildren, the children of a deceased daughter, who, in that event, will also be interested in her estate. This is admitted by contestant, and, upon his subsequent petition, the grandchildren, by order of court, were made parties as if included in the original petition, but they do not, as far as we discover, appear. This amendment, however, is not sufficient. Heirs, distributees or legatees cannot thus be made parties, perhaps, without their knowledge. The grandchildren should have been the petitioners, asking leave to join in the appeal, or else contestant should bring them into court by a citation to show cause why the appeal should not be sustained and the will set aside. The result is, the disposition of the present appeal will not conclude them, and must be deferred until they have regularly been made parties to the proceeding. See *Miller's Appeal*, 159 Pa. 562, and *Miller's Estate*, 166 Pa. 97.

Kelly's Estate.

Costs—Orphans' Court—Allowance of counsel fee out of the estate—Escheat.

Although the Orphans' Court has discretionary power over costs and an escheat has occurred, counsel fees will not be allowed out of a decedent's estate to one claiming to be his daughter, when the claimant utterly fails to make out a case.

Petition and answer. O. C. Phila. Co., July T., 1898, No. 105.

W. H. O'Brien, for petitioner.

W. G. Littleton, *John McCintock, Jr.*, and *Jas. F. Campbell*, for respondents.

FERGUSON, J., April 27, 1901.—In this case, the auditing judge found that the decedent died without heirs or kindred, and that an escheat had occurred. Subsequently a petition was filed by one Margaret E. Slater, alleging that she was the daughter of the decedent, and asking that the adjudication be opened, and that she be allowed to prove her claim. Considerable testimony was taken upon this question, and the petitioner utterly failed to make out a case. This was admitted by her counsel upon the argument. He, however, claims to be paid a fee out of the estate for the services rendered by him. "The general rule which would compel a party against whom the decree goes to pay the costs is

Kelly's Estate.

not inflexible. The Orphans' Court have discretionary power over costs:" Stokely's Estate, 19 Pa. 476. But, in this case, what is there that appeals to the discretion of the court? The claim of the petitioner was antagonistic to the estate. While the counsel no doubt rendered considerable services, none of them, either directly or incidentally, enured for the benefit of the estate. We do not see upon what principle this claim can be allowed. The petition to open adjudication is refused, and the claim for counsel fee disallowed.

McCahan v. Reeder.

Executors and administrators—Service of process on non-resident executors—Act of March 27, 1854.

Under the Act of March 27, 1854, P. L. 214, the service of a summons from a magistrate on the sureties of a non-resident executor gives the magistrate jurisdiction over the executor himself as though there had been a personal service upon him.

A non-resident who has been appointed executor under the will of a citizen of Pennsylvania, resident within the jurisdiction, and has given security within the jurisdiction for the performance of his duties as executor, and taken the oath of office and assumed its duties, is not to be regarded as a foreign executor.

Non-resident executor—Jurisdiction of justice of the peace—Service of summons.

Suit may be brought against a non-resident executor before a justice of the peace. The justice may acquire jurisdiction over the executor by serving the summons upon the resident sureties of the executor, as required by the Act of March 27, 1854, P. L. 214.

Justice of the peace—Entering non-suit—Adjournment and continuances.

A justice of the peace cannot enter a judgment of non-suit after an appearance by the plaintiff.

The granting of an adjournment or continuance by the justice is a matter within his discretion, and is not a valid reason for reversing the judgment.

Certiorari to John W. Hibbs, Esq., Justice of the Peace. C. P. Juniata Co., Sept. T., 1900, No. 6.

B. F. Burchfield, for certiorari; Charles B. Crawford, contra.

ATKINSON, P. J., March 26, 1901.—It is admitted in this case that the defendant, Emanuel Reeder, executor, &c., of Martha Reeder, deceased, is a non-resident of the State of Pennsylvania, and as executor gave security for the performance of his trust as required by the Act of Assembly, approved March 15, 1832, P. L. 139, which requires the register of wills to take a bond, with two or more sufficient sureties, inhabitants of this Commonwealth, before letters testamentary are issued to an executor who is not an inhabitant of this Commonwealth. C. Graham Reeder and Harvey B. Gray, both of whom are residents of Juniata county, among others, became sureties upon the bond of Emanuel Reeder, as executor. Letters testamentary were issued to Emanuel Reeder on April 8, 1898, by the register of wills of Juniata county; he was sworn to execute his trust according to law, and took upon himself the duties of the office of executor.

The plaintiff, desiring to begin an action against the estate of Martha Reeder, deceased, caused a summons to be issued by John W. Hibbs, Esq., a justice of the peace of Juniata county, on Feb. 5, 1900, in which writ the bondsmen of Emanuel Reeder, executor, &c., were named as well as the executor himself, and the constable to whom the writ was directed made return that Emanuel Reeder, the executor, is not a resident of his bailiwick, but is, in fact, a resident

McCaban v. Reeder.

of the State of Ohio, and then served the writ according to law upon two of the sureties on the bond of Emanuel Reeder, executor, &c., who reside in Juniata county. A meeting was had before Justice Hibbs on Feb. 12, 1900, at 10 A. M., being the time named in the summons, and after a number of continuances and the examination of witnesses on the part of the plaintiff to establish his claim, judgment was finally entered in favor of the plaintiff and against Emanuel Reeder, executor, &c., of Martha Reeder, deceased, for the sum of \$175.70, with costs. On April 6, 1900, a writ of *certiorari* was sued out by Emanuel Reeder, executor, &c., and service of the writ is acknowledged by Justice Hibbs the same day.

The first exception of the exceptant, Emanuel Reeder, executor, &c., sets out that the justice had no jurisdiction, both the plaintiff and the executor defendant being non-residents of the State, and not within the same at the issuance of the summons.

No law was cited to show that a non-resident plaintiff may not bring a suit against another in our State, and the fact that the plaintiff was not a resident of Pennsylvania is, as we view the case, of no importance. Did the justice acquire jurisdiction over the defendant by the service of the summons on the bondsmen of Emanuel Reeder, executor, &c., who reside in Juniata county, letters testamentary having been issued by the register of wills of this county? This raises the important question in the case. The plaintiff relies upon the Act of March 27, 1854, P. L. 214, for authority to bring the executor into court by service of a summons on his bondsmen, and counsel for the executor denies that such authority is to be found in the Act cited. The title of the Act is an "Act relative to bringing suits by creditors and others against executors, administrators and assignees and other trustees in certain cases, and serving notices, and for satisfaction of mortgages and opening judgments in certain cases." The statute itself provides "that in all cases where executors, administrators, assignees, or other trustees, shall not reside within the jurisdiction of the court having control of their accounts, proceedings may be had and suits may be brought against them by creditors and others interested in said estates, in the counties where such accounts are to be settled, and process may be served by the proper officers of said counties, or their deputies, on said executors, administrators, assignees or other trustees, beyond the bounds of said counties as if they resided therein, or upon any surety on their official bonds, with like effect as if they resided within the jurisdiction of the courts having control of their accounts."

Although this Act has been upon the statute books almost fifty years, it does not appear that there is any judicial decision interpreting it. This is probably because its purpose is very clearly set out in its title, and its language is free from ambiguity. In plain words, it states that "process may be served on an executor outside the county, or upon any surety on his official bond, with like effect as if the executor resided within the jurisdiction of the court having control of his accounts." The service of a summons upon any surety on the official bond is equivalent to a service on the non-resident executor, in legal effect, and makes him as liable to answer in the forum from which the summons was issued as if the executor had been personally served. The plain words of the statute show this to have been the intention of the legislature, and where there is no ambiguity there is no need of interpretation. In *Pittsburgh v. Kalchthaler*, 114 Pa. 547, it is held that "it is always unsafe to depart from the literal meaning of words, out of deference to some supposed intent, which would prevent their application to a given subject." "The courts have no right to narrow the construction of a statute so as to give the words a less comprehensive operation than they clearly import. The maxim is that, in the absence of ambiguity

no exposition of a statute shall be made which is opposed to the express words:" *Reimer Harrow Co. v. Rosenberger*, 40 Legal Intell. 382. We, therefore, hold that, under the statute cited, the service of the summons of the magistrate upon the sureties of the executor resident in Juniata county, gave that officer jurisdiction over the executor himself, and for this reason we overrule the first exception.

Second exception: "There is no law or Act of Assembly in Pennsylvania that warrants the service of summons from a justice of the peace upon the bondsmen of a foreign executor for the purpose of obtaining judgment against said executor for debts of a decedent's estate." Answer: It is held in *Oakes v. Robinson*, 1 Yeates, 250, that justices have jurisdiction in suits against executors and administrators. Emanuel Reeder, executor, &c., of Martha Reeder, deceased, is not a foreign executor. He became subject to the laws of Pennsylvania when he filed his bond, took the oath of office and assumed the duties of executor. A foreign executor is one who derives his authority from another State or nation. The Act of March 27, 1854, P. L. 214, as we have seen, warrants the service of a summons upon him, precisely as was done in this case, for the purpose of obtaining judgment against him, and he having come into this jurisdiction for the purpose of accepting this trust, should be considered as estopped from denying the jurisdiction in order to escape from the liabilities which he voluntarily assumes. The exception is overruled.

Third exception: "The justice erred in not entering a judgment of non-suit when asked for by counsel for C. Graham Reeder and H. B. Gray, it being evident from the statement of the plaintiff's claim that neither of the said persons served with the summons could be in any manner liable to have judgment entered against them, and Emanuel Reeder being without the justice's jurisdiction and not served with the summons." Answer: The plaintiff having appeared, the justice had no right to enter a non-suit. The Act of March 20, 1810, § 6, 5 Sm. Laws, 165, provides that in case the plaintiff does not appear either in person or by agent to substantiate his charge, the justice may then, or at some other day as he may judge reasonable, proceed to give judgment against him by non-suit, for the costs and fifty cents per day for the reasonable costs of the defendant for his trouble in attending such suit. *Lawver v. Walls*, 17 Pa. 75, decides that a justice of the peace has no authority to enter judgment of non-suit after an appearance by the plaintiff. The third exception is overruled.

Fourth exception: The granting of an adjournment or continuance by the justice was a matter within his discretion, and does not constitute a valid reason for reversing the judgment. It is not reviewable on error: *Maffitt v. Rynd*, 69 Pa. 380; *Tassey v. Church*, 4 W. & S. 141. The fourth exception is overruled.

Fifth exception: This is a summary of the preceding exceptions, with the additional statement that the executor did not have his chance to be heard upon any process served upon him, either actually or by implication of law. The record shows that the summons was returnable Feb. 12, 1900, and by numerous adjournments was continued until April 9, 1900, a period of nearly two months. Surely, this was all the time a man, even if he resided in Ohio, would need to make his defence in a suit before a justice of the peace in Pennsylvania. That the plaintiff had a right to sue the executor in a common law action is decided in *Swain v. Ettling*, 32 Pa. 486; and the Act of March 27, 1854, before cited, gave the authority to serve him with process, and secure jurisdiction over him as was done in this case. The summons, although not very carefully drawn, was sufficient in substance, and gave the sureties such notice of the suit as caused them to appear before the justice at the time and place fixed for the hearing. Their duty was to notify the executor of the fact of the suit, and to ask for such continuance as would enable them to communicate with him and procure

McCahan v. Reeder.

counsel and witnesses to make defence, if there was, in fact, a defence available. Besides all this, C. Graham Reeder, one of the sureties, was a son of the decedent and a residuary legatee under her will, and was as much interested in taking defence to the action as the executor himself. This surety had ample chance to defend, but, instead of defending the estate, he secured counsel for himself, he being in no peril and nothing being claimed from him. The fifth exception is overruled.

Sixth exception: "The whole proceedings are void as to Emanuel Reeder, executor of Martha Reeder, deceased." Answer: We do not think so. The plaintiff had a right to sue the estate of Martha Reeder, deceased, the statute pointing out the method of obtaining service on the executor, and this method was pursued. The proceedings before the justice were not so irregular as to afford just grounds for setting them aside, and ample time was given the executor to make a defence if he had any to make. We cannot see that any hardship was imposed upon the estate; the executor was delinquent in not filing an account within the year after his appointment, as he was bound by law to do, and the proceeding was on this account amply justified.

The exceptions are all dismissed and overruled, and the judgment is affirmed.

From F. M. M. Pennell, Mifflintown, Pa.

Stroup's Petition.

• *Public schools—Examination of teachers—Duty of county superintendent—Act of May 8, 1854, sec. 41.*

No discretion is reposed in the county superintendent in regard to the duty, under Act of May 8, 1854, § 41, P. L. 426, of examining candidates for the position of teacher, and nothing can justify a refusal to examine a candidate except the known or proved immoral character or habits of the candidate. The superintendent's office in this respect is ministerial, and it is his duty to examine such applicants as may apply to him for a teacher's certificate.

While the county superintendent may establish reasonable, proper and necessary rules and regulations for the performance of his duties, and while he may determine the dates on which he will hold his examinations, yet there is no provision whatever in the law which permits him to adopt an arbitrary rule or regulation by which applicants may be excluded from undergoing an examination at any subsequent date.

Hence a county superintendent cannot refuse to examine a candidate on the ground that his regular examination had been held before his receipt of the application, and that, under his rules, no subsequent examination would be given to any applicant.

Public schools—Appointment of teachers—School directors—Rules of county superintendent—Act of May 8, 1854, sec. 23, par. 5.

Under the Act of May 8, 1854, § 23, par. 5, P. L. 422, the school directors in every district have the power to select the teachers in their respective districts without regard to any rules or regulations the county superintendent may have made restricting their selection.

Mandamus. C. P. Clarion Co., Nov. T., 1900, No. 15.

G. G. Sloan and A. A. Geary, for petitioner; W. A. Hindman, for respondent.

CLARK, P. J., March 18, 1901.—Upon the petition of Mame Stroup, "that she is by profession and occupation a school teacher, and has been successfully engaged in teaching for two years last past, viz., Crenshaw School No. 1 and in Falls Creek No. 3, in the county of Jefferson, Pa. That her services have been requested by the directors of the township of Mill creek, in the county of Clarion, to teach the school known in said township as the McCama School. That in pursuance of the above request, and in order to comply with the same, she applied to W. A. Beer, the Superintendent of Clarion county, to examine

Stroup's Petition.

her, and, if found qualified, to give her a certificate setting forth the branches of learning required by the Act of Assembly of 1854, etc. That your petitioner further avers that the school board aforesaid, in writing, requested and demanded that he, the said W. A. Beer, comply with the above request, and that he examine your petitioner, and, if found qualified, to issue a certificate to her in order to teach the said school in said township, and that the same is now being held to await the granting of the certificate. That the said W. A. Beer has refused to examine your petitioner for the purpose aforesaid, and still does refuse, wrongfully and unjustly, as your petitioner believes. That your petitioner avers that she now has a certificate issued by R. B. Teitrick, Superintendent of Jefferson county, and that he, the said R. B. Teitrick, as well as your petitioner, requested him, the said W. A. Beer, to issue a certificate from the grades mentioned in the said certificate, all of which he then and there refused, whereby your petitioner is unable to enter upon the duties of teaching said school. Wherefore, your petitioner is without other adequate and specific remedy at law, prays this honorable court that a writ of mandamus may be issued and directed to the said W. A. Beer, County Superintendent of Clarion county, commanding him to examine her for the purpose aforesaid, in accordance with the Act of Assembly in such cases made and provided." On Aug. 30, 1900, the said petition was presented and filed in open court, and an alternative writ of mandamus was directed to be issued thereon, returnable within five days after service of writ on defendant. On Aug. 30, 1900, the alternative writ of mandamus was issued, and it is alleged that service thereof was accepted by the attorney for the respondent. On Sept. 4, 1900, the respondent, W. A. Beer, filed his answer and return to said writ, and says: "I admit that, on Aug. 2, 1900, the petitioner, Mame Stroup, made application to me, in writing, as superintendent of public schools of Clarion county, to be examined by me for a certificate to teach in the public schools of said county, which request was declined by me for the following reasons:

"During the whole time I have acted as county superintendent, viz., for the last seven years, I have followed established rules and regulations, arising from the necessities of the case, and made in my official capacity and discretion for the better government and general welfare of the teachers and common school system of this county, which rules have been by me well advertised throughout all that time, having been published in the 'Clarion Democrat,' 'Clarion Republican' and 'Clarion Jacksonian,' three weekly newspapers published at Clarion, Clarion county, Pennsylvania, a true copy of which rules and regulations governing the examinations of teachers for the common schools of Clarion county for the year 1900 is hereto attached and made part of this answer. That, under such rules and regulations, I fixed the time and place of holding said examinations for the year 1900, for the different school districts of Clarion county, from April 28 to May 25, inclusive, giving notice to the several boards of directors of the school districts of said county, as well as the intending applicants for such examination, by the published notice, a copy of which is appended. I examined of those who appeared before me, pursuant to above notice, about 287, and granted certificates to about 256, and these, with the teachers holding normal school and other high-grade certificates, made in all a total of 390 teachers in Clarion county, or 134 more teachers than there were schools. These rules and regulations, published as above, provided that there should be no other examinations for the year 1900, and no special examinations except in urgent need to fill vacancy which cannot otherwise be filled. And for the further reason that the petitioner, Miss Mame Stroup, had been elected June 30, 1900, by the board of directors of Mill Creek township, to teach the McCama School, and her election certified, July 18, 1900, to me, which employ-

10 DIST. R.

Stroup's Petition.

ment as teacher your respondent understood and believes to be illegal under the school laws of Pennsylvania, for the reason that she did not at the time have a valid certificate, and respondent believes this to be an attempt to obtain this certificate from me, the same with retroactive effect on said illegal act. Your respondent also declined to grant petitioner a certificate from the grades mentioned in the certificate given her by R. B. Teitrick, as set forth in her said petition, for the reason that he believed such action on his part to be illegal. Respondent denies that petitioner comes within any of the exceptions contained in the before-mentioned rules, and further denies that said petitioner has the right, under said rules and regulations and the law governing the conduct of the public schools of Pennsylvania and the examination of teachers therefor, to have an examination at such time or times as she may dictate, or at any other than the times so advertised, except in case of sickness at the time of the regular examinations, or under the other exceptions mentioned in said rules and regulations, and that to grant the same would be subversive to the orderly and proper administration of the duties of the respondent and inimical to the welfare of the teachers and common school system of this county. Respondent further avers that the said rules and regulations are, in all respects, reasonable and proper and necessary to the welfare of the teachers and schools of this county, and have been impartially enforced by the respondent. Wherefore, the respondent, setting forth the premises, prays that the said writ of alternative mandamus be, and respondent be, herewith dismissed, with his reasonable costs in this behalf unjustly expended." The petition and answer were both duly sworn to, and the case put on the argument list and heard on the petition and answer by the court on Dec. 17, 1900.

It will be observed in the answer of the respondent, as county superintendent of Clarion county, he admits that, on Aug. 2, 1900, the petitioner, Mame Stroup, made application to him in writing, as such superintendent, to be examined by him for a certificate to teach in the public schools of Clarion county, which request was declined by him for the reasons above stated. The facts, that the petitioner's services had been requested by the directors of the township of Mill Creek, in the county of Clarion, to teach the school known in said township as the McCama School, as averred in her petition, were not denied by the respondent. Nor has the respondent in his answer denied the facts averred in her petition, "that the school board aforesaid, in writing, requested and demanded that he, the said W. A. Beer, comply with the above request, and that he examine your petitioner," etc. It is true that the respondent, in the reasons assigned by him for refusing to examine her for a certificate to teach schools as aforesaid, says: "That the petitioner, Miss Mame Stroup, had been elected June 30, 1900, by the board of directors of Mill Creek township, to teach the McCama School, and her election certified, July 18, 1900, to me, etc.;" but this cannot be said to be a denial of the latter facts averred in her petition, and, if anything, it goes to some extent in corroboration of the facts averred by the relator in her petition. Before discussing the facts and the reasons alleged by the respondent, I shall first refer to some of the laws I believe to be applicable to the case. First, that "it shall be the duty of the county superintendent to examine all candidates for the profession of teacher, in the presence of the board of directors or controllers, should they desire to be present, to whom they shall first apply in his county, and to give to each person found qualified a certificate, setting forth the branches of learning he or she is capable of teaching; and examination and certificate shall be renewed as often as any such teachers shall be employed in teaching any branch of learning other than those enumerated in his or her certificate; and no teacher shall be employed in any school to teach other branches than those set forth in such certificate of said teacher," etc. :

Stroup's Petition.

Act of May 8, 1854, § 41, P. L. 628. Among the powers and duties of the board of school directors in every district in this State, it is provided in paragraph 5, section 23, of the Act of May 8, 1854, P. L. 622, that "they shall have the appointment of all the teachers of common schools in the district, fix the amount of the teachers' salaries, and may dismiss them at any time for incompetency, cruelty or immorality."

The proceedings in this case seem to be regular in every respect, down to and including the answer or return of the respondent, but the plaintiff has not, in writing, demurred to the answer or return, nor has she plead to or traversed all or any of the material facts therein contained; nor has the defendant made reply, taken issue or demurred thereto, as provided by law. But the counsel have, however, placed the case, upon petition writ and answer, on the argument list, and have argued it as if a demurrer had been filed to the answer, and the defendant had replied and taken issue therein, and having called for a decision, I shall consider the question raised without regard to the form in which they have presented, and decide the case on the petition and answer filed. It cannot be doubted that the county superintendent is required by law to examine "all the candidates for the profession of teacher (in the presence of the board of school directors or controllers should they desire to be present, to whom they shall first apply in his county), and to give to each person found qualified a certificate, setting forth the branches of learning he or she is capable of teaching," etc. It is well settled that those who accept public office or employment are bound to discharge the duties required of them by law, or assign such reason for the refusal as shall be deemed sufficient by the tribunal appointed to decide. It is equally well settled that it is only where a discretionary power is given to do or omit any particular act that the refusal or omission can be justified by a general averment of causes not specified, but which are deemed sufficient by the party refusing to act. In regard to the duty of examining the candidates for teachers, there was no discretion reposed in the county superintendent. In this respect, the law is imperative, and nothing can justify a refusal to perform it, except in the cases of candidates of known or proved immoral character or habits, no matter what their literary or professional claims may be. The examination of persons thus disqualified, and to whom no certificate could issue, would be but a waste of time. In the case at bar, no claim has been made by the respondent, at least it does not appear in his answer, that Mame Stroup, the applicant and relator, is a person of immoral character or bad reputation, nor was the refusal of the county superintendent to examine her based upon any such charges. From the records in this case, it appears to me there is no controversy as to the facts. It is purely a question of law, to be decided by the court. If the facts averred in the relator's petition be true, there can be no doubt as to her right to have a peremptory mandamus on the respondent to compel him to perform his duty in the premises, unless he has a good and sufficient excuse for his refusal to do so. Has the respondent in his answer denied a single fact averred in the relator's petition? I think not. One of the most important facts alleged in her petition, with reference to her application made to W. A. Beer, the said superintendent, to examine her, and, if found qualified, to give her a certificate, etc., was admitted in respondent's answer, together with his refusal to examine her for the profession of teacher, for the reasons therein stated by him as aforesaid. Nor were the additional facts averred by her in said petition, with respect to the school board of said Mill Creek township, having in writing requested and demanded that the said superintendent comply with the above request, and that he examine the said petitioner, and, if found qualified, to issue a certificate to her to teach the said school, etc. But, says the respondent, in effect, the facts are true, but the

Stroup's Petition.

request aforesaid of the petitioner has been refused, "was declined by me for the following reasons" (see the reasons hereinbefore quoted). Are the reasons alleged in the answer of the respondent sufficient to justify him in his refusal to examine the applicant for the purpose aforesaid? Great stress was laid on the reason assigned for the refusal that the county superintendent for the last seven years had followed "established rules and regulations arising from the necessity of the case, and made in my official capacity and discretion for the better government and general welfare of the teachers and common school system of this county, ... a true copy of which rules and regulations is hereto attached and made part of this answer." I quote a part of said rules:

"Teachers' examinations, 1900, for Clarion county. Edenburg, Saturday, April 28, . . . Clarion, Friday, May 25. . . . No other examinations for the year ending June 1, 1900. No special examinations except in urgent need to fill vacancy which cannot be otherwise filled. No applicant examined twice, and applicants must enter the first class they attend. . . . Persons who indulge in intoxicating liquors, immoral persons and persons of bad reputation in their own neighborhood or elsewhere, will not be examined if the superintendent have information with reference to these matters. . . . A circular, giving grades, will be mailed the school directors about July 1, and school directors are requested not to employ teachers who have not a valid certificate at the time of engagement. If a school board should not be able to fill their schools, it would be a good plan to notify the superintendent, so that he can give names and addresses of teachers who have not secured schools. Directors should not assume that any applicant will be examined at any time, regardless of the fact that many of our own teachers have not secured schools in which to teach. Only the most urgent reasons will cause this action to be taken. Teachers who fail to get schools may be helped if they promptly notify the superintendent of that fact," etc. (Signed), W. A. Beer, County Superintendent of Clarion county.

The county superintendent urges, as a further reason for his refusal as aforesaid, that under the said rules he fixed the time and place of holding said examinations for the year 1900, for the different school districts of Clarion county, from April 28 to May 25, inclusive, giving notice to the several boards of directors of the districts of the said county, as well as the intending applicants for such examination, by the published notice. Now, as to the notice published, did the superintendent therein fix or designate any place for such examination with reference to the school district of Mill Creek township, or with reference to the teachers who desired to make application for schools in that particular district, and did the directors of that district have notice when and where the examination for their district would be held? I think not. In the Pennsylvania School Laws and Decisions of 1890, page 114, place 172, it is thus ruled:

"An examination of the teachers of a county in a body, or those of several districts at one time, without the formal consent of all the directors concerned, is clearly contrary to law. The presence of the directors of the district in which the examination is held, or an opportunity by notice to be present, is, in all cases, indispensable."

But, aside from the fact as to whether or not the notice was in due form, the reasons assigned in the answer of the superintendent for his refusal to examine, or to afford the applicant the privilege of an examination for the profession of teacher, are, in my view of the law and the admitted facts, clearly insufficient to justify him in such refusal. There is nothing in the school laws of this Commonwealth in respect to the time when such examinations shall be held, and while I am ready to concede, by implication, the authority of county superintendents to establish reasonable, proper and necessary rules and regulations in

Stroup's Petition.

the performance of duties required of them by virtue of their employment, election or appointment, and such as are not inconsistent with the laws relating thereto, and while such superintendents may determine the dates on which they shall hold their examinations by complying with the requisites of the law, I shall hold that there is no provision whatever in the law which will permit a superintendent to fix an arbitrary rule or regulation by which applicants may be excluded from undergoing an examination at any subsequent date, except in cases of applicants of known or proved immoral habits.

Under my view of the law applicable to the case at bar, I think it is the business of the county superintendent to examine applicants who may apply to him for a certificate to teach in the public schools of his county, especially when a worthy applicant submits to the superintendent a written request from a majority of the board of directors of the school district where the applicant is to be employed, as in the case in hand. Taking into consideration the uncontroverted facts as shown by the petition, alternative writ of mandamus and return or answer filed, the superintendent has no authority, express or implied, under any statute, to justify him in his refusal to examine the applicant, the relator. The fact stated in the reasons assigned for such refusal in respondent's answer, as to the number of applicants he examined in Clarion county, "and these with the teachers holding normal school and other high-grade certificates, made in all a total of 390 teachers in Clarion county, or 134 more teachers than there were schools," does not in any sense justify his refusal. And that portion of his rules and regulations which reads, "directors should not assume that any applicant will be examined at any time, regardless of the fact that many of our own teachers have not secured schools in which to teach," is without authority and no justification for his refusal. The directors, and not the superintendent, have the power to select the teachers in their respective districts.

Another reason assigned for his refusal is, that "Miss Mame Stroup had been elected June 30, 1900, by the board of directors of Mill Creek township to teach the McCama School, and her election certified to me July 18, 1900, which employment as teacher your respondent understood and believed to be illegal," etc. This is technical, to say the least, and is absurd as an excuse for his refusal to examine the applicant for the express purpose of qualifying her as a teacher, so that she might legally enter into the service as teacher in said school, coupled with the fact of the request of said board of directors to the superintendent as aforesaid. In my judgment of the premises, the reasons assigned for the refusal to examine the applicant in this instance are not good and valid ones.

A writ of mandamus is no longer regarded in this country as a high prerogative writ, but one of right, to compel an officer to perform the duties pertaining to his office.

The following demurrer has been filed in the case: "And now, March 7, 1901, Mame Stroup comes into court and says that the answers of W. A. Beer, filed in this case, and the reasons therein, are not sufficient in law." (Signed, Mame Stroup, by her attorneys, G. G. Sloan and A. A. Geary), with the following agreement thereto annexed, to wit: "March 7, 1901, it is agreed that this case shall proceed as if the above demurrer to answer had been filed before the argument on petition and answer, and that the court shall dispose of the matter without further argument." Signed by attorneys for the relator and the respondent.

Under our views as above expressed, a peremptory writ of mandamus should be allowed to compel the respondent to examine the relator, the said Mame Stroup, a candidate for the profession of teacher, as provided by law, and in accordance with her request as set forth in her petition. The duties of the said superintendent to this extent are of a ministerial character, and there is no

10 DIST. R.

Stroup's Petition.

reason why he should not comply with the law in this respect. I therefore make the following order :

And now, March 18, 1901, after argument of counsel, and upon due consideration of the petition of the relator, the answers of the respondent and of the demurrer of the relator to the answer, and of the agreement of counsel, the court hereby enters judgment on demurrer to answer in favor of Mame Stroup, the relator. And it is further ordered, adjudged and decreed that a peremptory writ of mandamus be issued in above case against W. A. Beer, County Superintendent of Clarion county, the respondent, commanding him as such superintendent to examine the said Mame Stroup, the relator, a candidate for the profession of teacher in said county of Clarion, in pursuance of her request made to him for said purpose as set forth in her petition, in the presence of the board of directors of Mill Creek township of said county, should they desire to be present, and to give her, if found qualified, a certificate as provided by law. Such examination as aforesaid to be made within fifteen days from the date of notice of the filing of this order on the respondent ; and five days' notice of the time and place of such examination, to be fixed by the said superintendent within the period aforesaid, shall be given by him to the said Mame Stroup, the relator. The costs of these proceedings to be paid by the said W. A. Beer, the respondent.

From J. E. Wood, Clarion, Pa.

Notes of Treasury Department Decisions.

From April 25 to June 8, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes :— [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Articles and Occupations Subject to Tax.

No. 352, June 3, 1901. 4 Treasury Decisions, No. 23, page 18.

Bonds and Guaranties of Contractors for Public Works.

Stamp tax. No. 356, June 5, 1901. 4 Treasury Decisions, No. 24, page 28.

Calls.

Stamp tax. No. 338, May 4, 1901. 4 Treasury Decisions, No. 19, page 32.

Collector's Record of Stills, No. 115.

No. 337, May 2, 1901. 4 Treasury Decisions, No. 19, page 31.

Concerning the Cancellation of Internal Revenue Stamps.

No. 347, May 22, 1901. 4 Treasury Decisions, No. 21, page 19.

Excise Tax on Business of Refining Sugar.

No. 350, May 25, 1901. 4 Treasury Decisions, No. 22, page 14.

Exhibitions.

Special tax. No. 357, June 8, 1901. 4 Treasury Decisions, No. 24, page 29.

Export Bills of Lading.

No. 333, April 25, 1901. 4 Treasury Decisions, No. 18, page 20.

Stamp tax. No. 339, May 7, 1901. 4 Treasury Decisions, No. 19, page 35.

No. 355, June 5, 1901. 4 Treasury Decisions, No. 24, page 27.

DISTRICT REPORTS.

Notes of Treasury Department Decisions.

Express Receipts.

Stamp tax. No. 334, April 26, 1901. 4 Treasury Decisions, No. 18, page 20.

Indictments Against Parties Charged with Violation of Oleomargarine Laws.

No. 335, April 27, 1901. 4 Treasury Decisions, No. 18, page 21.

Instructions as to Collection of Judgments.

No. 348, May 23, 1901. 4 Treasury Decisions, No. 22, page 13.

Legacy Tax.

Section 29, Act of June 13, 1898, as amended by Act of March 2, 1901, imposing a tax on legacies, applies only where the testator or intestate died after the Act was passed. Taxes collected prior to the amendatory Act cannot be refunded, pending decision of the courts. No. 336, April 30, 1901. 4 Treasury Decisions, No. 18, page 25.

Moneys collected from rents which accrued after death of testator not subject to legacy tax; but rents accrued before death, but not paid, are considered personal property of testator's estate. No. 342, May 8, 1901. 4 Treasury Decisions, No. 20, page 23.

Personal estate passing by the intestate laws or by will passes from the testator and not from the administrator, executor or trustee; therefore, no tax accrues on legacies where testator died prior to June 13, 1898. No. 343, May 9, 1901. 4 Treasury Decisions, No. 20, page 23.

Accumulations held taxable, as the tax is on the "clear value" of the legacy or beneficial interest. No. 349, May 25, 1901. 4 Treasury Decisions, No. 22, page 13.

Memorandum.

Stamp tax. No. 345, May 17, 1901. 4 Treasury Decisions, No. 21, page 17.

Oleomargarine.

No. 344, May 11, 1901. 4 Treasury Decisions, No. 20, page 26.

Oleomargarine, Retail Dealers—Stalls in Market Building.

No. 346, May 18, 1901. 4 Treasury Decisions, No. 21, page 18.

Packing Domestic Cigars.

No. 332, April 25, 1901. 4 Treasury Decisions, No. 18, page 19.

Rebate on Goods in Transit.

No. 340, May 7, 1901. 4 Treasury Decisions, No. 19, page 50.

Scenic Railway.

Special tax. No. 358, June 8, 1901. 4 Treasury Decisions, No. 24, page 29.

Tax on Brokers, Class 2.

No. 351, May 29, 1901. 4 Treasury Decisions, No. 23, page 17.

Tobacco, Snuff, Cigar and Cigarette Stamps.

No. 341, May 7, 1901. 4 Treasury Decisions, No. 19, page 52.

Use of Form 45 and Record 59.

No. 353, June 3, 1901. 4 Treasury Decisions, No. 23, page 24.

Use, Redemption and Method of Accounting for Beer, Cigar and Small Cigarette Stamps after July 1, 1901.

No. 354, June 3, 1901. 4 Treasury Decisions, No. 23, page 24.

10 DIST. R.

Philadelphia Base-Ball Club, Limited, v. Lajoie et al.

Limited partnerships—Act of June 2, 1874—Contracts.

A contract signed by the secretary of a limited partnership association under the Act of June 2, 1874, P. L. 371, and afterwards endorsed by two managers "within contract approved," is executed by two managers of the association within the meaning of the Act.

Contract for personal service—Injunction—Lumley v. Wagner.

To bring a case within the principle of *Lumley v. Wagner*, 1 De G., M. & G. 604 (1852), as construed and restricted by recent decisions, the defendant's services must be unique, extraordinary and of such a character as to render it impossible to replace him, so that his breach of contract would result in irreparable loss to the plaintiff.

The contract between the plaintiff, a base-ball club, and the defendant, a player, provided that the defendant should play base ball for the plaintiff for the period of six months, beginning April 15, 1900, and ending Oct. 15, 1900, and that he should not perform such duties for any other party or parties during said period. It also contained the following clause: "19. . . . The party of the first part or its assigns shall have the option or right to renew this contract, with all its terms, provisions and conditions, for another period of six months, beginning April 15, 1901, and for a similar period in two successive years thereafter, and the said party of the second part hereby agrees to perform similar services and to be subject to all obligations, duties and liabilities prescribed in this contract for the period or periods of such renewal or renewals, provided only that written notice of the exercise of such option of renewal be served upon the said party of the second part prior to the 15th day of October of the current year of this contract and of the current year of each renewal thereof." On Oct. 11, 1900, the plaintiff, by its secretary, served a written notice upon the defendant of the exercise of its option to renew, and the contract thereupon became binding upon the parties for the season of 1901. On Feb. 14, 1901, the defendant entered into a contract with another club, the Philadelphia American League Base-Ball Club, to play with it for the season of 1901.

Upon a bill filed by the base-ball club, plaintiff, praying for an injunction restraining the defendant from carrying out his contract with the Philadelphia American League Base-Ball Club, it appeared at the hearing that he was an expert base-ball player in any position: that he had a great reputation as a second baseman; that his place would be hard to fill with as good a player, and his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the games.

Held, that, notwithstanding these facts, an injunction should be refused.

Contracts—Specific performance—Mutuality.

A court of equity will not decree specific performance of a contract when it is lacking in mutuality.

Hence, where the plaintiff employed the defendant for six months under contract which contained an option to renew for another period of six months and for a similar period in two successive seasons, so that the defendant might be bound for four years at the option of the plaintiff, while the plaintiff might discharge the defendant upon ten days' notice at any time, and without giving any reason, *held*, that the contract was wanting in mutuality, and that an injunction restraining the defendant from breaking his contract by playing with another club should be refused.

Bill for injunction. C. P. No. 5, Phila. Co., March T., 1901, No. 789, in Equity.

John I. Rogers and John G. Johnson, for plaintiffs.

Richard C. Dale and William J. Turner, for defendants.

RALSTON, J., May 17, 1901.—The plaintiff, a limited partnership association, filed its bill against the defendant, alleging that the defendant, on the 18th day of April, 1900, entered into a contract with the plaintiff to play base ball for the period of six months, and not to play for any one else; that the plaintiff had a right to renew the agreement upon giving notice at a certain time; that such notice was given; that, notwithstanding this, the defendant subsequently contracted with certain other persons to play base ball for them. The bill prayed for an injunction restraining the defendant from playing base ball with any club other than the plaintiff.

The case was argued by counsel upon bill, answer and proofs. The defendant urged that the contract was not binding upon him, 1st, because it was not

Philadelphia Base-Ball Club, Limited, v. Lajole et al.

executed by two managers of the plaintiff, in accordance with the Act of Assembly of June 2, 1874, and supplements; and 2nd, because the defendant had been induced to execute the contract by false representations and without knowledge of its terms.

It appears that the contract was signed by the secretary of the plaintiff, and shortly afterwards endorsed by two managers: "Within contract approved." The court is of opinion that this was sufficient to bind the plaintiff.

The proof failed to establish the defendant's second contention.

The contract provided that the defendant should play base ball for the plaintiff for the period of six months, beginning April 15, 1900, and ending Oct. 15, 1900; and that he should not perform such duties for any other party or parties during said period. It also contained the following clause:

"19. . . . The party of the first part or its assigns shall have the option or right to renew this contract, with all its terms, provisions and conditions, for another period of six months, beginning April 15, 1901, and for a similar period, in two successive years thereafter, and the said party of the second part hereby agrees to perform similar services and be subject to all obligations, duties and liabilities prescribed in this contract for the period or periods of such renewal or renewals, provided only that written notice of the exercise of such option of renewal be served upon the said party of the second part prior to the 15th day of October of the current year of this contract and of the current year of each renewal thereof."

On Oct. 11, 1900, the plaintiff, by its secretary, served a written notice upon the defendant of the exercise of its option to renew. The contract thereupon became binding upon the parties for the season of 1901. On Feb. 14, 1901, the defendant entered into a contract with the Philadelphia American League Base-Ball Club to play with it for the season of 1901.

The question to be decided is: Will the court enjoin the defendant from playing with the last-mentioned club in violation of his contract with the plaintiff?

Covenants not to practise a profession or exercise a trade within certain bounds have been enforced by injunction, but these are not contracts for personal services, and the decisions upon the point may be passed over as not applicable to the case at bar.

Courts of equity have been frequently asked to enjoin breaches of negative covenants in contracts for personal service where, from the nature of the case, specific performance of the contract could not be enforced.

In *Lumley v. Wagner*, 1 De G., M. & G. 604 (1852), the defendant, Johanna Wagner, a singer of great reputation, contracted with the plaintiff to sing for three months at Her Majesty's Theatre, in London, with a negative covenant that she would use her talents at no other theatre. Subsequently she agreed with Mr. Gye to sing at the Covent Garden Theatre. Lord St. Leonards, L. C., granted an injunction upon the ground that irreparable loss would ensue to the plaintiff, and that, while he could not make the defendant sing at Her Majesty's Theatre, he could prevent her from singing at Covent Garden, which might, perhaps, be the means of forcing her to keep her contract with the plaintiff. This case has ever since been regarded as the leading case upon the subject.

It overruled the earlier cases of *Kemble v. Kean*, 6 Sim. 333 (1836), and *Kimberly v. Jennings*, 6 Sim. 340, Lord St. Leonards observing that the weight of V. C. Shadwell's authority was removed by his decision in *Rolfe v. Rolfe*, 15 Sim. 88 (1846). This was followed in *Stiff v. Cassell*, 2 Jur., N. S., 348 (1856), where, upon a breach of the negative covenant, Vice-Chancellor Wood granted an injunction, and *Webster v. Dillon*, 3 Jur., N. S., 432 (1857), where an actor was enjoined by the same judge, although there was no negative covenant, and in *Montague v. Flockton*, L. R., 16 Eq. 189.

10 DIST. R.

Philadelphia Base-Ball Club, Limited, v. Lajoie et al.

In *Wolverhampton & Walsall Ry. Co. v. London and N. W. Ry. Co.*, L. R., 16 Eq. 433 (1873), Lord Selbourne, after stating that contracts for personal services have been ordinarily left to their operation at law, said, in speaking of *Lumley v. Wagner*, "It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not the form."

In *Donnell v. Bennett*, L. R., 22 Ch. Div. 835 (1883), a contract for the sale of chattels to the plaintiff contained a negative covenant not to sell to any other manufacturer. Fry, L. J., granted an injunction, although specific performance of the contract would not have been decreed.

In *Petero v. Harmiston*, 31 Sol. Jour. 154 (1887), the court said that the circumstances in *Lumley v. Wagner* were such that no amount of damages would have given adequate relief to the plaintiff, and that the rule was that the court would not grant an injunction where specific performance could not be obtained, unless they considered that damages would be an absolutely inadequate remedy for the non-performance of the agreement.

From this time on the English decisions construe *Lumley v. Wagner* strictly, and do not extend its principle.

In *Whitwood Chemical Co. v. Hardman*, 2 Ch. (1891) 416, Lindley, L. J., said: "I confess I look upon *Lumley v. Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend. I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal services than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief would be done to one, at all events, of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have, apart from the extraordinary remedy of an injunction." *Montague v. Flockton*, *supra*, was expressly disapproved.

In *Davis v. Foreman*, 3 Ch. (1894) 654, an injunction was refused. Kekewich, L. J., said: "It seems to be perfectly settled that an agreement for personal services cannot be enforced otherwise than by an action for damages, though it may be enforced in certain exceptional cases, not to be extended where there is a strictly negative stipulation."

In *Mutual Reserve Fund Life Ass'n v. New York Life Insurance Co. and Harvey*, 75 L. T. 528 (1896 in Court of Appeals), there was no negative clause, and the injunction was refused. Lindley, L. J., said: "I look upon *Lumley v. Wagner* and the whole of the cases of that class as rather anomalous."

Lord Justice Fry, in his work on specific performance (3 Ed. 1892, § 862), thus states the result of the English authorities:

"The position of that branch of the law on which *Lumley v. Wagner* is the leading authority can hardly be said to be very satisfactory. It may, it is conceived, be concluded that the principle of this case will not be extended; that negative stipulations will not be implied except in the cases where the courts have already done so; and that even the presence of an express negative stipu-

Philadelphia Base-Ball Club, Limited, v. Lajoie et al.

lation will not be found a sufficient ground for jurisdiction, unless the contract is of a kind of which specific performance can be granted. In other words, it is probable that the court will hereafter, except so far as it may be bound by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind fit for specific performance; that, if it be, the court will tend to restrain acts inconsistent with it, whether there be negative words or not; that, if it be not of a kind fit for specific performance, no injunction will be granted, even though negative words are present."

In *Chicago and A. Ry. Co. v. N. Y., L. E. and W. R. R. Co.*, 24 Fed. Repr. 516 (1885), *Lumley v. Wagner*, and *Wolverhampton, &c., Ry. v. London, &c., Ry.* were approved. The court said that an injunction might be granted to restrain acts in violation of a lawful contract, although the nature of the contract were such that specific performance could not be enforced. In *Singer Co. v. Union Co.*, 1 Holmes 253 (1873), a corporation, owner of certain patents, granted an exclusive license to the complainant to sell machines, and agreed to furnish the machines at a certain price. After furnishing many machines, the corporation, without fault of the complainant, refused to deliver more, and assigned the patent to one having knowledge of the contract. An injunction was granted. The court said: "It is now firmly established that the court will often interfere by injunction when it cannot decree specific performance."

But in *Suburban Construction Co. v. Naugle*, 70 Ill. App. 384 (1897), it was held that, to entitle a party to a specific performance, the contract must be one that can be enforced by either party; that specific performance of contracts extending over considerable periods of time, such as railroad building contracts, cannot be specially enforced, and therefore an injunction was refused. *Lumley v. Wagner* was distinguished, and *Singer Co. v. Union Co.*, *supra*, was disapproved, and said to be clearly in conflict with the majority of English and American decisions.

In *De Rivafnoll v. Corsetti*, 4 Paige, 264 (1833), and in *Hamblin v. Dinneford*, 2 Edwards, 529 (1835), *Kemble v. Kean*, *supra*, was followed, and an injunction refused.

In *Friedricks v. Mayer*, 13 How. Pr. 566 (1857), these cases were reversed, and *Lumley v. Wagner* was followed. The court said that services which involved the exercise of powers of mind, which in many cases, as of writers and performers, are purely intellectual, may form a class in which a court will interfere. Such services are generally individual and peculiar. This element of mind exhibited in the subject of the contract, as distinguished from what is mechanical and material, furnished the rule of distinction and decision. See, also, *Hayes v. Willio*, 11 Abb. Pr., N. S., 167 (1871), *Duff v. Russell*, 14 N. Y. Supp. 134 (1891), s. c. 133 N. Y. 678; *Hoyt v. Fuller*, 19 N. Y. Supp. 962 (1892).

In *Daly v. Smith*, 49 How. Pr. 150 (1874), an injunction was granted, and *Lumley v. Wagner* was followed in a very elaborate opinion, reviewing all the authorities up to that date.

In *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779 (1890), and in the same *v. Ewing*, 24 Abb. N. C. 419 (1890), an injunction was sought to restrain a base-ball player from a breach of his covenant not to play with any club other than the plaintiff. The principle of *Lumley v. Wagner* was recognized as applicable to the case, but the injunction was refused upon other grounds.

In *Arena Athletic Club v. McPartland*, 58 N. Y. Supp. 477 (1899), two boxers agreed to give a sparring exhibition. The court said it had no doubt that it might restrain them from performing elsewhere, but the injunction was refused on other grounds.

In Pennsylvania the question seems to have arisen first in *Ford v. Jermon*, 6 Phila. 6 (1865). The plaintiff prayed for an injunction to restrain the defend-
10 Dist. R.

Philadelphia Base-Ball Club, Limited, v. Lajole et al.

ant from a breach of her covenant not to act in any other theatre than his. Judge Hare refused to grant the injunction. He referred to *Lumley v. Wagner*, which he disapproved, and said he preferred to rely upon the cases of *Kemble v. Kean*, 6 Sim. 333; *De Rivaflnoli v. Corsetti*, 5 Paige, 264; *Hamblin v. Dinneford*, 2 Edwards, 529, *supra*.

The question again came before the court twenty-five years later, in *Philadelphia Ball Club v. Hallman et al.*, 47 Legal Intell. 130 (1890). This was an application for an injunction to restrain a base-ball player from playing with any club other than the plaintiff.

Judge Thayer cited, with approval, *Lumley v. Wagner*, *Montague v. Flockton*, and other cases. (*Montague v. Flockton* has since been disapproved in England, see *Whitwood Chemical Co. v. Hardman*, *ante*.) *Ford v. Jermon* was disapproved, the learned judge stating that if Judge Hare were to consider that case at the present time (1890), he would probably reach a different conclusion. The injunction was refused upon other grounds.

Shortly after this decision the question came before Judge Arnold in *American Ass'n Base-Ball Club, of Kansas City, Mo., v. Picket and The Players' National League Base-Ball Club, of Philadelphia*, 47 Legal Intell. 212 (1890).

The court referred to Judge Thayer's opinion in the *Hallman* case, and treated it as settling the law upon the subject. An injunction was granted. The defendant had received \$800 for his release from another club and \$200 in advance of his salary, and broke his contract before the playing season began. *Lumley v. Wagner*, *Montague v. Flockton* and *Daly v. Smith* were approved. Judge Arnold stated that it was immaterial whether the contract did or did not contain a negative clause.

Another base-ball case, *Harrisburg Base-Ball Club v. Athletic Ass'n*, 8 Pa. C. C. Reps. 337 (1890), soon afterwards came before Judge Simonton, who, after reviewing Judge Thayer's opinion, expressed his to be that if Judge Hare were considering the case at that time his opinion would be the same as he expressed in *Ford v. Jermon*. The injunction was refused upon other grounds.

Thus we have, in Pennsylvania, *Ford v. Jermon*, where the principle of *Lumley v. Wagner* was rejected by Judge Hare, *Philadelphia Ball Club v. Hallman*, where the same principle was recognized and stated by Judge Thayer to be the law, although the case was decided upon other grounds, *American Ass'n, &c., of Kansas City, v. Picket et al.*, where Judge Arnold did not consider the question anew, but accepted the principle on the strength of Judge Thayer's opinion, and *Harrisburg Base-Ball Club v. Athletic Ass'n*, where Judge Simonton followed Judge Hare. While Judge Thayer and Judge Simonton differed in their opinion as to what Judge Hare's opinion would have been at that time, it is interesting to note that the English courts, since 1890, have come to regard the principle of *Lumley v. Wagner* as an anomaly not to be extended.

From the testimony it appears that the defendant is an expert base-ball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game. But something more than this is required to bring the case within the principle of *Lumley v. Wagner*. The defendant's services must be unique, extraordinary and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff.

In *Columbus Base-Ball Club v. Reilly*, 25 W. L. Bull. 385 (C. P. Ohio, 1891), the plaintiff sought to restrain a base-ball player from playing with another club. The court said: "Professional base ball has become a business and should be treated as any other business, with no greater consideration and no less; and

Philadelphia Base-Ball Club, Limited, *v. Lajoie et al.*

if the court undertook to exercise its jurisdiction in this particular case, unless this player were conceded to be an extraordinary and unique player, there would be ground for exercising its jurisdiction in almost every case of a contract for personal services, which I think would be something not only extraordinary in the history of jurisdiction, but something which no one would claim that the court ought to undertake."

In *Cort v. Lassard*, 22 Pac. Repr. 1054 (S. C. Ore. 1889), the plaintiff, a theatrical manager, sought to enjoin the defendants, who were acrobats, from performing at a rival theatre. The cases were reviewed, and *Lumley v. Wagner* approved, but the injunction was refused upon the ground that the services were not special, unique and extraordinary. A negative clause was regarded as unimportant. See, also, *Carter v. Ferguson*, 12 N. Y. Supp. 580 (1890).

In *Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432 (1897), the defendant entered into a contract with the plaintiff to act as salesman for one year, and covenanted that he would not engage in like services for any one else during the time. The court refused an injunction, saying: "*Lumley v. Wagner* has received only a qualified endorsement by the courts of this country, that is, to the extent that if the services contracted for are purely intellectual and personal in their character, such as the services of authors or actors, or if the services are mechanical and material, but which require unusual skill and practice, they are held to form a class, and a court of equity will interfere to restrain the breach of a contract for such services upon the ground that the services are unique, individual and peculiar." See, also, *Strobridge Lith. Co. v. Crane*, 12 N. Y. Supp. 898.

In *William Rogers Manf. Co. v. Rogers*, 58 Conn. 356 (1890), in a suit in which the plaintiff averred that the defendant's services had, by his familiarity with their business and customers, become of special value to them, and that his engagement with a rival would do them irreparable damage, it was held that it did not appear that the services were of such a special and individual character as to justify a court of equity in issuing an injunction.

In *Burney v. Ryle & Co.*, 91 Ga. 701 (1893), the defendant assigned his interest in an agency for an insurance company, and covenanted to remain with the firm as a special agent for one year, and to give his entire time to the business of that company. There was no negative stipulation. It did not appear that the defendant was in any way remarkable or especially skillful or expert so that his place could not be supplied. An injunction was refused.

If the court were to issue an injunction against this defendant, then, in the words of the Ohio court, "There would be ground for exercising its jurisdiction in almost every case of a contract for personal services."

There is another principle which is controlling in this case. A court of equity will not decree specific performance of a contract which is lacking in mutuality. Thus, where one party only is bound, as in cases under the statute of frauds, specific performance will not be decreed: *Wilson v. Clarke*, 1 W. & S. 554; *Patton v. Devlin*, 2 Phila. 103; *Bodine v. Glading*, 21 Pa. 50; *Meason v. Kaine*, 63 Pa. 335.

So in the case of a married woman, *Dornan's Estate*, 2 W. N. C. 522.

Although a contract be binding upon both parties, nevertheless, if it lack mutuality of remedy, specific performance will not be decreed; the parties will be left to their legal remedies.

In *Welty v. Jacobs*, 171 Ill. 624 (1898), the defendant was under contract with the plaintiff to furnish the plaintiff with a theatre, together with the necessary scenery, equipments and employees, for a certain time. Subsequently the defendant entered into a contract with a third party to furnish him the theatre, scenery, equipment and employees during the period of time covered by the

10 DIST. R.

Philadelphia Base-Ball Club, Limited, v. Lajoie et al.

plaintiff's contract. Plaintiff sought to enjoin the defendant from performing the contract. An injunction was refused. The Supreme Court said (page 630) : "Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either, and as this contract was of such a nature that it could not have been enforced by appellee, Jacobs, it should not be enforced by appellant."

In *Hill v. Anderson*, 6 Ohio, N. P., 11 (1898), it was held that the injunction was sought for the purpose of indirectly compelling performance, and that as the element of mutuality of remedy was lacking, the contract could not be specifically enforced.

The contract in issue contains this clause :

"17. It is further understood and agreed, that the party of the first part, or its assigns, may, at any time after the beginning and prior to the completion of the period of this contract, give the party of the second part ten days' written notice of its option and intention to end and determine all its liabilities and obligations under this contract, in which event, upon the expiration of said ten days, all liabilities and obligations undertaken by said party of the first part, or its assigns, in this contract, shall at once cease and determine; the said party of the second part shall thereupon be also freed and discharged from his obligations hereunder, and shall have no claim for salary or other compensation for any period after said ten days. If such notice be given to the party of the second part while 'abroad' with the club, he shall be entitled, at or before the expiration of said ten days, to his necessary traveling expenses to the city of Philadelphia. But if this contract shall be so ended and determined by said party of the first part or its assigns, after the beginning and before the end of the term of employment under this contract, without any fault or neglect of duty on the part of the party of the second part, then said party of the second part shall be entitled to salary or compensation at the contract rate for said ten days, in addition to the sum earned and due, and unpaid to him at the time of the giving of notice of termination as aforesaid, whether during said ten days the party of the second part shall be required to perform services, or not, but he may be required to perform services under this contract, during said ten days, at the option of said party of the first part, or its assigns, without affecting the validity or force of such notice."

In *Marble Co. v. Ripley*, 10 Wall. 339, the contract contained a clause allowing one party to abandon it upon giving a year's notice. Held, that specific performance would not be decreed because of lack of mutuality.

In *Philips v. Mining and Mfg. Co.*, 7 Phila. 619 (1870), Thompson, P. J., said : "The contract is that Moro Philips shall have an option to say if he would take another thousand tons (at the same price and terms as the first thousand) on the delivery of the first thousand tons, and so on after the delivery of each thousand tons, and so on, so long as Mr. Philips elects to take and pay for the same. Would it be conscionable to order one party to execute a contract which the other party might or might not receive at his option? It would be iniquity to decree that the defendant should perform his contract, if the plaintiff elects to insist on it, and if not, not."

In *Rust v. Conrad*, 47 Mich. 449 (1882), a contract for a lease contained a provision that the lease, when given, might at any time be terminated by the lessees on thirty days' notice. It was held that the option was a conclusive answer to an appeal by those who would be lessees for the specific performance of the contract.

In *Bickford v. Davis*, 11 Fed. Repr. 549 (1882), the contract provided that one party should use his skill and machinery in the manufacture of an article, while the other agreed to purchase from him such article to the extent of the market

Philadelphia Base-Ball Club, Limited, v. Lajoie et al.

demand, on condition that the manufacturer should sell exclusively to him. The court said: "A contract which is unequal will not be enforced by injunction. If I were to enjoin the defendant from selling to any one but the plaintiff, I could not require the latter, on his part, to buy a single roll of peg-wood of the defendant." *Marble Co. v. Ripley* was followed.

In *Paragon Oil Co. v. Hamilton*, 5 Ohio, N. P., 23 (1897), the contract required an employee not to enter the service of a rival within one year after leaving his employer, and was held to be oppressive and unjust, and not to be enforced by injunction. The employer might discharge at any time for any reason and still retain his control over the defendant for one year.

In *Stanley v. Pollard*, 25 N. Y. Supp. 766 (1893), a contract between a soap manufacturer and one of his salesmen, to continue during the pleasure of the employer, bound the salesman not to engage in a similar business within the city and county of New York for two years after leaving the manufacturer's employ. In view of the fact that the sole consideration for the salesman's covenant was a weekly employment, terminable at the pleasure of the employer, an injunction restraining him was modified so as to allow him to purchase soap from other manufacturers and sell the same.

The principle has been applied in several of the base-ball cases.

In *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, the contract contained a clause very similar to the one under consideration. O'Brien, J., said: "This contract . . . provides, at paragraph 17, that the club may, at any time, by giving the party of the second part ten days' notice of its option and intention so to do, end and determine all its liabilities and obligations under this contract; in which event, upon the expiration of said ten days, all liabilities and obligations undertaken by said party of the first part to this contract shall at once cease and determine, and said party of the second part shall thereupon be also free from his obligations thereunder, and shall have no claim for wages for any period after said ten days. So that the club may at any time, at the beginning, in the middle, or at the end of the playing season, when the player is in New York or San Francisco, or anywhere else, and without the assignment of any cause whatever, 'determine all its liabilities and obligations under said contract,' leaving the player to make his way home as best he can.

"In thus considering the obligations which, under the plaintiff's construction of the contract, each has assumed, we have the spectacle presented of a contract which binds one party for a series of years and the other for ten days, and of the party who is itself bound for ten days coming into a court of equity to enforce its claim against the party bound for years."

The injunction was refused upon this ground as well as upon the ground that the "reserve clause" was merely an agreement to enter into a contract.

In *Philadelphia Ball Club v. Hallman*, 47 Legal Intell. 180, the contract was similar to that in the Ward case. Thayer, P. J., said that if the reserve clause was a contract and not merely an agreement to make a contract, it practically bound the player for life, while the club might terminate it at any time upon giving ten days' notice; such a contract was so wanting in mutuality that no court of equity would lend its aid to compel compliance with it.

In *Harrisburg Base-Ball Club v. Athletic Ass'n*, 8 Pa. C. C. Reps. 337, the contract provided: "It is further agreed between the parties hereto that the party of the second part (the plaintiff) reserves the right to abrogate this agreement at any time, when, to it, it appears that the said party of the first part is not fulfilling his contract to the best of his ability." Simonton, P. J., among other reasons for refusing an injunction, said that the contract lacked mutuality.

In the case at bar, the plaintiff employed the defendant for six months, with an option to renew for another period of six months, and for a similar period in 10 DIST. R.

Philadelphia Base-Ball Club, Limited, v. Lajole et al.

two successive seasons, so that the defendant might be bound for four years, at the option of the plaintiff, while the plaintiff might discharge the defendant upon ten days' notice at any time and without giving any reason.

It was stated at the argument that the base-ball clubs have found it necessary to reserve this right to discharge; that without it the business must be discontinued. This may be so, but if the clause is so important that it cannot be omitted, then the benefits arising from it must compensate for the lack of the remedy by injunction, for a court of equity will not enforce specific performance of a contract, or enjoin the breach of it, where one party is bound for a series of years, while the other may annul it at any time upon giving ten days' notice.

If the court were to enjoin the defendant for the balance of the period for which he agreed to play for the plaintiff there would be no way to compel the plaintiff to employ him, or to pay him a salary for more than ten days.

Such a contract is lacking in mutuality, and a court of equity will leave the parties to their remedies at law.

The injunction is refused and the bill dismissed.

Hipple v. The Supreme Ruling of the Fraternal Mystic Circle.

Beneficial associations—Power to alter terms of beneficial certificate by subsequently enacted laws.

Where an application for membership in a beneficial society contains the stipulation "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the constitution, laws, rules and usages of this Order now in force, or which may hereafter be adopted by The Supreme Ruling thereof," and the beneficial certificate is issued "upon condition that the said member complies in the future with the laws, rules and regulations now governing the said Ruling and fund, or that may hereafter be enacted by The Supreme Ruling to govern said Ruling and fund," the beneficial certificate is accepted subject to the right of the corporation to amend its by-laws and to change the contract in so far as the contract is made by the by-laws, but not in so far as the contract is made by the beneficial certificate itself.

Hence, when the Order, upon compliance with the aforesaid conditions, expressly bound itself in the certificate to pay a specific sum at death out of the benefit fund, "in accordance with and under the provisions of the law governing said fund," held, that the Order could not reduce the sum by a subsequently enacted law.

Rule for judgment for want of a sufficient affidavit of defence. C. P. No. 1, Phila. Co., Dec. T., 1900, No. 463.

Monaghan & Phillips, for plaintiff.

John F. Follet (Cincinnati, O.), and *Louis Hopper*, for defendants.

BEITLER, J., June 12, 1901.—The plaintiff's husband at the time of his death, on Sept. 8, 1900, was a member of the Order. His application for membership was filed May 22, 1893, and contained the following stipulation: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the constitution, laws, rules and usages of this Order now in force, or which may hereafter be adopted by The Supreme Ruling thereof."

On June 19 a beneficial certificate was issued to plaintiff's husband: "Upon condition that the said member complies in the future with the laws, rules and regulations now governing the said Ruling and fund, or that may hereafter be enacted by The Supreme Ruling to govern said Ruling and fund. These conditions being complied with, The Supreme Ruling of The Fraternal Mystic Circle hereby promises and binds itself to pay out of the benefit fund belonging to said Circle, etc., \$3000, in accordance with and under the provisions of the law governing said fund."

Hipple v. The Supreme Ruling of the Fraternal Mystic Circle.

At the date of the death of the plaintiff's husband, the following provision of law 2, section 6, was in force: "Provided, That upon the death of any member of said life department before the end of the first ten years of his membership, his beneficiary or beneficiaries shall, as a condition precedent to receiving the benefits named in this section, contribute to the surplus benefit fund an amount equal to one assessment per month for the period of one-half of his life expectancy, less the time for which assessments have been paid by him during life. And in any such case, such sum is all that can be claimed by any one."

The said law, the defendant contends, was, by the provisions of the constitution and the terms of the certificate issued to Hipple, binding upon the plaintiff, and by its operation the plaintiff, the beneficiary under the certificate, became liable, as a condition precedent to receiving the benefits, to contribute a certain number of assessments. The amount of the beneficial certificate, less the sum of the said assessments, has been paid to the plaintiff, to wit, the sum of \$2743.50. The balance, the defendant contends, the beneficiary is liable to pay in assessments. This sum of \$255.50 is the amount in controversy.

Section 6 above quoted was not the law of the Order when the member joined and his certificate was issued. It was the law when he died.

The question then is, are the rights of the beneficiary to be fixed and determined by the certificate, or by this by-law of recent date?

The question has been ruled on again and again in many of the States of the Union. The diversity of opinions upon the subject will be seen by a glance at the authorities cited in 3 Am. & Eng. Ency. of Law, 2nd ed., 1065, but our case of *Becker v. Berlin Beneficial Society*, 144 Pa. 232, is cited as being opposed to the decisions in many of the other States.

This case was followed in *Hale v. Equitable Aid Union*, 168 Pa. 377. In this case the plaintiff was a beneficiary in a certificate which provided: "If living and in good standing twelve years from the date hereof, one-half the sum stipulated above shall be payable to the legal payee of this certificate, the balance at death." In the application was this clause: "I further agree to accept said beneficiary certificate subject to such laws, rules and regulations as now exist, or may hereafter be adopted and governing said corporation." Twelve years thereafter the corporation adopted a by-law providing that "all persons holding valid benefit certificates that have been or may be hereafter issued to them, who shall live to the period of expectation of life . . . shall be entitled to receive yearly a one-tenth part of the amount specified in their benefit certificate."

The amount payable at the expiration of twelve years under the certificate was \$900. The defendant association contended that plaintiff could only recover under the amended by-law. The court charged: "The benefit certificate was accepted subject to the right of the corporation to amend its by-laws and to change the contract in so far as the by-laws make it, but not in so far as the contract is made by the benefit certificate itself."

The court directed a verdict for the plaintiff for \$900 and interest. The Supreme Court affirmed the judgment, quoting the charge of the court below with entire approval.

In the case before us, the benefit certificate in plain language agrees that \$3000 shall be paid to the member's widow. The contract did not depend on the by-laws at all. It was complete in itself. True, Hipple agreed to comply "with the laws, rules and regulations now governing the said Ruling and fund, or that may hereafter be enacted by the Supreme Ruling to govern said Ruling and fund," but this was not a reservation of a right to alter the contract by an amendment of the by-laws.

The law in our State is plain, and, therefore, the plaintiff should recover the balance withheld from her. We therefore make the rule absolute.

10 DIST. R.

Morrell's Estate.

Corporations—Stock dividends—Principal and income.

Where a corporation accumulates profits and distributes among its stockholders a stock dividend, and a portion of said stock dividend goes to a trust-estate, which is held to pay the income to a life-tenant and the principal to other persons in remainder, the stock received by the trustee of the estate is to be divided between the principal of the estate and the life-tenant in the proportion which the profits accumulated by the corporation prior to the death of the person who founded the trust, bear to the profits accumulated by the corporation after his death.

That the principal of the estate has decreased in value makes no difference in the application of this rule. The fluctuations of the stock market do not govern in determining whether a stock dividend represents capital or income.

In determining the proportion of dividend due to the life-tenant and remaindermen, the factors should be of the same class having a natural relation to each other, to wit, the surplus or income.

Exceptions to auditor's report. C. P. No. 4, Phila. Co., March T., 1886, No. 378.

Robert H. McGrath and D. Ramsay Patterson, for exceptions.

Townsend, Elliott & Townsend, contra.

ARNOLD, P. J., June 12, 1901.—We think that the rule of apportionment established in *Earp's Appeal*, 28 Pa. 368, furnishes the true rule for the decision of the question raised in this case. Mr. Morrell at the time of his decease owned eighteen hundred and twenty shares of the capital stock of the Cambria Iron Company. He put this stock, and other property, in a trust by a deed dated November 18, 1884, in trust to apply the income for the sustenance and maintenance of himself and wife during his life, and, after his death, then in trust for such uses and purposes as he might direct, limit and appoint by a will, and, in default of such appointment, then for the use of his wife for life, and in further trust, after the death of his wife, for the sole and separate use of Anna S. Chapin, daughter of Mr. Morrell, during her life, and after her death, in trust for her children and their issue. Mr. Morrell died August 20, 1885, and by his will gave the residue and remainder of his estate in trust for the uses declared in the deed of trust before mentioned. Mrs. Morrell, the widow, died in 1887, and since her death Mrs. Chapin has been receiving the income. On November 6, 1895, the Cambria Iron Company distributed among its stockholders a stock dividend of twelve-and-a-half per cent. in stock, having a book value of \$890,090, under which the trustee of Mr. Morrell's estate received two hundred and twenty-five shares additional to his original holding. On October 31, 1885, the end of the fiscal year of the Cambria Iron Company, there was an accumulated surplus account or income of that company amounting to \$3,688,135.83, and since 1885 and down to and including 1895 the surplus earnings of that company amounted to \$577,234.60.

It is contended on behalf of Mrs. Chapin that the auditor to whom the account was referred has erred in awarding the entire stock dividend of 1895 to the principal of the estate, and she has excepted thereto and claims that she is entitled to one hundred and forty-six shares of the stock dividend of two hundred and twenty-five shares made in 1895 in payment of the income or surplus of the company accumulated during the life-tenancy, and that the residue should go to principal in part payment of the surplus or income accumulated during the life of Mr. Morrell. By this rule Mrs. Chapin would obtain payment in full, whereas the principal of the estate would receive but a small payment on account of the surplus of income accumulated during Mr. Morrell's life, and, therefore, part of the principal of the estate. If the rule for the application of payments is to be adopted, the whole of the stock dividend should be applied to the payment of that income which accrued first, that is, on account of

Morrell's Estate.

the \$3,688,135.83, but, following the rule in Earp's Appeal, we apportion this stock dividend between the principal of the estate and the life-tenant according to the amount of surplus income due to each in 1895, when the stock dividend was declared. That the principal of the estate has decreased in value makes no difference in the application of this rule. Many causes conspire to increase or decrease the value of stock. The fluctuations of the stock market do not govern in determining whether a stock dividend represents capital or income: Moss's Appeal, 83 Pa. 264; Smith's Estate, 140 Pa. 344. Perhaps the reason why the stock of the Cambria Iron Company decreased below the appraisement at the time of Mr. Morrell's death was the fact, as found by the auditor, that the dividend, which in 1886 was fifteen per cent., fell to twelve per cent. in 1887, and then to ten per cent., and eventually to four per cent.

The matter will be referred back to the auditor to make the necessary calculation and apportionment.

ARNOLD, P. J., June 24, 1901.—We have heard a reargument of this case at the instance of Mrs. Chapin, the life-tenant, who, while admitting that the rule of apportionment of the stock dividend received by the trustee of the above estate is the correct rule, yet contends that the apportionment should be made upon the relative proportion that the income which accrued during the life-estate, to wit, \$577,234.60, bears to the book value of the stock dividend of twelve and one-half per cent. declared in 1895 on the capital of the Cambria Iron Company, to wit, \$890,090, as appears on the journal of that company, but the factors which she uses in the problem are not in the same class. The stock dividend, according to the resolution of the company, was declared out of the accumulated surplus of the company, and the factors for determining the proportion due to the life-tenant and the remaindermen should be of the same class having a natural relation to each other, to wit, the surplus or income. The proportion which the surplus earnings which accrued and were withheld during the life tenancy bear to the whole of the dividend to all the stockholders of the company, does not furnish a correct rule. The whole dividend is not to be taken as a factor in the problem.

We therefore adhere to our judgment heretofore entered in this case. Instead, however, of referring the matter back to the auditor, counsel will make the proper calculation and prepare a form of decree and submit it to the court for approval.

Kemble's Estate.

Decedent's estate—Principal and income—Stock—Increase in value—Express power to sell and reinvest given by will.

Whether the value of stock received in exchange for stock owned by a decedent's estate is or is not greater than the original stock is immaterial, as far as the question of principal and income is concerned, when express power is given to the executors to sell all or any part of the estate at any time and to reinvest the proceeds without liability for loss "or the character of the investments made . . . the investments and reinvestments to be in all respects subject to the provisions of" the will; *i. e.*, in trust, after payment of certain annuities, to pay the income to the wife and children of the testator in proportions specified. In such case the profit on sale of securities is part of the principal of the estate, but the gain on sale of stock acquired under an option to subscribe for the stock of the purchasing company is income.

Exceptions to master's report. O. C. Phila. Co., April T., 1892, No. 53.

Bernard Gilpin, for petitioner; John G. Johnson, for respondent.

PENROSE, J., June 1, 1901.—It is strongly suggestive of error in the theory upon which the master finds that the assets of The Metropolitan Traction Company of New Jersey had risen in value, in the single year following the 10 Dist. R.

Kemble's Estate.

testator's death, from \$9,148,630 to \$21,000,000—being a gain of \$11,851,370, that he also finds that during the five years which preceded there had been no appreciable gain, whatever, and that in the five which followed the first year, with all the advantage of an incorporation under the laws of New York, the gain was but \$6,000,000. There is no evidence that the assets were valued at the death of the decedent, and nothing to explain this extraordinary rise or to show that it had not taken place in his lifetime. The presumption in favor of continuance is that the value was the same in September, 1891, as in September, 1892, and the burden of proving the contrary, by clear and specific evidence, is upon the party alleging the contrary. The error, as we think, lies in the assumption or inference that because the original valuation was carried on the books of the company and, necessarily, therefore, so set forth in the balance sheet of September, 1891, it was to be accepted as the actual value in the determination of questions with regard to principal and income as between tenants for life and those ultimately entitled to the principal of the estate of a stockholder.

There was no declaration of a dividend by the New Jersey company, nor was there any sale or transfer of its assets during the time that the decedent's estate was the owner of shares of its stock. A company organized under the laws of New York offered to stockholders of the New Jersey company, individually, to purchase their stock by giving in exchange twelve shares of the purchasing company's stock for ten of the New Jersey company, with the privilege, additionally, of subscribing for ten per cent. at par, payable in instalments; and at a later date, the New York company, having thus acquired the control of the stock of the New Jersey company, voted for its dissolution and a transfer of its assets,—but this was not until a year after the sale or exchange of its stock by the decedent's estate.

But whether the value of the stock thus received in exchange was, either intrinsically or at the brokers' board, greater than that of the original stock, is not material. The will of the testator expressly declares that the executors shall at all times have the right to "sell and dispose of" all or any part of his residuary estate, real or personal, "and to invest the proceeds thereof," without liability for loss "or the character of the investments made . . . the investments and reinvestments . . . to be in all respects subject to the provisions of" the will,—that is to say, in trust, after payment of certain annuities, to pay the "income" to the wife and children of the testator in the proportions there specified. In such case, as held in *Connolly's Estate*, 198 Pa. 137, 141-2, and in *Graham's Estate*, 198 Pa. 216, where the subject is exhaustively discussed by Judge Over, whose very able opinions were adopted by the Supreme Court, the profit on sale of securities "is part of the principal of the estate, and as such to be held by the trustees." That the exchange in this case was one which inured greatly to the advantage of the *cestui que trusts* for life, no less than of those entitled to the principal, appears from the fact stated by the master that the former received as accumulated profits, for five years, on the 6000 shares of the New York company transferred to The Metropolitan Street Railway Company, in August, 1897, debenture bonds to the value of \$120,000.

We concur, however, in the opinion of the master that the gain on sale of the stock acquired under the option to subscribe for stock of the New York company, viz., \$9487.50, is to be regarded as income, and as such to be awarded: *Eisner's Estate*, 175 Pa. 148; *Wright's Estate*, 9 District Reps. 447.

The exceptions are sustained to the extent indicated by this opinion. Counsel will prepare the necessary decrees: costs to be divided between the parties.

**The Lancaster and Susquehanna Turnpike Road Co. et al. v.
The Columbia Telephone Co.**

Roads—Turnpike company—Trolley railways—Private property—Art. 1, sect. 10, Constitution.

A turnpike company and a trolley company occupying the turnpike under a lease have property interest in the road which cannot be interfered with or encumbered under art. 1, § 10, of the Constitution, without just compensation first made or secured.

Telephone and telegraph companies—Roads—Additional servitude—Art. 1, sect. 10, Constitution.

The construction of a telephone line along the side of a turnpike, the middle or side of which is occupied by a trolley railway, imposes an additional servitude upon the turnpike and trolley companies, and will be enjoined until just compensation to them is made or secured.

Bill for injunction. C. P. Lancaster Co., Equity Docket, No. 3, page 225.

W. U. Hensel, William B. Given and E. P. Brinton, for plaintiffs.

N. M. North, for defendant.

LIVINGSTON, P. J., April 14, 1900, after stating the averments of the bill and answer, made the following findings of fact:

1. That the Lancaster and Susquehanna turnpike road was incorporated under an Act of Assembly of the State of Pennsylvania, approved April 22, 1794, authorizing it, *inter alia*, to build a turnpike road from Lancaster to Columbia, and said turnpike road was built and has ever since been used, and continues to be used, by the said company, extending from Lancaster to Columbia, all in the county of Lancaster.

2. That on March 24, 1891, a charter was granted by the Commonwealth of Pennsylvania to the Lancaster and Columbia Railway Company, authorizing it to construct a passenger railway, beginning at a point on the Lancaster and Susquehanna turnpike, on the east side of the Little Conestoga creek, and thence along and upon said turnpike in a westerly direction to the borough of Columbia.

3. That by virtue of certain proceedings had in the Court of Common Pleas of Lancaster county, recorded in Trust Book No. 14, page 228, and an agreement had and made thereunder, the said The Lancaster and Columbia Railway Company acquired the right to build, erect and locate its railway upon the road-bed of the said The Lancaster and Susquehanna Turnpike Company, between the points named in the second finding, and to erect and maintain all proper and necessary poles, wires and apparatus for conducting its railway and the cars operated thereon as an electric railway or system, and what is known as a trolley road.

4. That the Pennsylvania Traction Company was incorporated by the Commonwealth of Pennsylvania on July 19, 1893, under the provisions of the Act approved March 22, 1887, entitled "An Act to provide for the incorporation of motor-power companies for operating railways by cable, electrical or other means."

5. That by a certain lease dated Feb. 3, 1894, the Lancaster and Columbia Railway Company leased its road-bed, right of way, franchises, equipment, over-head power and all electrical or other apparatus, to the said The Pennsylvania Traction Company for a period of 999 years, and under the said lease the said The Pennsylvania Traction Company entered into possession of the said leased premises, and has since operated the said railway.

6. That at the time of the said lease, the said The Lancaster and Columbia Railway, between the said Little Conestoga creek and the borough of Columbia,
10 DIST. R.

The Lancaster and Susquehanna Turnpike Co. v. The Columbia Telephone Co.

was equipped and provided with a railway, poles, wires, feed-wires, cross-wires and all other apparatus necessary for its operation as an electric railway and trolley road.

7. That by a certain agreement made on Dec. 13, 1894, the said The Lancaster and Susquehanna Turnpike Road Company leased its right of way for sidings and turnouts to the said The Pennsylvania Traction Company, subject to the rights of the said The Lancaster and Columbia Railway Company, under the proceedings and agreement above set forth.

8. That on Nov. 30, 1896, by virtue of a decree entered in the Circuit Court of the United States for the Eastern District of Pennsylvania, William B. Given was appointed receiver of the said The Pennsylvania Traction Company.

9. The Columbia Telephone Company is a corporation organized on May 6, 1895, under the laws of the State of Pennsylvania, to construct, maintain and operate telephone lines in the county of Lancaster.

10. The said The Columbia Telephone Company has neither made nor tendered compensation to the Lancaster and Susquehanna Turnpike Company or its lessees, and denies the right of the said plaintiffs or any of them to demand or receive either compensation or indemnity, and claims the right to erect its poles and place thereon telephone wires on the road-bed of the said turnpike without either making or tendering compensation to plaintiffs or any of them.

11. The erection of the said poles and wires interferes with the operation of the said turnpike road and the railway company, lessee thereof, and interferes with and encumbers the right of way of said road, and the operation of the said railway and thence of the said turnpike.

12. The erection of the poles and wires, as above set forth, works irreparable injury to the plaintiffs.

Conclusions of law.

1. The plaintiff turnpike company owns and has a property interest in the road upon which the defendant has constructed its line of poles and wires, and the plaintiff railway company has a private interest therein by reason of its lease. Any additional servitude upon said roadway interfering with or encumbering the same is an interference with plaintiffs' rights and an appropriation of their property, in violation of § 10, art. I, of the Constitution of Pennsylvania, which declares that private property "shall not be taken or applied to public use without authority of law and without just compensation being first made or secured."

2. There can be no taking nor appropriation of private property, nor interference with private rights, under the constitution of Pennsylvania, "without just compensation being first made or secured."

3. If the defendant company has a right under the law of Pennsylvania to so far exercise the right of eminent domain as to appropriate or interfere with rights already granted to other corporations, it can only exercise such right subject to the general constitutional principle of first making or securing just compensation.

4. Any other taking of a right of way, or any part thereof, is in violation of the constitution.

5. The construction of a telegraph or telephone line upon even a public highway or a turnpike company, or along the line of a trolley railway, subjects the existing easements to an additional servitude, for which the company infringed upon is entitled to compensation.

6. The determination of the question of or amount of damage done to either of the plaintiffs is not involved in the present suit. The defendant company denies the duty of making and the right of the plaintiff to require it to either make or secure compensation. It must, therefore, be enjoined until it either

The Lancaster and Susquehanna Turnpike Co. v. The Columbia Telephone Co.

makes compensation or tenders bond in an amount sufficient to secure the same.

The complainant's bill will not be dismissed, but will be sustained and a permanent injunction issued, to be modified only when the defendant company shall tender and file a bond to meet the approval of the court and to protect the plaintiffs.

From George Ross Eshleman, Lancaster, Pa.

Lathrop Poor District v. Nicholson Poor District, Wyoming Co.

Poor law—Practice—Order of removal signed by justice of the peace of removing district—Act of May 12, 1897.

An order of removal, signed by a justice of the peace residing in the removing district, will be quashed.

An order of removal, issued without giving five days' notice to the district to which it is proposed to remove a pauper, as provided by Act of May 12, 1897, P. L. 63, will be quashed.

An order of removal is fatally defective unless it shows that there was a hearing and an adjudication by the justices that the pauper has a settlement in the district to which it is proposed to take him.

Poor law—Motion to quash order of removal—Jurisdictional defect.

A motion to quash for a jurisdictional defect in the order may be made at any stage of the proceedings.

Appeal from an order of removal. Q. S. Susquehanna Co., Aug. Sess., 1899.

McCollum & Smith and James W. Piatt, for appellant.

W. D. B. Ainey, for appellee.

SEARLE, P. J., April 8, 1901.—The depositions show that :

1. Aug. 9, 1899, an order of relief was issued by N. M. Finn, Esq., and J. H. Billings, Esq., two of the justices of the peace of Susquehanna county, directed to the overseers of the poor of Lathrop township, commanding them to take charge and care of Georgianna Rought, a poor and impotent person, etc.

2. Aug. 10, 1899, the same two justices of the peace executed an order of removal of said pauper to the township of Nicholson poor district. Following is a copy of said order of removal : "Aug. 10, 1899, county of Susquehanna, ss. : Whereas, complaint having been made unto us, two of the justices of the peace in and for said county aforesaid, that a certain Georgianna Rought fell ill in Lathrop township, and that the poor directors of Lathrop have been providing for her sufficiently until she could be removed to her former residence, which the poor masters of Lathrop find to be Nicholson township ; therefore, this is to authorize you, the poor masters of Lathrop township, to remove the said Georgianna Rought to her last legal place of residence, if such be known, and that the poor masters of such township is required to receive the said Georgianna Rought forthwith unto their care.

(Signed), N. M. FINN, J. P. [Seal]
J. H. BILLINGS, J. P. [Seal]"

3. N. M. Finn, Esq., one of the justices who executed this order, is and was, at the time of its execution, a justice of the peace of the borough of Hopbottom, Susquehanna county, and J. H. Billings, the other justice, was at the time a resident and justice of the peace of Lathrop township, the removing district.

10 DIST. R.

Lathrop Poor District v. Nicholson Poor District.

4. No notice was given to defendant poor district of the order of relief, or of any hearing upon the application for an order of removal, and the first notice defendant district had of the proceedings was when plaintiff district delivered the pauper to the overseers of the poor of defendant district on the day of date of order of removal, Aug. 10, 1899.

5. At the time of the taking of the first deposition, April 5, 1900, by plaintiff, and before taking same, notice was given by defendant district to plaintiff district "that objection is raised and will be urged against the issuing of the order of removal by Lathrop poor district, without notice and hearing as required by law, and especially by the Act of May 12, 1897, P. L. 63."

The hearing was had April 2, 1901, and defendant district moved to quash the order of removal for the following reasons:

1. The order of removal was not issued and signed by two justices of the peace competent to issue the same.

2. The order of removal was not issued after five days' notice given to the overseers of the poor of Nicholson poor district, and opportunity given to them to be heard prior to issuing of said order, as required by Act of May 12, 1897.

3. That no evidence was heard by the justices of the peace who signed the order of removal, nor meeting by the said justices of the peace to deliberate and consider upon the propriety of issuing said order.

4. That there is no adjudication by the said justices of the peace that Nicholson township was the last place of legal settlement of the said pauper, nor order which authorized the overseers of the poor of Lathrop township to place the pauper with the overseers of the poor of Nicholson township, defendant.

5. That the findings or recitals in the order of removal, that "the poor masters of Lathrop have been providing for her sufficiently until she could be removed to her former residence, which the poor masters of Lathrop find to be Nicholson township; therefore, this is to authorize you, the poor masters of Lathrop township, to remove the said Georgianna Rought to her last legal place of residence, if such be known, and that the poor masters of such township is required to receive the said Georgianna Rought forthwith unto their care," is not a finding by the justices of the peace that the settlement of the pauper was in Nicholson township, nor does it contain any direction or authority to Lathrop poor masters to leave the pauper in Nicholson township poor district.

6. No legal order of removal was issued.

Opinion.—The Act of May 12, 1897, P. L. 63, is as follows: "Be it enacted, &c., that no order of removal of any poor person from one district to another shall be made without at least five days' previous notice to the proper officers of the district to be affected and an opportunity given them to be heard." The language of this Act is explicit, and prohibits justices from making an order of removal from one district to another without giving the required notice.

It has been expressly decided by the Supreme Court that justices of the peace are incompetent to grant an order of removal from their own township to another: *Upper Dublin v. Germantown*, 1 Yeates, 250; *Washington v. Beaver*, 3 W. & S. 548; *McVeytown v. Union Township*, 5 W. & S. 434. In these cases it was held that the justices were disqualified from acting upon the ground of interest.

The learned counsel for the plaintiff district did not claim that the justices were authorized to issue the order of removal without notice, or that the interest of one of the justices, by reason of his being a resident of plaintiff district, did not disqualify him from acting, but claimed that the defendant district was estopped from pleading this disqualification, as well as from setting up the other irregularities in the proceedings, by reason of defendant having taken an

Lathrop Poor District v. Nicholson Poor District.

appeal instead of obtaining a writ of *certiorari*, and having neglected to move to quash the order of removal until after depositions had been taken upon the question of the settlement of the pauper, and cited in support of his contention an opinion by Savidge, P. J., in *Point Township v. Northumberland Borough*, 22 Pa. C. C. Reps. 243; *Tioga v. Lawrence*, 2 Watts, 43.

In *Tioga v. Lawrence*, two justices having jurisdiction, after notice, adjudicated not only the last legal settlement of pauper, but also the expense of removing district in maintaining him, and issued an order of removal. This order was only signed by one of the justices. Upon an appeal, the case was heard upon its merits and confirmed. Upon *certiorari* from the Supreme Court, one of the errors assigned was that the order of removal was signed but by one justice. The Supreme Court held this a formal objection to the proceedings of the justices, and that the proceedings were superseded by the determination of the merits on the appeal.

In *Point Township v. Northumberland Borough*, Savidge, P. J., held that the neglect to give the five days' notice required by Act of 1897 could not be taken advantage of where the case is being heard upon appeal on its merits, quoting *Tioga v. Lawrence*, 2 Watts, 43, as authority for the ruling, but further stated as follows: "We know of no decision settling the practice under this Act. Probably a *certiorari* should be resorted to. Possibly a motion to quash pending appeal, but before a hearing on the merits, would be the proper remedy. Neither have been resorted to here, and we hold these irregularities to have been waived. . . . We would be quick to reverse on *certiorari* or quash on motion where the objection was taken in time."

In the case at bar, while the motion to quash was not made until after depositions had been taken upon the question of settlement, notice had been given by the appellant before the taking of depositions that objections to the lack of notice would be urged, and the motion to quash was made before any depositions were submitted for the consideration of the court.

Under the circumstances, the motion to quash was in time under the ruling by Judge Savidge.

In *Davidson Township v. Jordon Township*, in Q. S. of Sullivan county, an unreported case, Judge Dunham held that an order of removal, unappealed from, which did not show the five days' notice required by Act of 1897 was given, was absolutely void.

In *McVeytown v. Union Township*, 5 W. & S. 434, cited by counsel for defendant, the motion to quash was made after the case had been argued upon its merits. The court held that it was a question of jurisdiction of the justices, and could be taken advantage of at any time, and quashed the proceedings. This action was affirmed by the Supreme Court for the same reason.

This case is authoritative and binding upon us, and necessitates the quashing of these proceedings, for the reason that the justices had no jurisdiction by reason of one of them being a resident of plaintiff township.

It would also seem clear that, under the Act of 1897, the justices had no jurisdiction of the defendant district until after the notice required by the Act had been given.

The proceedings before the justice are also defective in that there was no hearing and no adjudication by the justices of the last place of settlement of pauper, and the order of removal itself is defective in that it fails to set forth such adjudication, or the removal of the pauper to any particular poor district.

The case not having been disposed of on the merits, and there being no adjudication as to place of settlement, the proceedings are quashed without prejudice and plaintiff poor district directed to pay the costs.

From C. O. Dershelmer, Tunkhannock, Pa.

Granger v. Pigott.

Trusts and trustees—Purchase by trustee at his own sale—Corporations.

The equitable principle that a trustee cannot be permitted to buy the trust property at his own sale, or secure to himself any individual benefit from such purchase, applies to a purchase by an officer of a financial corporation, for his own benefit, of stock held by the corporation in a trust capacity, where he has acquired his knowledge of the trust property through his connection with the corporation, and is the agent through whom its directions with respect to the disposition of the property have been carried into effect.

Pledge—Personal property—Sale by pledgee—Waiver of common law rule—Contract—Construction.

The common law rule that a pledgee of personal property can only sell it at public sale after reasonable notice to the pledgor, and cannot purchase it himself, may be waived by the parties by contract, but such contracts are to be strictly construed. That is, the authority claimed must be shown in the contract and cannot depend upon interpretation or construction.

In November and December, 1889, G. borrowed money, for which he gave two promissory notes for one year, and, as collateral, certain stock. Each note gave the holder, in the event of non-payment at maturity, the right to sell the collateral, at public or private sale, without notice, and "to become the purchaser at such sale or sales of the whole or any part of the said collaterals freed and discharged of any equity of redemption." The holder was further authorized to apply the proceeds of such sale or sales to the payment of the liabilities, "returning the overplus, if any, to me." The lender having died, letters of administration upon his estate were granted to the Fidelity Co., of which P. was secretary. July 8, 1894, the administrator, acting through its secretary, sold the collateral at public sale, at which there was but a single bid. P., through the agency of a friend, in whose name the stock was taken, without the knowledge of G. or the administrator, purchased some of the stock. *Held*, that P. bought the stock in the interest of the Fidelity Co., of which he was secretary, irrespective of what may have been his intention, and that, under the circumstances, the common law rule prevailed, and the Fidelity Co. held the stock as a pledge thereafter as before.

There was a final settlement between G. and the Fidelity Co. on Nov. 7, 1894, at which time the former paid the balance due upon his notes, and received such of his collaterals as had not been sold. *Held*, that both parties considered that thereafter whatever right of recovery there may have been against P. was vested in or then transferred to G.

Rule for a new trial. C. P. No. 2, Phila. Co., Jan. T., 1896, No. 1450.

J. W. M. Newlin, for plaintiff; *F. P. Prichard*, for defendant.

PENNYPACKER, P. J., May 14, 1901.—This case presents questions of serious difficulty, which, so far as appears, are to be decided for the first time. The plaintiff, on Nov. 17, 1889, borrowed from the late John G. Reading the sum of \$7000, for which he gave his promissory note at one year; and on Dec. 7, 1889, he borrowed the further sum of \$100,000, for which he gave a promissory note at one year. Along with these two notes were certain certificates of stock, including, *inter alia*, five hundred shares of The Electric Storage Battery stock as collateral security. Each note gave the holder, in the event of non-payment at maturity, the right to sell the collateral, at public or private sale, without notice, and "to become the purchaser at such sale or sales of the whole or any part of the said collaterals freed and discharged of any equity of redemption." The holder was further authorized to apply the proceeds of such sale or sales to the payment of the liabilities, "returning the overplus, if any, to me."

Reading having died, letters of administration upon his estate were granted to The Fidelity Insurance, Trust and Safe Deposit Company, of which the defendant, Pigott, was the secretary. On July 3, 1894, the administrator, acting through its secretary, caused the five hundred shares of Electric Storage Battery stock to be sold at public sale, and they produced the sum of 50 cents a share. At this sale there was but a single bid. Pigott, through the agency of a friend, in whose name the stock was taken, without the knowledge of the plaintiff or of the administrator, became the purchaser of one hundred and forty of these shares. He had directed his friend to buy them at the price of

Granger v. Pigott.

\$6 a share. Almost immediately afterwards the market value of the stock began rapidly and greatly to enhance. On or about Oct. 3, 1894, the plaintiff learned that Pigott had bought the stock, and about the same time the president of The Fidelity Insurance, Trust and Safe Deposit Company was informed of the fact. There was a final settlement between the plaintiff and the administrator on Nov. 7, 1894, at which time the former paid the balance due upon his notes, and received such of his collaterals as had not been sold.

It is a well established equitable principle that a trustee cannot be permitted to buy the trust property at his own sale, or secure to himself any individual benefit from such a purchase. He cannot even make a purchase of the trust property at an adverse sale, if he has been instrumental in bringing about such sale: *Mullen v. Doyle*, 29 W. N. C. 508. His purchase at a sale made or procured by him is, therefore, held to be for the benefit of his *cestui que trust*. Where the trustee is a corporation, it would be idle and vain to attempt to apply the principle if the officers of the corporation, who have acquired their knowledge of the trust property through their connection with the corporation, and who carry into effect the directions of the corporation with respect to the disposition of the property, were not included in the prohibition. The officers ought to be protected from the temptation to exercise their control over the acts of the corporation, in such a way as to benefit themselves as individuals, at the expense of the estates for which the corporation may be trustee. We hold, therefore, that it is contrary to public policy, and against good morals, to permit the secretary of a financial corporation to buy, for his own benefit, stock held by the corporation in a trust capacity. When, therefore, Pigott bought the shares of stock at the sale of July 3, 1894, he bought them irrespective of what may have been his intention in the interest of The Fidelity Company, of which he was secretary, and that company held them for the benefit of the Reading estate, of which it was administrator.

Having advanced thus far, the next question which arises is as to the effect of this transaction, if any, upon the relation existing between the Reading estate and the plaintiff.

The rule at common law, with respect to the pledge of personal property as security for the payment of a debt, is that the pledgee can only sell it at public sale after reasonable notice to the pledgor: *Davis v. Funk*, 39 Pa. 243; *Diller v. Brubaker*, 52 Pa. 502; *Sitgreaves v. Bank*, 49 Pa. 359. The pledgee is, in a certain sense, a trustee to carry into effect the objects of the pledge, and, in the event of the payment of the debt, to restore the property to the pledgor. If the pledgee buys, though at a public sale, he still holds the pledge, subject to the equities of the pledgor: *Register v. Sellers*, 44 Legal Intell. 502; *Hestonville, &c., R. R. Co. v. Shields*, 3 Brewster, 257; *White & Tudor's Leading Cases in Equity* (Hare & Wallace's ed.), vol. 1, page 245. He can only foreclose the equity of redemption by a *bona fide* public sale, to a third party, with proper notice to the pledgor: *White & Tudor's Leading Cases in Equity* (Hare & Wallace's ed.), vol. 1, page 245.

This rule may be waived by the parties by contract, but such contracts, being in derogation of the common law, and being the outcome of a situation in which the creditor has the advantage, because of the needs of the debtor, are to be construed with strictness. That is, the creditor must be able to show his authority for the foreclosure, without notice and by sale to himself in the contract, and cannot depend upon interpretation or construction to help him. In the present case the equity of the plaintiff, under the terms of the contracts, could have been foreclosed by a sale, either public or private, to a third person, or by such a sale at which the administrator of the Reading estate became the purchaser. Neither event occurred. A sale, like other contracts, depends upon

Granger v. Pigott.

intention. The minds of the parties must meet. That cannot be regarded as a sale, within the meaning of the contracts, where the supposed purchaser neither bought nor intended to buy. It is entirely plain, from the evidence, that the administrator had no purpose of exercising the right given by the contracts to become the purchaser. No directions were given by the administrator to buy. No money was paid by it and no transfer was made to it. The president of the company did not know of the purchase by Pigott until three months later. There are no provisions in the contracts which, even by the most liberal construction, could be held to cover this unusual situation. In fact, there was no real bid at the sale at all, the only ostensible bidder being one who, under the law, was incapable of buying, and the transaction much resembles one where the holder bids, not in order to purchase, but to protect the property from sacrifice. We think, therefore, that what happened was not a foreclosure, within any of the terms of the contracts, and that the attempted sale, rendered abortive by the unlawful effort of an officer of the company to secure the stock for himself, resulting in a return of the title, by process of law, to the Reading estate, did not affect the equities of the plaintiff. Under these circumstances, the common law rule prevailed, and the administrator held the stock as a pledge thereafter as before.

At the final settlement, on Nov. 7, 1894, between the plaintiff and The Fidelity Company, the notes were paid, and, as required by the contracts, the overplus of collateral was returned to the plaintiff. It is manifest from their conduct that both parties considered that thereafter whatever right of recovery there may have been against Pigott was vested in or was then transferred to the plaintiff. The plaintiff demanded the stock from Pigott, and brought this suit to recover its value. The administrator, as appears from the testimony, has asserted no right and made no demand upon Pigott, and the time has elapsed in which any demand could be enforced. It may be that if the administrator, upon learning of the purchase by Pigott, had asserted a right, as against the plaintiff, to complete the transaction, and treat it as a purchase by itself, thus endeavoring to exercise the power given by the contracts, we should have had a different situation, but no such claim was made. Any other interpretation of its action than that of an intention to return to the plaintiff, together with the rest of the overplus of the collaterals, this right of recovery, must assume that it entertained a purpose to permit its derelict officer to retain the very large sum of money unlawfully in his hands. Such an assumption ought not to be made.

The verdict of the jury is for a larger sum than was justified under the charge of the court, but counsel upon both sides have indicated in court a willingness that the amount should be reduced to \$7649.04, and an unwillingness to have the verdict set aside for this reason. Upon plaintiff filing a *remittitur* for all sums over \$7649.04 the rule for a new trial is discharged, otherwise the rule is made absolute.

Philadelphia v. Linton.

Taxes—Escheated real estate—Liability of Commonwealth for taxes.

Real estate which has escheated to the State is liable for city and county taxes, and may be sold for the same.

Case stated. C. P. No. 4, Phila. Co., Dec. T., 1898, No. 23, M. L. D.

Alfred S. Miller, assistant city solicitor, for plaintiff.

Joseph T. Ford, for defendant.

ARNOLD, P. J., June 11, 1901.—This case stated raised the question whether real estate which has been escheated to the Commonwealth is liable for city and

Philadelphia v. Linton.

county taxes, and our opinion is that it is taxable. The Commonwealth takes the property just as a natural heir does, subject to its burdens past and future, unless the property is put to some public use. It is the public use of real estate owned by any department of government which exempts such real estate from taxation: *County of Erie v. City of Erie*, 113 Pa. 360. This subject has lately received consideration by the Superior Court of this State, in the case of the *City of Erie v. The School District of Erie*, 17 Pa. Superior Ct. 33, in which the cases are cited and the subject discussed, with the result that real estate held for a public purpose was exempted from an assessment for laying a pavement.

Real estate obtained by escheat is not taken or purchased for any public purpose. It falls upon the State as the last statutory heir, and is taxable the same as it would be in the hands of a natural heir. The process to assess and collect the taxes is *in rem.* against the real estate. There is no personal liability for the taxes for the reason that the Commonwealth cannot be sued except by its own consent, and there is no law giving such consent, but the real estate may be sold under proceedings *in rem.*

Judgment for the plaintiff on the case stated.

Buck's Estate.

Practice, O. C.—Foreign guardian—Award to foreign guardian without notifying auditing judge—Payment by executor.

Where an award was properly made payable to the guardian of minors without the attention of the auditing judge being called to the fact that the guardian was a non-resident, it is not necessary to alter the adjudication in order to make the foreign guardian comply with the Acts of Assembly relative to payments to foreign guardians. The executor can simply suggest, when called upon to make payment, that the guardian is a foreign guardian, and he will then be ordered not to pay over until the foreign guardian has complied with the Acts of Assembly.

Petition for review. O. C. Phila. Co., April T., 1900, No. 522.

H. Merian Allen, for executor and petitioner.

Samuel H. Kirkpatrick, for guardian.

HANNA, P. J., June 1, 1901.—We have carefully examined the record, namely, the adjudication filed in this estate, and discover no reason for its correction and review. The award complained of was properly made payable to the guardian of the minors, without the attention of the auditing judge being called either by the counsel for the accountant or counsel for the guardian that the latter was, with his wards, a non-resident. If this had been brought to the attention of the auditing judge, he would, no doubt, have directed the payment to be made to the guardian upon proper presentation of his petition, as required by the Acts of Assembly relative to payments to foreign guardians. But this was not done, and, as stated, as appears from the adjudication, the award is directed to be paid to the guardian of the minors. It was therefore simply incumbent upon the executor, when called upon to make payment, to suggest that the guardian is a foreign guardian. He would not then be ordered to pay over until the foreign guardian had complied with the requirements of the Acts of Assembly.

We see no necessity for any alteration in the adjudication in this respect, and the executor will simply retain the amount of the award until the further order of the court, upon the presentation of a proper petition by the foreign guardian.

The petition for review is accordingly dismissed.

10 DIST. R.

Buck's Estate.

Decedent's estate—Election to take real estate as realty—Petition for confirmation of election and delivery of title papers—Claim of executor for allowance of repairs to real estate—Practice, O. C'.

The Orphans' Court cannot authorize the residuary legatees to elect to take the real estate as realty, nor confirm or prevent their election. All that is necessary for them to do is to notify the executors of their election and file the written evidence thereof in the office of the clerk of the court. Hence, a petition to confirm the election is wholly superfluous.

An order on the executor to deliver to the legatees the title papers to real estate situate in New Jersey will be made if required.

Upon a petition to confirm the election of legatees to take the real estate as realty and for the delivery of title papers, a claim by the executor, as trustee, for the allowance of expenses for repairs to real estate situate in New Jersey, authorized to be incurred by the Orphans' Court of Philadelphia, and a claim for reasonable compensation for his care of the real estate, in addition to his commission upon the rentals, cannot be allowed.

When no mention was made of such claims upon the adjudication, and distribution in accordance therewith has been partially made, they can properly be considered only upon the filing of a further account by the executor of the rentals received by him.

Petition for confirmation of election by legatees. O. C. Phila. Co., April T., 1900, No. 522.

Samuel H. Kirkpatrick, for petitioner; *H. Merian Allen*, for executor.

HANNA, P. J., June 1, 1901.—We discover no occasion for this petition, except so far as relates to the delivery by the executor to the legatees of the real estate and title papers connected therewith. We are not aware of any Act of Assembly authorizing the court to confirm the election by the residuary legatees to take the real estate as realty. All that seems necessary to us is that they should notify the executor of their election, and file of record in the office of the clerk of the court written evidence of their election. The court neither authorizes them to make an election, or confirms their election, or can prevent their election to take. It is wholly within the control of the legatees; so that, so far as respects one of the objects of this petition, it is wholly superfluous.

Nor could we, it may furthermore be stated, have any jurisdiction over the real estate situate in New Jersey. We cannot authorize its sale, or have any other control over it; and, so far as concerns the title papers, we do not understand the executor to decline to place the legatees in possession thereof, or give possession to them of the real estate. See *McCalla's Estate*, 16 Pa. Superior Ct. 202.

But the executor, as trustee, claims in his answer to be entitled to be reimbursed the costs of certain repairs made to the real estate, and incurred by him for work not yet completed, and, furthermore, that he should be allowed a proper and reasonable compensation for his care of the real estate since he assumed possession thereof upon the granting of letters testamentary to him.

In this proceeding we cannot make any such order, and the claim might, with great propriety, have been made at the adjudication of his account as executor. Upon an examination thereof, we discover by the supplemental account a statement therein by the executor that he was authorized, by decree of this court, to make certain repairs to the real estate in Camden, for which either the amount must be retained by him or the residuary legatees be required to assume the same. But no mention or reference thereto is made in the adjudication. So that this also does not appear to have been called to the attention of the auditing judge. Nor is provision made therefor in the distribution made by him. This allowance of the expenses authorized to be incurred by the accountant should have been therein provided for, and at the same time it would have been proper to present any claim he considered himself entitled to for the care of the unconverted real estate, and as compensation therefor in addition to his

Buck's Estate.

commission upon the rentals. Under the circumstances, it can only properly be considered upon the filing of a further account by the executor of the rentals received by him, as we do not see how we can disturb the original distribution which has in fact partially been made by the executor.

So far as concerns the title papers, as we have already stated, the executor concedes the right of the parties to receive the same. Thus far this petition is granted, and the proper order will be made if required; but in all other respects the petition is refused.

McKeown's Estate.

Decedent's estate—Domicile—Probate—Original will probated outside testator's domicile—Duty of register in such case—Practice.

The forum which has original jurisdiction for the grant of letters testamentary is determined by the domicile of the testator. This jurisdiction is not taken away from the proper officer by the circumstance that the original of the will has been proved elsewhere. Probate may be had in as many places as the testator may have had property. If the original of the will cannot be produced, and the register is satisfied that its copy is properly authenticated and is therefore a true copy, and that the testator's domicile is within his judicial sphere of action, he is possessed of all the elements which are needed for reaching a just decision as to the validity of the testament.

Decedent's estate—Establishment of domicile—Original and ancillary letters.

The domicile being established, the letters therein issued, whether founded upon the will itself or a certified copy, are original and not ancillary in their character, and the register is bound so to treat them.

Register of wills—Jurisdiction.

A petition for revocation of ancillary letters, or a demand for production of the original will, should be made before the Register of Wills in the first instance, and not the Orphans' Court.

Petition to show cause why will should not be produced for probate. O. C. Phila. Co., July T., 1900, No. 97.

J. M. Vanderslice, for petitioner.

M. R. Longstreth, F. B. Bracken and J. G. Johnson, for respondent.

ASHMAN, J., June 1, 1901.—The forum which has original jurisdiction for the grant of letters testamentary is determined by the domicile of the testator. This jurisdiction is not taken away from the proper officer by the circumstance that the original of the will has been proved elsewhere. That probate may be had in as many places as the testator may have held his properties. In Coleman's Estate, 7 District Reps. 731, the codicil to the original will was proved in France, and, by permission of the French court, was afterwards transmitted to Philadelphia and admitted to probate in this county. Having determined that the testator's domicile is within his judicial sphere of action, the duty of the register is plain. If the original of the will cannot be produced, and he is satisfied that its copy is properly authenticated and is therefore a true copy, he is possessed of all the elements which are needed for reaching a just decision as to the validity of the testament. He may lawfully inquire into the questions of testamentary incapacity and of undue influence, and if disability is shown to have existed, he may treat the alleged will as a nullity and grant letters of administration as in cases of intestacy. The petition in this instance declares that the proponent falsely claimed that Florida was the domicile of the testatrix, when, in point of fact, the actual domicile was Philadelphia, and that by fraud and undue influence he procured a will in his own favor, and these facts were conceded by the demurrer. It would be extraordinary if in such a case the register has no power to inquire into the truth of these allegations and no power, upon due proof of their verity, to revoke the letters heretofore granted to the respondent. This conclusion does not antagonize what

10 DIST. R.

McKeown's Estate.

was said when the present will was before us at a previous term. The point then decided was that an appeal from the probate of a will by a foreign tribunal will not lie in this jurisdiction. It was also said that an issue to test the validity of a will cannot be had at the place of ancillary administration. The converse of that proposition is equally true, that the contest must be waged at the seat of the domicile. That *situs* being established, the letters therein issued, whether founded upon the will itself or a certified copy, are original and not ancillary in their character, and the register is bound so to treat them. In a word, the testatrix could have had at her death but one domicile, and, no matter in how many places her will may have been probated, only one was a place of original jurisdiction. Hence, that the proponent proved the original document in Florida is not a factor in the question. He could not, as was said before, "so invert the functions of the original and ancillary tribunals that the court of secondary jurisdiction should pass upon the final account and award the final distribution of a testator's estate;" to which we add that he could not take away from the court of the domicile the power to determine the validity of the alleged will.

The record does not show that any demand was made before the register for the production of the original document or for the revocation of the ancillary letters—matters which, in the first instance, are exclusively within the province of that officer.

The petition must therefore be dismissed, without prejudice, however, to the right of the petitioner to pursue his remedy by direct proceedings before the register.

Freas's Estate.

Register of wills—Status—Decree made by register—Conclusiveness of.

The register of wills is a judicial officer, and his decrees are conclusive until duly reversed or set aside, upon appeal, within the time prescribed by law. They cannot be attacked collaterally.

Wills—What instruments are not made wills by probate.

A paper admitted to probate, which on its face is manifestly not testamentary, or not signed at all or at the end of the complete instrument, does not, originally or by lapse of time, become a will.

Wills—Construction—Signature—When a will is signed at the end.

The last clause of the will was as follows: "In perfectly sound mind and in the presence of those witnesses signed underneath, I do make this written will my last.

DOROTHEA FREAS.

{ Executrix
LOUISA GAGE."

The will disposed of real estate exclusively, giving it directly to the devisees, free from the operation of any testamentary power, and there was no occasion for the appointment of an executrix. Held, that, as there were no words of appointment, it could be inferred from their position that the words { Executrix
Louisa Gage were written after the will had been signed, or that they were designedly omitted with no intention that they should be made part of it, and the instrument was signed "at the end thereof" and properly admitted to probate.

Practice, O. C.—Register of wills—Inquiry suggested by Wineland's Appeal—Making same—Presumption.

It is presumed that the register of wills made the inquiry suggested by the decree in Wineland's Appeal, 3 Crumr. 37.

Petition in partition. O. C. Phila. Co., July T., 1900, No. 91.

C. D. White, for petitioner.

John Weaver and C. L. Lockwood, for respondents.

PENROSE, J., June 1, 1901.—That the signature to the paper purporting to be

a will was that of the decedent is conceded, but it is said that it is not at the end of the instrument, and the admission to probate was not only erroneous but absolutely without validity: it is therefore contended, notwithstanding such admission and the length of time which has since elapsed, that the decree of the register may be attacked collaterally and the real estate of the testatrix disposed of in this partition among the persons entitled under the intestate laws.

Without pausing to consider how far the parties alleging intestacy are estopped by having heretofore availed themselves of provisions of the will in their favor, we are of opinion that its validity is not now open to question. The register is a judicial officer, and his decrees are conclusive until duly reversed or set aside upon appeal within the time prescribed by law. Of course, if a paper is admitted to probate which on its face is, manifestly, not testamentary (*Bowlby v. Thunder*, 9 Outerb. 173), or not signed at all (*Wall v. Wall*, 8 Crumr. 545), or at the end of the complete instrument (*Hays v. Harden*, 6 Barr, 409), such probate does not, originally or by lapse of time, make it a will; *Quod initio non valet tractu temporis non convalescet*: and it is supposed in the present case that because beneath, and to the right of the signature of the testatrix, certain words, preceded by a bracket, appear, the will is not signed at "the end thereof," and the decision in *Hays v. Harden*, *supra*, and the decision in *Wineland's Appeal*, 3 Crumr. 37, exclude it from probate. In the former of these cases, the signature was followed by words which, as stated and explained by Chief Justice Gibson, in *Wikoff's Appeal*, 3 Harris, 291, were palpably and essentially part of the will; and the same, perhaps, may be said of *Wineland's Appeal*, though that case, in applying the doctrine to words following the signature, which merely appointed an executor (which might well have been treated as an unsigned codicil), has been severely criticized. Here the conclusion of the will is as follows:

"In perfectly sound mind and in the presence of those witnesses signed underneath I do make this written will my last.

DOROTHEA FREAS.

"Witnesses { HENRY FREAS.
 { JOHN S. GAGE.

{ Executrix
 { LOUISA GAGE."

The will disposes of real estate, exclusively, giving it directly to the devisees, free from the operation of any testamentary power. There was, therefore, no occasion (as there was in *Wineland's Appeal*) for the appointment of an executor; and as there are no words of appointment, it may well be inferred from their position, that the words { "Executrix
 { Louisa Gage" were written after the will had been signed, or that they were designedly omitted with no intention that they should be made part of it. This was a question of fact, and as *Wineland's Appeal* was decided in January, 1888, and this will was presented for probate in April, 1889, it is to be assumed, under the presumption in favor of the proper performance of official duty, that the register made the inquiry suggested by that decision, and that it was shown to him that the words were no part of the will. See *Wikoff's Appeal*, *supra*.

In *Wineland's Appeal*, it may be remarked, not only was personal property the subject of disposition, but there was a formal appointment of executors following the signature of the testatrix and preceding the attestation clause; while here, as in *Wikoff's Appeal*, the words relied upon were a mere excrescence, not affecting in any way the only property which the will disposed of. *Utile per inutile non vitiatur*.

We think the rights of the parties are dependent upon the will of the testatrix and not upon the provisions of the intestate laws.

Counsel will prepare the necessary decree.

10 DIST. R.

Commonwealth v. Pierce.

Osteopathy—Practice of medicine or surgery—Act of May 18, 1893.

Osteopathy is a modern sect or school teaching a modern system or science of treating human diseases by kneading and rubbing the body. The entire treatment consists in rubbing and kneading the body as a treatment for the cure and relief of infirmity or disease, and its practitioners wholly reject drugs and medicines.

Hence, it is not "practicing medicine or surgery" within the intention of the legislature, and its practice is wholly without and not in violation of the provisions of the Act of May 18, 1893, P. L. 94, regulating the practice thereof.

But where a practitioner of osteopathy furnishes medicines to patients or introduces a sound, he is practicing medicine or surgery within the provisions of the Act, and is indictable under section 14 thereof.

Hence, when an osteopath was indicted under this Act and found guilty, and on the trial there was evidence that the defendant had furnished medicines to patients, and, on one occasion, had introduced a sound, and the court had no way of determining whether the jury found the defendant guilty upon that evidence or upon the fact that he practiced osteopathy, a new trial was granted.

Motion for arrest of judgment and for a new trial. Q. S. Beaver Co., Dec. Sess., 1900, No. 9.

Harry Calhoun, district-attorney, and *J. R. Martin*, for plaintiff.

Roger Cope and *J. H. Cunningham*, for defendant.

WILSON, P. J., May 6, 1901 (after reciting the Act and the reasons in support of the motion).—Upon the trial of the case, the defendant was found guilty of violating the provisions of Act of May 18, 1893, P. L. 94, and the case is now under consideration upon a motion in arrest of judgment or sentence and for a new trial.

The legal question presented is, what is the meaning of this Act of Assembly? What is comprehended by the language "shall enter upon the practice of medicine or surgery in the State of Pennsylvania?" This is a penal statute, and should be construed strictly. The words used in the Act should be given their popular rather than their technical meaning, to conform to the rule relative to the construction of statutes.

The defendant is an osteopath, a modern sect or school teaching a modern system or science of treating human diseases by kneading and rubbing the body. Our knowledge of osteopathy is indefinite. None but the very latest dictionaries contain the word. It is alleged that the entire treatment consists in rubbing and kneading the body as a treatment for the cure and relief of infirmity or disease, and that the practitioners of osteopathy wholly reject drugs and medicines. And, upon the trial, the defendant contended that there was no violation of the Act of 1893, *supra*, as charged in the indictment. 'Medicine, in the popular sense, is a remedial substance; the practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing or alleviating diseases or pain, which rests largely in the science of anatomy, physiology and hygiene; it requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and further, it requires a knowledge of drugs, their preparation and action. Popularly, it consists in the discovery of the cause and nature of disease and the administration of remedies or the prescribing of treatment therefor.'

The testimony in this case shows that osteopaths are a recognized sect or school of recent origin, a system not practiced in this State at the time of the passage of the Act under which this indictment was drawn.

It is contended that, if the practice of osteopathy is the practice of medicine, it is entitled to recognition by the State medical council to the same extent as

other schools or systems of medicine, and its members should be entitled to certificates to practice according to their rules, provided they possess the satisfactory qualifications.

The purpose of the Act of 1893 was to determine whether practitioners of medicine possessed the qualifications to practice in accordance with the recognized system of a particular school. Under that Act the board cannot determine which school or system of medicine in its theories and practices is right; it can only pass upon the qualifications of the applicant to practice in accordance with the theories of the school to which he belongs. The court in considering this question in the light of the decisions of the Supreme Courts of other States in construing the Acts of those States, some far more stringent than the Act in this State, that the practice of osteopathy is not a violation of the laws of such States, must conclude that it is not a violation of the laws of such States, must conclude that it is not a violation of the Act of May 18, 1893. The preamble of the Act relates to the competency and qualifications of physicians and surgeons, and the Act recognizes but three schools of medicine. Indeed, it could not have recognized the school to which the defendant belongs, because at the time of its passage that school was not known in this Commonwealth, if we believe the evidence.

The case of *Nelson v. State Board of Health*, Court of Appeals of Kentucky, June 20, 1900, decided, first, A college which teaches osteopathy, a method of treating disease by kneading or manipulation of the body, and does not teach surgery, bacteriology, *materia medica* or therapeutics, is not a medical college within the meaning of the Kentucky statute, which requires the State board of health to issue a certificate to practice medicine to any reputable physician who has a diploma from a reputable medical college chartered under the laws of that State, or from a reputable and legally-chartered medical college of some other State or country, endorsed as such by the State board of health. Second, one who practices osteopathy, not using medicines or surgical appliances, does not practice medicine within the Kentucky statute, which declares that authority to practice medicine shall be a certificate from the State board of health; though another statute provides that to open an office for such purpose, or to announce to the public in any way a readiness to treat the sick or afflicted, shall be deemed to engage in the practice of medicine within the meaning of this Act. As the Act of which these sections form a part was considered as a whole, shows that the legislature only intended to regulate the practice of medicine by physicians and surgeons, and therefore a certificate from the State board of health is not necessary to authorize one to practice osteopathy."

The justice, in discussing the case, said: "The terms 'physician,' 'practice of medicine' and 'medical college' used in the Act have a well-defined popular meaning, and are used, we think, by the legislature in this sense. The term 'physician' refers to those exercising the calling of treating the sick by medical agencies, as commonly practiced throughout the State at the time the Act was passed. The term 'medical college' refers to those schools of learning teaching medicine in its different branches, at which physicians at that time were educated, or schools of that character organized since. At such an institution an essential part of the instruction was in teaching the nature and effect of medicines, how to compound and administer them and for what maladies they were to be used. In such institutions, also, surgery is an essential part of the instruction; without a knowledge of surgery or medical agencies, no person would be deemed equipped to practice medicine by any medical college; for these things lie at the base of the instruction given in such schools. Osteopathy teaches neither therapeutics, *materia medica*, nor surgery. Bacteriology is also ignored by it. As we understand the record, it relies entirely on manipulation of the

body for the cure of diseases. Its theory is that a large number of ailments are due to irregular nerve action, and that by stimulating or repressing the nerve centers by manipulation they enable nature to right the evil. It administers no drugs. It uses no knife. When a case is presented requiring surgery or medication, the osteopath gives way to the physician. It does not profess to cure all diseases. Faith cure or magnetism has no place in the system. It relies wholly upon manipulation aiding the *vis medicatrix naturee*. The main things taught in the school are physiology, anatomy and the treatment of diseases by manipulation. The system is new, and of necessity imperfect as yet, but, if we may credit the evidence in this record, is often efficacious where the regular practice is ineffective. Still, a school which teaches neither surgery, bacteriology, *materia medica*, nor therapeutics, cannot be regarded as a medical college within the popular meaning of those terms, as understood in this State when the Act in question was passed. Having reached the conclusion that the school at which appellant graduated is not a medical college within the meaning of the statute, it remains for us to inquire whether the Act applies to him at all. The subject-matter in the minds of the legislature in passing the Act was to protect the people of the State from the practice of medicine founded merely on experience without scientific knowledge. To effect this it allows only reputable physicians holding a diploma from a regular or reputable school to practice medicine, with an exception in favor of those then already long engaged in the practice."

The court reads at length from the opinion of the Supreme Court, for the reason that what is there said applies with equal force to the Act in the State of Pennsylvania. The Act of 1893, under which this indictment is drawn, as has been said before, does not recognize osteopathy as a school of medicine. The purpose of the Act was to prevent the practice of medicine, according to the theories of the three schools from which boards were selected and under whose supervision the applicants are to be examined, by persons who did not or do not possess the proper qualifications. If the Act applies to the defendant, he can in no case practice his system in this State; for, however well qualified he may be, he can not be examined for license as a physician, and he could not obtain a diploma from a medical college. If the statute applies to him, it also applies to trained nurses and all others of that class who, for compensation, administer to the wants of the sick. If the court held that the defendant, who practices rubbing and kneading of the body for certain nerve ailments, should obtain a certificate and file the same with the prothonotary, as required by the Act, it would compel every one, whether willing or unwilling, to employ a registered physician to care for him when he is sick, no matter how much he might prefer skillful nursing or rubbing, to medical treatment. It is doubtful if the legislature has the right to restrict the choice of the citizen in a matter concerning only himself and not the people at large. It certainly was not the intention of the legislature to do more than regulate the practice of medicine by physicians and surgeons in the passage of the Act under consideration.

In *Smith v. Lane*, 24 Hun (N. Y.), 632, in holding that a person treating diseases like the defendant was not violating a similar Act, the court, among other things, said: "The practice of medicine is a pursuit very generally known and understood, and so, also, that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases, while the functions of the latter are limited to manual operations, usually performed by surgical instruments or appliances. It was entirely proper for the legislature to prescribe the qualification of the persons who might be entrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other

manner. To allow incompetent or unqualified persons to administer or apply medical agents, or to perform surgical operations, would be highly dangerous to the health as well as to the lives of the persons who might be operated upon, and there is reason to believe that lasting and serious injuries, as well as the loss of life, have been produced by the improper use of medical agents and surgical instruments or appliances. It was the purpose and object of the legislature by this Act to prevent a continuance of deleterious practices of this nature, and to confine the use of medicines and the operations of surgery to a class of persons who, upon examination, should be found competent and qualified to follow these professional pursuits. No such danger could possibly arise from the treatment to which the plaintiff's (defendant's) occupation was confirmed. While it might be no benefit, it could hardly be possible that it could result in harm or injury. . . . His system of practice was rather that of nursing than either medicine or surgery. He neither gave nor applied drugs or medicine, nor used surgical instruments. He was outside of the limits of both professions, and neither of the schools or societies mentioned in the Act had jurisdiction over him."

In *State v. Liffing*, 61 Ohio, 39, it was held that the system of rubbing and kneading the body, commonly known as osteopathy, is not an agency within the meaning of the Act of Feb. 27, 1896, to regulate the practice of medicine, which forbids the prescribing of any drug or medicine or other agency for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualifications. Among other things, the court said: "The obvious purpose of the Act under consideration is to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition, and to protect society from the evils which result from the administration of potent drugs by the ignorant and unskillful. The purpose of the Act is accurately indicated by its title to be 'to regulate the practice of medicine.' No provision of the Act indicates an intention on the part of the legislature that those who do not propose to practice medicine shall graduate from a college of medicine, or otherwise become learned in its use. Without such knowledge, no one is entitled to a certificate from the board of examination. The result of the view urged in support of the exception is, that by this Act the General Assembly has attempted to determine a question of science and control the personal conduct of the citizen without regard to his opinion; and this is a matter in which the public is in no wise concerned. Such legislation would be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct, which does not invade the rights of others."

A similar ruling was made in Rhode Island. *State v. Mylod*, 40 Atl. Repr. 753: "While the phraseology of these Acts is in some respects different, the purpose is plainly the same, and the same construction should be adopted. The thing in the mind of the legislature, and declared by the Act to be unlawful, is 'for any person to practice medicine in any of its branches, or surgery, without a license. And as the board is only authorized to issue a certificate to a reputable physician having a diploma from a reputable medical college, or foreign diploma, the defendant cannot be held within the statute. The defendant is in no proper sense a physician or surgeon. He does not practice medicine. If by kneading and manipulating the body of the patient he could give relief from suffering, any individual has the right to employ him for such purpose. Kneading and manipulating the body are no more of the practice of medicine than services in bathing a patient to allay his fever or the inflammation of a wound. The defendant may not prescribe or administer medicines or perform surgery, but so long as he confines himself to osteopathy, kneading and manipulation

Commonwealth v. Pierce.

of the body without the use of medicines or surgical appliances, he violates no law."

Upon the trial of the case, there was some evidence that the defendant had furnished medicines to patients, and there was evidence that, upon one occasion, he introduced a sound. The instances were practically lost sight of in considering the greater question as to whether the practice of osteopathy was included in the Act of 1893, and it was practically conceded by the counsel for the plaintiff and the defendant that the main question was the construction of the meaning of the language of the Act, "practicing medicine or surgery," and whether the practice of osteopathy was included therein. In view of the fact that this evidence was introduced, and as the case stands, the court has no way of determining whether the jury found the guilt of the defendant upon that evidence, or upon the fact that he practiced osteopathy, a new trial must be granted.

From F. H. Laird, Beaver, Pa.

Com. ex rel. Attorney-General v. State Insurance Company of Philadelphia.

Assignment for the benefit of creditors—Receivership—Insolvency—Time of vesting of creditors' rights.

At the time when the property and assets of an insolvent—natural person or corporation—pass by assignment or by order of court into the hands of an assignee or of a receiver for distribution among creditors, the rights of all parties are fixed. Those who are then creditors become the equitable owners of the property and those who are not then creditors have no claim upon the fund and cannot obtain any by afterwards becoming creditors.

Hence, claims arising after the appointment of the receiver have no right to participate in the distribution of the assets.

Insurance companies—Insolvency—Proceedings under section 5, clause 8, of the Act of April 4, 1873.

Under section 5, clause 8, of the Act of April 4, 1873, P. L. 20, which formulates proceedings against insolvent insurance companies by the attorney-general, the appointment of a receiver for the purpose of winding up a corporation and distributing its assets implies a finding that the corporation is insolvent.

Hence, where, on motion of the attorney-general for a rule on a defendant insurance company to show cause why its business should not be closed and a receiver appointed, on the ground of insolvency, the defendant in its answer did not deny the insolvency, and the court appointed a receiver, but did not declare the corporation insolvent: *Held*, that insolvency of the corporation was implied from the appointment of the receiver, and claims for losses arising thereafter could not participate in the distribution of the assets.

Exceptions to auditors' report. C. P. Dauphin Co., Commonwealth Docket, 1898, No. 623.

Edwin W. Jackson, W. H. O'Brien and Patrick J. Daley, for exceptants.

Robert Snodgrass, for report.

SIMONTON, P. J., April 27, 1901.—In accordance with the provisions of section 5, clause 8, of the Act of April 4, 1873, P. L. 20, the attorney-general, on July 23, 1898, applied to the court for an order on the defendant, a mutual fire insurance company, to show cause why its business should not be closed and a receiver appointed, averring that it was insolvent. An answer was filed by the defendant, not denying the allegation of insolvency, but stating that "defendant would not oppose the appointment of a temporary receiver to take charge

Com. ex rel. Attorney-General v. State Insurance Company of Philadelphia.

of the assets of the company, pending an inquiry into its condition and its efforts to make good any impairment which may be ascertained to exist." The court, on Aug. 2, 1898, made a decree, appointing J. Bayard Henry and Henry F. Walton temporary receivers of the assets of the corporation, requiring each of them to give bond in the sum of \$25,000, and the rule to show cause why the business of the company should not be closed was continued until the further order of the court. No formal action was afterwards taken upon this rule, but the receivers, having given bond as required, on Aug. 6, 1898, took possession of the property and assets of the defendant, and proceeded to wind up its business and convert its property into cash, during the course of which they procured a number of orders from the court, authorizing them to employ counsel, clerks and such other assistants as might be necessary and proper for the collection of the assets of the company, to institute proceedings for the recovery of its assets, to compromise claims, to sell real estate and ground rents and mortgages, and to wind up its affairs and make distribution of its assets among creditors. But no formal decree was ever entered dissolving the corporation, or declaring it to be insolvent.

On Jan. 13, 1900, the receivers filed their account, showing a balance for distribution among creditors, and, thereupon, auditors were appointed to distribute. On Jan. 19, 1901, they filed their report, to which exceptions have been filed, which are now to be passed upon.

Several exceptions were filed, but the single question raised is, whether the auditors erred in holding that claims for losses, which occurred after the date of the appointment of the receivers, Aug. 2, 1898, have no right to participate in the distribution.

It is argued by exceptants that as there was no formal finding by the court that the defendant was insolvent, and no decree dissolving the corporation, the claims in question should have been allowed.

In *Miller's Appeal*, 35 Pa. 481, as stated by Mr. Justice Paxson, delivering the opinion of the court in *Dean's Appeal*, 98 Pa. 101, at page 104, "it was held that in the case of a voluntary assignment the creditors became the owners of the assigned estate by virtue of the assignment, and their ownership was fixed by the amount of their respective claims when the assignment was made. It follows from this that in such cases the rights of the parties are fixed as of the date of the assignment. *Miller's Appeal* has been followed in a number of later cases and is settled law." See *Brough's Estate*, 71 Pa. 460, and *Jordan's Appeal*, 107 Pa. 75.

In *Dean's Appeal*, *supra*, which was, as this is, a proceeding under the Act of 1873 and its supplement of 1876 cited above, the rule in *Miller's Appeal* was applied, Mr Justice Paxson saying: "We see no reason why the same principle shall not be applied to the case of an insolvent corporation which has been dissolved by a decree of the court. The corporation is dead for every purpose. But one duty remains, and that is to distribute its assets among its creditors. Even this the corporation is powerless to do, and the Act of Assembly devolves that duty upon a receiver to be appointed by the court. Who are the creditors to participate in the distribution? Clearly those who were such at the time of the dissolution of the corporation. At that time the appellants were creditors to the extent of the premium they had paid. Beyond this they had no claim upon their policy, for no loss had occurred. A possibility of loss in the future would not be a claim upon assets, and if it were it would be common to all policyholders. The distribution of the assets was an immediate duty on the part of the receiver; its delay is due merely to the fact that time is necessary to realize them. If, therefore, distribution had been practical immediately after the appointment of a receiver, the appellants would have received only a dividend
10 DIST. R.

Com. ex rel. Attorney-General v. State Insurance Company of Philadelphia.

upon premium paid by them. Does the fact that the distribution was necessarily delayed change the rights of the parties and introduce a new class of creditors who were not creditors at the time of the dissolution? We find neither reason nor authority for such a proposition."

In *Cowan v. Plate Glass Co.*, 184 Pa. 1, the court held that where a manufacturing corporation was decreed insolvent and a receiver had taken possession of its property, the status of all creditors was fixed as of the date of the appointment of the receiver. On the question of distribution, Mr. Justice Dean, delivering the opinion of the court, said: "In the case before the court the right of appellants, as of all creditors, must be determined as of the date the insolvency was adjudged, which entitled them only to a ratable return of premiums paid. The only distinction between *Dean & Son's Appeal*, *supra*, and the one before us, is in the consequences following the decree of insolvency; there the proceedings against the corporation were initiated and carried on by the Commonwealth, and the fact of insolvency was followed not only by an order for receiving and distributing the assets but also by a decree for a dissolution of the corporation. Here there was no decree for a dissolution, for the court had no jurisdiction at the instance of the creditors to make one. But the corporation to all intents and purposes, practically, by the appointment of a receiver to take possession of all its assets, ceased to exist. Therefore, we are of opinion that the court below was clearly right in his conclusion."

It cannot be doubted in the light of these cases that only debts that exist when the property and assets of a corporation, declared by the court to be insolvent, pass into the hands of receivers, to be converted into cash and distributed, can participate in the distribution; and it needs no argument to show that a fire insurance company is not indebted to a policy-holder until a loss occurs. But in this case there was no formal finding of the court that defendant was insolvent, and it differs in this respect from the case of *Cowan v. Plate Glass Co.*, *supra*. Does this difference forbid the application of the same principle?

Clause 8 of the Act of April 4, 1873, P. L. 20, provides that on the hearing of a rule granted at the suggestion of the attorney-general on an insurance corporation to show cause why its business should not be closed: "If it appears to the satisfaction of said court or judge that such company is insolvent . . . the said court or judge shall decree a dissolution of such corporation and a distribution of its effects;" but the Act does not prescribe any particular manner in which the court shall declare the fact that insolvency appears to its "satisfaction." The presumption is that the court was satisfied when it took the further step of appointing receivers, and the allegation of insolvency by the attorney-general, not denied by the defendant, furnished a sufficient reason why it was satisfied that the defendant was insolvent. It was, in fact, utterly and hopelessly insolvent, as abundantly appears by the auditors' report.

It is true, as suggested by counsel for exceptants, that § 49 of the Act of 1876, P. L. 66, which is a supplement to the Act of April 4, 1873, P. L. 20, authorizes the appointment of a receiver "when an insurance corporation is dissolved." But if any objection could be made to the proceedings in this case, for the reason that receivers were appointed without a decree of dissolution, it would go to the validity of their appointment, and, if sustained, would render it, and hence all their subsequent acts, invalid. This is not claimed to be the case by the exceptants, and we think they could not be heard so to claim after standing by until the receivers had wound up the affairs of the corporation and when they are claiming to share in the distribution of the assets.

We understand the principle of the decisions above cited to be, that at the time when the property and assets of an insolvent—natural person or corporation—pass by assignment or by order of the court into the hands of an assignee

Com. ex rel. Attorney-General v. State Insurance Company of Philadelphia.

or of a receiver for distribution among creditors, the rights of all parties are fixed. Those who are then creditors become the equitable owners of the property; each creditor owning such a proportional part of the whole as the debt due to him bears to the aggregate debts; and those who are not then creditors of the insolvent have no claim on the fund, and cannot obtain any by afterwards becoming creditors.

The appointment of a receiver for the purpose of winding up the affairs of a corporation and distributing its assets among its creditors implies a finding that the corporation is insolvent; and when that implication accords with the fact alleged by the attorney-general as the foundation for the proceeding, not denied by the corporation and actually existing, we do not think the absence of a formal finding by the court prior to or at the time of the appointment of the receivers can vary the principle upon which a distribution of the assets is finally to be made.

For these reasons, in addition to those so well stated by the auditors in their report, the exceptions are overruled, and the report is confirmed and distribution is ordered to be made in accordance therewith.

From William M. Hargest, Harrisburg, Pa.

Commonwealth v. Conrad.

Gambling—Act of March 11, 1834—Recovery of penalty prescribed by Act.

Sections 18 and 19 of the Act of March 11, 1834, P. L. 122, relating to gambling in inns and taverns, contemplate a summary conviction in an action of debt to recover the penalty of \$14, and not an indictment.

Motion to quash the indictment. Q. S. Blair Co., March Sess., 1901, No. 39.

This was a prosecution for gaming brought under the provisions of the Act of Assembly of March 11, 1834, P. L. 122, against a hotelkeeper. Motion to quash the indictment for the reason, *inter alia*, that "the said Act of Assembly provides for the forfeiture and payment of a money penalty for the commission of the said offence, and does not prescribe any particular remedy for the enforcement of such forfeiture and payment, and does not invest any particular court with jurisdiction. The appropriate and well-established remedy for such cases is an action of debt for the penalty, and is within the original jurisdiction of an alderman or justice of the peace alone. The Court of Quarter Sessions has, therefore, no jurisdiction except by action of debt, or upon appeal from the judgment of an alderman in proceedings in the nature of summary conviction."

William L. Hicks, District-Attorney, for Commonwealth.

H. A. Davis, for The Blair County Anti-Saloon League.

Nicholas P. Mervine, for defendant.

BELL, P. J., March 15, 1901.—This indictment, on motion of counsel for defendant, is quashed. I am of the opinion that the Act of March 11, 1834, §§ 18 and 19, P. L. 122, contemplate a summary conviction on an action of debt to recover the penalty of \$14, and not an indictment.

Com. v. Darenger, 10 Phila. 478, seems to be in point, and indicates that either summary conviction or action in debt will lie, but not indictment. The indictment is, therefore, quashed, without prejudice to rights of Commonwealth to press for collection of penalty for alleged offence before a justice or alderman.

From Robert W. Smith, Hollidaysburg, Pa.

Peoples' Passenger Railway Co. v. Taylor, Receiver of Taxes.

Corporations—Passenger railways—Taxation—Property essential to the exercise of public franchises—Duplicate taxation.

The property of a quasi-public corporation which is essential to the carrying out of its public purposes and indispensable to the exercise and enjoyment of its charter rights is represented by its capital stock, and, as such, is taxed specially by the legislature, and the law will not subject it to duplicate taxation by mere inference.

Where part of the property of a quasi-public corporation consists of horses, which are essential to the carrying out of the public purposes of such corporation and indispensable therefor, such property is included in the capital stock and is not taxable for local purposes.

Where horses are used as the motive power of a passenger railway and are thus a part of its capital stock, they will not be deprived of that character by their occasional use for other purposes necessary for the due performance of the railway company's franchises.

A passenger railway used horses exclusively as its motive power. It possessed 1600 head. Of this number, four were used to haul feed twice a week to the stables of the company for the use of all the horses, and after the trip was over they finished the day's work hauling cars: nine were used occasionally in carts while the company was making repairs on the streets occupied by their tracks, and, when not hauling the carts, they were used to draw cars; one horse was employed in hauling the moneys received by the company from its depots to the banks where the money was deposited, and was not used for any other purpose except upon holidays, when it also was employed in drawing cars; all the others were used to draw the cars. The company paid the tax imposed by the legislature upon its capital stock. *Held*, that all the horses were part of the capital stock and not subject to local taxation, except the one engaged in making trips to the bank, and as to it the maxim *de minimis* relieved the court from the consideration of its case.

Taxes—Injunction—Equity jurisdiction.

Where a tax is lawfully assessed, or where the matters complained of are mere irregularities in the valuation or assessment, equity will not interfere, and will leave the party aggrieved to his statutory remedy by appeal from the assessment; but where there is a want of power to tax or a disregard of the constitution in the mode of assessment, a court of equity will restrain the collection of the tax.

Hence, where a municipality imposes a local tax upon the horses of a street passenger railway essential to the exercise of its public purposes and corporate franchise, a court of equity will enjoin its collection.

Bills for injunction. C. P. No. 3, Phila. Co., March T., 1893, Nos. 645 and 646, in Equity.

Rufus E. Shapley and Ellis Ames Ballard, for plaintiff.

E. Spencer Miller, assistant city solicitor, for defendant.

MCCARTHY, J., June 20, 1901.—These two causes came on to be heard on March 12, 1901, before the court, sitting as chancellors. The parties, both plaintiff and defendant, were represented by counsel. The cases were heard together upon bills, answers and proofs, and were fully argued by counsel.

Abstract of pleadings.

The bill filed in No. 645 avers that the plaintiff was created a body politic by an Act of Assembly, approved April 15, 1873, and exercises thereunder its powers and franchises as a passenger railway company in the city of Philadelphia.

The bill filed in No. 646 repeats the above-mentioned averments, and further avers that the Germantown Passenger Railway Company is also a body politic created by an Act of Assembly, approved April 21, 1858, under which it is authorized to exercise corporate powers and franchises as a passenger railway company in the city of Philadelphia, and that the plaintiff is the lessee of the said Germantown Passenger Railway Company, lawfully exercising its rights and franchises.

After the above-mentioned averments, the tenor of both bills is to the same purport, as follows: That the plaintiff is possessed of a large number of horses, used only in and about its corporate business and appurtenant, necessary and

Peoples' Passenger Railway Co. v. Taylor, Receiver of Taxes.

indispensable therefor, and that it could not exercise its corporate franchises without them; that it is a stock company, declaring dividends; that the said horses are part of the capital stock of the company, and as such pay the State tax; that the stock of the plaintiff is owned by a considerable number of individuals who pay tax thereon to the State; that the defendant is the receiver of taxes for the city and county of Philadelphia, and that he claims that the horses are subject to local taxation, and have been assessed with a city and county tax, amounting to \$163.17 for the horses used on the Peoples' Passenger Railway, and to \$1139.28 for those used on the Germantown Passenger Railway; that the defendant has demanded payment of the said taxes, and threatens and intends, if they are not paid, to levy upon the said horses and sell them for payment of the tax, and that he has so notified the plaintiff by notice in writing; that the plaintiff is advised by counsel that the horses are not liable to local taxation, and has, therefore, declined to pay the tax, but fears that the defendant, at the expiration of the time mentioned in his said notice, will proceed to levy upon and sell the said horses. Plaintiff further avers that if the horses are levied upon and sold it will be prevented from exercising its franchises, carrying its passengers and fulfilling the object and purposes for which it was chartered.

The prayers are: (1) That the assessment be declared null and void; (2) that the defendant be restrained from levying upon and selling the horses; (3) that defendant be restrained from collecting the taxes, and (4) general relief.

The material averments of the answers are: That the said horses are not used only in the business of conveying passengers according to the corporate powers of the plaintiff, and are not appurtenant, necessary or indispensable therefor, but are put to a great variety of other uses in no wise strictly or indispensably necessary for the exercise of the plaintiff's corporate privileges; that the said horses are liable for taxes for county and municipal purposes, and that if the horses were levied upon and sold the plaintiff would not be prevented from exercising its franchises.

Preliminary injunctions were granted, and afterward the cases were tried before the president judge of this court. Evidence on behalf of plaintiff was heard in open court. The defendant offered no testimony.

Findings of fact.

The following facts are clearly established by the testimony:

1. On April 21, 1858, the legislature, by an Act of Assembly approved on that date (see P. L. of 1858, page 494), incorporated the Germantown Passenger Railway Company, empowering it, *inter alia*, to "construct and complete a passenger railway, with single or double tracks, on all or any part of the Germantown turnpike road within the city of Philadelphia," with branches, etc., "to procure the cars, carriages and other appliances required for the objects and purposes of this Act, and erect or procure the necessary offices, depots, station-houses, workshops, stables and such other buildings as may be required for the economical and convenient transaction of their business and the accommodation of their passengers."
2. Afterward, namely, on April 15, 1873, the legislature, by an Act of Assembly approved on that day (see P. L. of 1873, page 788), incorporated the Peoples' Passenger Railway Company, granting them power, *inter alia*, "to lay and construct a railway in the city of Philadelphia, and carry passengers along such route and streets as hereinafter provided for," and authorizing them "to select a suitable place for the erection of depots, stables, offices and other buildings necessary for conducting the business of the said railway company."
3. By a lease in writing, duly executed, bearing date Oct. 19, 1881, the Germantown Passenger Railway Company leased to the Peoples' Passenger Railway

Peoples' Passenger Railway Co. v. Taylor, Receiver of Taxes.

Company its lines of railway and property, and from that time until the bills were filed in the causes under consideration, the Peoples' Passenger Railway Company, plaintiff, as lessee under the said instrument of writing, lawfully operated the railway and exercised the rights and franchises of the said Germantown Passenger Railway Company.

4. All taxes due to the State upon the capital stock of the Peoples' Passenger Railway Company, and also upon the capital stock of the Germantown Passenger Railway Company for the year 1892, have been fully paid into the treasury of the Commonwealth.

5. The plaintiff used horses only as the motive power to propel the cars upon the Peoples' Passenger Railway and the Germantown Passenger Railway during the year 1892. It owned altogether 1600 horses for the operation of its entire system, which, however, included other lines of railway beside the two just named. The plaintiff company at that time had no other means of propelling its cars, and could not move them without using horses. All of these horses, without exception, were used in hauling the cars of the company along and over its railways, but certain of them were used occasionally for other purposes. The company owned a mill at Eighth and Dauphin Streets and ground the feed for its animals there. Four horses were used twice a week in a single trip on each occasion to haul the ground feed from the mill to the company's barn in Germantown. After the trip was over, these horses finished the day's work hauling cars over the railways of the company. Nine horses were used occasionally in carts while the company was making repairs on the streets, rendered necessary by the work of maintaining its road-bed and tracks in good order. These horses, when not hauling carts, were used to draw the cars upon the railways. One horse only was employed in hauling the moneys received by the company from its depots to the banks, where the money was deposited, and was not used for any other purposes except upon holidays, when it also was employed in drawing cars upon the railways.

6. In order that a passenger railway company may exercise its franchise to carry passengers over its railway upon the streets of a city, three things are indispensable: (1) It must have a railway track upon which vehicles suitable for carrying passengers may be propelled. (2) It must have vehicles suitable for the carriage of passengers and adapted to its track. (3) It must have a motive power adequate to propel its vehicles, suitable to its track and the conveyances thereon and proper for use in city streets. These three indispensable things must concur in order that it may exercise its corporate functions, and the absence of any one of them would prevent the corporation from fulfilling the purpose for which it was chartered.

Neither the Act incorporating the Germantown Passenger Railway Company nor that incorporating the Peoples' Passenger Railway Company mention the nature of the motive power to be employed by those companies respectively in carrying passengers over their roads. In both Acts, however, the erection of *stables* as among the necessary buildings required by the company is expressly authorized. A stable is a house, shed or building for beasts to lodge and feed in, especially a building or apartment with stalls for horses. It may, therefore, be fairly inferred from the language of the Acts that the use of horses as necessary to the operation of a passenger railway was contemplated by the legislative bodies which enacted them, and it was asserted at the argument, and not denied, and is indeed matter of common knowledge, that, when those statutes were enacted, no other method of propulsion for the cars of a street railway than their traction by horses or mules was known or used in this community. The evidence fully establishes that in 1892 the plaintiff company used only horse power for the propulsion of its cars, and had no other means of propelling

Peoples' Passenger Railway Co. v. Taylor, Receiver of Taxes.

them. The conclusion from these facts is irresistible, and I therefore find that the 1600 horses owned and used by the plaintiff company in the operation of the Peoples' Passenger Railway, the Germantown Passenger Railway, and other leased lines, were necessary and indispensable for the business of conveying passengers over the said railways, and that without them the plaintiff could not have exercised its corporate functions and franchises.

Findings of law.

1. The Peoples' Passenger Railway Company and the Germantown Passenger Railway Company are quasi-public corporations, having the right under their charters to exercise the franchise of carrying such of the general public as desire to become passengers in their cars, along and over the routes which they severally are especially authorized to lay down and maintain in the public streets of the city of Philadelphia.

2. The property of a quasi-public corporation which is essential to the carrying out of its public purposes and indispensable to the exercise and enjoyment of its charter rights, is represented by the capital stock of such corporation, and, as such, is taxed specially by the legislature, and the law will not subject it to duplicate taxation by mere inference: *West Chester Gas Co. v. Chester County*, 30 Pa. 232; *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. 162; *St. Mary's Gas Co. v. Elk County*, 191 Pa. 458; *Light and Heat Co. v. Elk County*, 191 Pa. 465.

3. Where part of the property of a quasi-public corporation consists of horses, which are essential to the carrying out of the public purposes of such corporation and indispensable therefor, such property is included in the capital stock, and is not taxable for local purposes. In the *Easton Passenger Railway Company's* case, wherein a case stated in the nature of a special verdict for recovery of county taxes was the form of action, the enumeration of the property of the passenger railway company sought to be locally taxed included its horses, and it was agreed that the said property, including the horses, was appurtenant, necessary and indispensable for the business of conveying passengers and produce according to the defendant's corporate powers. The Supreme Court, in affirming the judgment for defendant entered by the court below, held that the agreement in regard to the facts clearly brought the case within the ruling in *West Chester Gas Co. v. Chester County*, 30 Pa. 232, and the like cases, and that the property, of course including the horses, was not taxable for local purposes: *Northampton County v. Easton Pass. Ry. Co.*, 148 Pa. 232.

4. The averments of the answers that the plaintiff's horses are put to a great variety of other uses than conveying passengers, and that such uses are in no wise strictly or indispensably necessary for the exercise of its franchises, are not sustained by the evidence. Out of the whole number of 1600 horses, the testimony shows that fourteen in all were occasionally used for other purposes than the traction of the cars upon the railways. As to thirteen of these animals, the uses for which they were employed were plainly not mere matters of convenience. In order that horses may perform their work, it is indispensably necessary to feed them, and their feed must be hauled to the stables wherein their mangers are constructed in order that they may be fed. It follows that the four horses which the testimony shows made a single trip twice a week hauling the ground feed to the stables of the company for the use of the animals there stalled and fed, were employed in a use indispensably necessary for the due performance of the franchises of the plaintiff company. Again, the maintenance and repair of the tracks and roadway is not merely convenient, but necessary for the exercise of the corporate privileges of the railway company, and for such work, and the repair of streets rendered necessary as a consequence of it, carts hauled by horses must be employed. Hence, the nine horses, which,

10 DIST. R.

Peoples' Passenger Railway Co. v. Taylor, Receiver of Taxes.

the testimony shows, were occasionally used to haul carts for the repair of streets by the company, were, when so employed, engaged in work which was indispensably necessary for the proper exercise of the plaintiff company's corporate powers. This disposes of thirteen out of the fourteen cases of horses not used exclusively for propelling cars; the maxim *de minimis* relieves the court from consideration of the case of the single remaining animal which hauled money to the banks on working days and drew cars only upon holidays.

5. Where animals are used as the motive power of a passenger railway, and are thus a part of its capital stock, they will not be deprived of that character by their occasional use for other purposes necessary for the due performance of the railway company's franchises. The contention of defendant's counsel to the contrary is not supported by reason or authority. The use of any one animal as a source of motive power upon a passenger railway cannot, in the nature of things, be continuous. Beasts of burden grow tired, hungry and exhausted, and their work must be intermitted while they rest, feed and sleep. For a considerable portion, therefore, of the twenty-four hours of each day the animal is not used at all in the work of propelling cars. It may also be possible that, owing to the exigencies of travel, a certain number of animals may be kept in reserve for a longer or shorter period; but, notwithstanding some of the animals thus, during considerable periods of time, desist from the labor of drawing the cars, this does not in any wise affect their character as property indispensable to the performance of the corporate functions, such periods of diversion from their principal use being occasioned by necessity. Upon what ground, then, can it be held that other occasional diversions of the animals from their principal use, also occasioned by necessity, should destroy their character as such property? The cases cited at the argument, arising under the statute of May 14, 1874, exempting the property of churches and charities from taxation in certain cases, cannot be regarded as of binding authority in determining the points now under consideration. The plaintiff corporation is not a charity, nor is it seeking to exempt its property from taxation, but contends that it has paid all the taxes due thereupon, and asks relief from a threatened duplicate tax, which it asserts is unlawfully sought to be imposed upon it. So far, however, as these decisions afford points of analogy, they support the finding stated at the beginning of this paragraph. In *Philadelphia v. Barber*, 160 Pa. 123, the controlling feature was that the church seeking exemption rented out a part of its property and derived a revenue from it. In *Donohugh's Appeal*, 86 Pa. 306, it was held that the public character of the Philadelphia Library as a charity was not destroyed because members and other individuals had also special privileges in its use. In *Philadelphia v. Pennsylvania Hospital for the Insane*, 154 Pa. 9, the Supreme Court held that a building maintained upon land owned by the hospital, although used to make a profit for the hospital, which profit was employed in extending the charitable purposes and not for the benefit of any person concerned in administering the charity, was exempt from taxation. In *House of Refuge v. Smith*, 140 Pa. 387, a large tract of land in Delaware county, cultivated by inmates of the House of Refuge of Philadelphia, the products of the cultivation being sold and the proceeds used to defray part of the expenses of the institution, was held as a part of the plant on and by means of which the purposes of the charity were carried on, and that it was therefore exempt from taxation.

In *Pennsylvania Hospital v. Delaware County*, 169 Pa. 305, the hospital, which is a public charity, located in Philadelphia, purchased certain farms in an adjoining county and used them only during the pleasant weather of summer and autumn as an open air sanitarium for convalescent patients. The land was also farmed for profit to reduce the expenses. The Supreme Court

Peoples' Passenger Railway Co. v. Taylor, Receiver of Taxes.

held this property exempt from taxation. In the opinion, by Mr. Justice Mitchell, the above cited cases are reviewed and their purport summed up as follows: "Property which is not used directly for the purposes and in the operation of the charity, but for profit, is not exempt, and the devotion of the profit to the support of the charity will not alter this result. But property which is used directly for the purposes and in the operation of the charity is exempt, though it may also be used in a manner to yield some return and thereby reduce the expenses."

In the cases at bar, the property under consideration is used directly for the purposes and in the operation of the franchise, but a part of it—a very inconsiderable proportion of the whole—is also used in a manner to reduce the expenses, although not yielding any return or income. If the plaintiff were a charity, this property would certainly be exempt. So far, therefore, as any argument by analogy holds good, it should not be subjected to further taxation.

6. The plaintiff company has correctly chosen its forum and its remedy. Although the point was not raised by the pleadings, it was contended by counsel for defendant upon the argument that the plaintiff had mistaken its remedy, and should have appealed from the assessments in the manner set forth in the Act of Assembly authorizing such appeals. The same point was raised in the Ridgway Light and Heat Company's case, where the local authorities attempted to tax all the gas in certain lands which had been conveyed to a natural gas company. The evidence showed that the gas was indispensably necessary to carry out the public purposes for which the company was chartered. The case, on appeal to the Supreme Court, was affirmed *per curiam* upon the opinion of the court below, wherein the point in question is referred to as follows: "But it is contended by defendant that if the assessment of taxes was illegal, a bill for injunction is not the proper remedy; that plaintiff should have proceeded in the manner provided by the Act of Assembly and appealed from the assessments. This contention is untenable. In the case of Banger's Appeal, 109 Pa. 91, the Supreme Court said: 'It was urged that a court of equity will not interfere to restrain the collection of taxes, but will leave the party aggrieved to his remedy at law. This is true where tax is lawfully assessed, or where the matters complained of are mere irregularities in the valuation or assessment; but where there is want of power to tax or disregard of the constitution in the mode of assessment, we have no doubt of the power and duty of a court of equity to interfere.' St. Clair School Board's Appeal, 74 Pa. 256; Wheeler v. Philadelphia, 77 Pa. 338; Kitty Roup's Case, 81* Pa. 211.'" St. Mary's Gas Co. v. Elk County, 191 Pa. 458. See also Ridgway Light and Heat Co. v. Elk County, 191 Pa. 465.

In conclusion upon the whole case, I find that the horses used in 1892 by the Peoples' Passenger Railway Company to propel its cars upon the Peoples' Passenger Railway and the Germantown Passenger Railway, were a part of the capital stock of the said company and of the Germantown Passenger Railway Company, its lessor; that the said plaintiff company has paid the tax imposed by the legislature upon the said capital stocks, including as part thereof the said horses, and that the said horses are not liable to be taxed again for the purposes of the local municipality; it follows that the assessment and collection of such local tax should be perpetually enjoined.

A decree proper for the decision of these causes, in accordance with the foregoing findings, has been prepared, and will be entered forthwith in each of the said cases.

These findings of fact and of law will be filed in the action No. 645, of March Term, 1893, and an exact duplicate of them in the action No. 646, of March Term, 1893.

10 DIST. R.

Vacation of Toronto and other Streets.

Road law—Vacation of streets—Acts of May 16, 1891, and April 21, 1858.

The Act of May 16, 1891, P. L. 75, relating to laying out or vacating streets or alleys, constructing bridges, grading, paving, macadamizing or otherwise improving streets and alleys and the construction of sewers, does not repeal the Act of April 21, 1858, P. L. 386. The Act of 1891 can be invoked where no earlier act provides a remedy, or where the later act provides a fuller remedy than the earlier local act, or where the municipal action is based on the Act of 1891; but where, as in Philadelphia county, a remedy and procedure to enforce that remedy existed prior to 1891, that act does not interfere with the earlier act, and the proceedings to recover damages for the vacation of a street can only be taken under the Act of 1858.

Petition for appointment of jury to assess damages. C. P. No. 1, Phila. Co., March T., 1901, No. 1361.

E. A. Anderson, for petitioner.

Francis L. Wayland, assistant city solicitor, and *John L. Kinsey*, city solicitor, contra.

BEITLER, J., June 12, 1901.—James Brown filed his petition in this court, praying for the appointment of a jury of three to assess the damages caused by the vacation of Toronto and other streets. To this petition the city of Philadelphia has filed an answer, praying that the petition be quashed.

The answer sets out that on the same day that the petition was filed in this court, a similar petition was filed in the Court of Quarter Sessions for the appointment of six viewers, in accordance with the practice prevailing in that court, under the Act of April 21, 1858, P. L. 386, and that on that petition a jury of six has been appointed.

The answer further sets out that the proceedings in this court are based on the Act of May 16, 1891, P. L. 75, which Act "does not contemplate or provide for such a vacation as is herein the subject of complaint," the only vacation for which a remedy is provided by the said Act being such as is had under an ordinance of councils in accordance with the said Act and its supplement, the Act of May 22, 1895, P. L. 107. That in this case there has been no vacation by ordinance of councils.

There seems to be no dispute as to the facts. The petition in this court sets out that by an ordinance of councils, approved April 9, 1892, the department of public works was directed to make a revision of a part of a plan in the twenty-fifth ward so as to strike certain streets therefrom, and that, in pursuance of the authority therein given, the department did make the revision and did strike from the plan certain streets, including Toronto street, on which street petitioner owns a property. This was done on April 15, 1895.

This action of the city department was, in fact, a vacation of the streets stricken from the plan: In re William Street, 7 District Reps. 1; *Wetherill v. Pennsylvania R. R. Co.*, 195 Pa. 156; *Carpenter v. Pennsylvania R. R. Co.*, 195 Pa. 160.

The Act of May 16, 1891, P. L. 75, shows by its title that it relates to "the laying out . . . or vacating streets or alleys, the construction of bridges, the grading, paving, macadamizing or otherwise improving streets or alleys, and the ascertaining of the damages to private property resulting therefrom, the assessment of the damages, costs and expenses thereof upon the property benefited, the construction of sewers and the payment of the damages, costs and expenses thereof."

By the first section, power is given to all municipal corporations "whenever it shall be deemed necessary in the laying out, opening, widening, extending or grading of streets, lanes or alleys, the construction of bridges and the piers and abutments therefor, the construction of slopes, embankments and sewers, the

changing of water-courses or vacation of streets or alleys, to take, use, occupy or injure private lands, property or material."

By section 9 of the Act, the power thus given in section 1 is curtailed. This section provides that "every municipal corporation shall have power to open . . . and to vacate the same upon the petition of a majority in interest and number of owners of property abutting on the line of the proposed improvement."

The Act contains twelve sections. The other ten sections need not be referred to for the purposes of this case, further than to say that, except where they provide the procedure to be followed by the jury, they deal with matters then already provided for by existing laws so far as this city is concerned. The Act contains no repealing clause. It is followed by another Act (page 80), approved the same day, repealing "the following Acts and parts of Acts concerning streets and sewers in the city of Pittsburgh." The list of Acts repealed covers over seven pages in the pamphlet laws. After May 16, 1891, the city of Pittsburgh had only the Act approved that day by the Governor, giving it power to lay out and vacate streets and alleys, construct bridges, grade and pave streets and alleys, construct sewers and ascertain the damages and benefits therefrom.

As a matter of fact, the Act was drawn to relieve Pittsburgh from a muddle resulting from the decisions of the Supreme Court upon Acts relating to the proceedings in that city in reference to street improvements. See *Paving, etc.*, of Wyoming Street, 137 Pa. 494; *Pittsburgh's Petition*, 138 Pa. 401. In this latter case the Supreme Court pointed out the necessity for legislation, and expressed the belief (page 427) that the legislature then in session would enact some remedial statutes.

The Act is preceded by another of the same date (page 71), authorizing the ascertainment, etc., of damages and expenses of municipal improvements . . . completed or now in process of completion, and authorizing the completion of any such improvement, and by another Act of the same date (page 65), authorizing the ascertainment of the damages to property in opening, &c., of streets where municipalities have heretofore entered upon private property or filed bonds under laws subsequently decided to be unconstitutional, or which are invalid, and providing for the ascertainment, levy and collection of benefits therefor, and constituting such benefits a lien upon the properties upon which they are respectively assessed, and still another of that same date (page 69), "creating and regulating municipal liens and proceedings thereon."

No one of these Acts has any repealing clause attached. They were, as a whole, intended for the relief of Pittsburgh, and the draughtsmen of the Acts studiously avoided putting anything in the Acts to overturn or interfere with the local Acts then regulating the matters dealt with by the several Acts of 1891 in the many cities, boroughs and counties in the State. The Acts were all general Acts. The constitution so required. The Supreme Court had already passed upon many Acts drawn to regulate proceedings in road cases (to use an expression general enough to cover this class of legislation). The cases already referred to and the many referred to in the case in 138 Pa., including our own *Ruan Street Case*, 132 Pa. 257, are but a few of those decided under the new constitution, and in all of them the Supreme Court had held the Acts to be unconstitutional because local.

By the Act of May 22, 1895, P. L. 106, the ninth section of the Act of 1891 (page 75) is amended by adding to the power given therein to every municipal corporation to open, &c., streets, upon the petition of a majority of the property-owners, a power to do these several acts without any petition of property-owners, "whenever the councils or authorities thereof shall deem it necessary."

10 DIST. R.

Vacation of Toronto and other Streets.

The ordinance to authorize such opening, &c., must, however, be passed by a three-fourths vote in councils, must be approved by the mayor or burgess, must be advertised pending its passage, &c. This amendatory Act contains no repealing clause.

The Act of 1891 has been frequently construed by the Supreme Court. In *Hand v. Fellows*, 148 Pa. 457, Mr. Justice Williams, delivering the opinion of the court, says (page 461): "It is an affirmative Act, containing no repealing clause, and can have no effect on the Act of 1889, unless the system provided by it is so inconsistent with that previously existing as to make it impracticable for them to stand together."

The same principle was relied upon in the decisions in *McCall v. Coates*, 148 Pa. 462, and in *Com. ex rel. v. George*, 148 Pa. 463. It was announced again in *Frederick Street*, 150 Pa. 202, where it was held that the Act of 1891 did not interfere with the power of a borough to open a street, under the Act of April 3, 1851, P. L. 320, but that the proceedings to carry out the borough ordinance may be under the Act of 1891. Mr. Justice Mitchell in that case said: "Repeals by implication are never favored, and the implication would have to be very strong, indeed, to justify a court in adjudging an implied repeal of the power to lay out, open and widen streets which had existed in some form from the colonial days, and is an essential part of our modern conception of a municipality of any grade."

This decision was followed in *Beltzhoover Borough v. Beltzhoover's Heirs*, 173 Pa. 213.

The proceedings in *re Melon Street* were in the Court of Quarter Sessions under the Act of April 21, 1858. A reading of the several opinions in that interesting case (1 Pa. Superior Ct. 63; 182 Pa. 397; 9 Pa. Superior Ct. 18; 192 Pa. 331) shows that neither the Superior Court nor the Supreme Court entertained any doubt of the right to a jury in Philadelphia for a vacation, under the Act of 1858, and the final judgment entered in the case got the parties injured the damages awarded to them.

There would seem, then, to be no doubt that the petitioner who filed a petition both in this court and in the Court of Quarter Sessions had a right to go into the Court of Quarter Sessions—the Act of 1858 providing his remedy. The Act of 1891 did not repeal the Act of 1858. The petitioner certainly cannot have two proceedings and two juries in two distinct courts. The Act of 1891 can be invoked where no earlier Act provides a remedy, or where the later Act provides a fuller remedy than the earlier local Act, or where the municipal action is based on the Act of 1891, but where, as in our own county, a remedy and procedure to enforce that remedy existed prior to 1891, the Act of May 16, 1891, clearly did not interfere with the earlier Act, and the proceedings to recover damages for the vacation in this case must be taken under that Act and only under that Act. Under the decisions in *Centre Street*, 115 Pa. 247; *Howard Street*, 142 Pa. 601, and *Melon Street*, *ante*, there seems to be no reason why the petitioner's remedy and rights are not plain and ample.

The prayer of the city in its answer is, therefore, granted; the petition in this court is quashed, and all proceedings had thereunder are set aside.

Philadelphia v. Athow et al.

Municipal claims—Time of filing claim—Act of July 26, 1897—Retroactive—Constitutionality.

The Act of July 26, 1897, P. L. 420, is applicable to the city of Philadelphia. Its effect, where assessments are made by foot-front rule within the time required by the Act, is to render a claim valid which is filed within a year of the completion of the *entire* contract.

The Act is retroactive in character, but is not unconstitutional, for that reason.

Its effect is not to revive liens generally which had lost their hold upon properties **against** which claims had been filed when the Act was passed, but only to operate upon claims which were then alive, where the liens were still in existence under the definition and requirements contained in the terms of the statute.

Reargument. C. P. No. 4, Phila. Co., Sept. T., 1894, Nos. 1728, 1735, 1737, 1738, 1739, 1743-1746, 1748, 1749, 1752.

James Alcorn and David Lavis, assistant city solicitors, and *John L. Kinsey*, city solicitor, for plaintiff.

L. H. R. Nyce, for *Righter et al.*, defendants in liens Nos. 1735, 1737, 1738 1739, 1743, 1744, 1749 and 1752.

Alfred R. Haig, for *Athow and Ball & Fries*, defendants in liens Nos. 1728, 1745 and 1746.

WILSON, J., June 26, 1901.—In the opinion previously filed (10 District Reps. 187), the only reason given for holding that the Act of July 26, 1897, P. L. 420, was applicable to these cases was that the Supreme Court had decided in *Dick v. Philadelphia* that the statute is operative in this city. In view, however, of the fact that that case, as finally reported (197 Pa. 467), expresses no opinion upon the subject, it becomes necessary for us to consider it as an original question. To aid us in so doing, we have had a reargument of the point.

It is needless to say that our duty is simply to put a fair and reasonable construction upon the statute. No doubt, if it applies to the city of Philadelphia, it will introduce new methods and limitations of time affecting municipal claims, which will probably not be regarded as desirable by those who deal in, or lend money upon, real estate. Such considerations, however, cannot have any proper bearing upon the question, in case the only natural and reasonable interpretation of its provisions is such as will make the statute operative in all the municipalities of the Commonwealth.

After a careful examination of its terms, with somewhat of a disposition, it may be admitted, to come to a different conclusion, we have reached the opinion that we must regard the statute as intended to apply to municipal claims of all kinds throughout the whole State. To hold otherwise, in our judgment, would twist the law out of its true meaning and bearings.

It is argued, on behalf of the property-owners, that the statute was only intended to apply to municipal districts other than cities of the first class, but we cannot adopt that view. When the legislature enacted that "all municipal claims, when the same are the final assessments . . . in *any city*, borough, township or other municipal division of the State," should have a certain effect, it used the most comprehensive language possible to describe the territory intended to be covered. Such sweeping language leaves no room for excluding cities of the first class. But it is said, in argument, that the provisions of the Act relative to assessments are not germane to any condition of affairs existing in this city, but are applicable only to cities and boroughs in which assessments are made, subject to a right on the part of the property-owner to object to the same and to be heard before some tribunal upon his objection. It is contended that, for this reason, the statute should be limited in its application exclusively

10 DIST. R.

to municipal divisions wherein such proceedings are provided for. The argument will not, however, stand the test of examination.

In the first place, it should be noted that "*all municipal claims . . in any city, . . filed . . within six months from the making . . of any assessment,*" are covered by the scope of the law. Such language cannot be regarded as inappropriate to describe an ordinary condition of affairs in respect of such claims in Philadelphia. On the contrary, it is very apt. No straining is needed to make it apply to actual conditions. Besides this, the application is made closer by the clause showing that the legislature had in view assessments "*made by the foot-front rule or according to benefits.*" The foot-front rule is the ordinary standard upon which municipal officers in this city make their assessments. It may be true, as argued, that the same rule exists in localities where the property-owner has the right of objection or appeal, but that constitutes no reason why language of general operation should be limited to one class of cases, exclusive of another to which it is just as appropriate.

Assessments are made in all municipalities, including cities of the first class. In some they are fixed and arbitrary; in others they are determined by standards of cost, value or benefits.

In all cases, the statute seems to have been intended to give to such assessments, when final, an indefinite life, provided certain steps should be taken, which it is not necessary to enumerate. The intention, whatever it may have been, was embodied in a statute not only general in form, but made doubly so in effect by words that apparently leave no loop-hole through which any municipality can escape.

Upon the grounds thus stated, we base the conclusion previously expressed, viz., that the Act of 1897 is applicable to this city and to the cases in hand.

With reference to the retroactive bearing of the statute, we desire only to add that legislation of that character is not necessarily beyond the power of the legislature: *Grim v. Weissenberg School District*, 57 Pa. 433. In matters of taxation, under which class most municipal claims are to be grouped, this is pre-eminently true. Whether the statute under discussion would be allowed to have a retroactive application in cases where a *bona fide* purchaser had acquired title to property after the lien had expired under previously existing laws, is a question which does not arise in the cases now before us. We should hesitate before adopting such a view.

From what has been stated, it follows that the judgments heretofore entered in these cases must stand, and we so order.

McCullough's Estate.

Decedent's estate—Partnership—Firm guarantee.

A claim against a decedent will not be allowed when it is not for materials furnished to a firm for the debts of which he had, as alleged, made himself liable as a general partner, but on an agreement in writing, expressed in the first person but signed by one of the partners in the firm name, guaranteeing payment by a third party for materials furnished to the latter, there being no proof that such agreement was made in the regular course of business of the firm, or that it was subsequently ratified by the partner sought to be charged.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1901, No. 527.

C. L. Lockwood, for exceptant; A. D. Harrington, contra.

PENROSE, J., June 1, 1901.—If it be conceded, as it probably must, that a loan of money under an agreement to receive a share of profits in lieu of interest creates a partnership as to third persons, except so far as provided by the Act of April 6, 1870, *Purd.* 1648 (though it would be otherwise under an agreement to

VOL. 10—23

McCullough's Estate.

receive a commission or percentage of profits: *Miller v. Bartlet*, 15 S. & R. 137; *Dunham v. Rogers*, 1 Barr, 255; *Edwards v. Tracy*, 12 P. F. Smith, 374), and if it also be conceded, though the auditing judge has found that it was not, that the contract was fully performed by the exceptants, there still remains an insuperable obstacle in the way of their recovery from the estate of this decedent.

Their claim is not for materials furnished to the firm for the debts of which he had thus, as alleged, made himself liable as general partner, but on an agreement in writing, expressed in the first person but signed by one of the partners in the firm name, guaranteeing payment by a third party for materials furnished to the latter. Such an agreement is outside of the scope of a partner's authority, and does not bind in the absence of proof that it was made in the regular course of business of the firm or that it was subsequently ratified by the partner sought to be charged (3 Kent, 46; *McNickle v. Irwine*, 12 S. & R. 13; *Hamill v. Purvis*, 2 P. & W. 177). Here there was no such proof: at least none has been called to our attention.

The exceptions are dismissed, and the adjudication confirmed absolutely.

Grier's Estate.

Wills—Construction—Vested interest.

A testatrix having given to three of her daughters her entire estate for life or so long as they remained unmarried, with limitation at the death of the survivor, if they all remained single, to her two other daughters, who were already married, absolutely, declared by a subsequent clause of her will that "in the event of one or more of my said daughters . . . marrying and after the determination of the life-estate thereupon limited to the one who shall remain single, it is my will and pleasure, and I hereby direct, that all my estate shall be equally divided among my said daughters (naming them, being five in number), . . . and the issue of such as may be deceased, such issue to receive only such portion as their parent would have been entitled to if living." One tenant for life married and the other two died unmarried and without issue. *Held*, that the interests were vested in the five daughters, subject only to being divested by death leaving issue, and the distribution should be made in fifths and not in thirds.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 586.

A. D. Harrington, for exceptants; *J. Rich Grier*, contra.

PENROSE, J., June 1, 1901.—The testatrix having given to three of her daughters her entire estate, for life or so long as they remained unmarried, with limitation at the death of the survivor, if they all remained single, to her two other daughters, who were already married, absolutely, declared by a subsequent item of her will that "in the event of one or more of my said daughters . . . marrying and after the determination of the life-estate thereupon limited to the one who shall remain single, it is my will and pleasure, and I hereby direct that all my estate shall be equally divided among my said daughters, Jane, Margaret, Christianna, Elizabeth . . . and Mary, . . . and the issue of such as may be deceased, such issue to receive only such portion as their parent would have been entitled to if living." As the event thus provided for has actually happened—Christianna having married and the other two tenants for life, both of whom remained single, having died, the auditing judge was clearly right in awarding distribution in fifths and not in thirds, as claimed by the exceptant. The interests were vested in the five daughters, subject only to being divested by death leaving issue (*Carstensen's Estate*, 196 Pa. 325; *Williams on Executors*, 1383).

As we are not convinced that all of the questions arising before the auditing judge were not properly disposed of by him, the exceptions are dismissed and the adjudication confirmed absolutely.

10 DIST. R.

Lutz v. Browne et al.

Landlord and tenant—Replevin—Pleading.

It is not allowable both to plead and demur to the same matter. Matters which tend to raise different issues should be pleaded by separate pleas and not be combined in one. Hence, where a *narr* was filed in an action of replevin arising out of a distress for rent, to which the defendants made avowry and cognizance in the usual form, alleging rent in arrear, with sufficient detail as to the character of the tenancy, and a plea was filed to the avowry in the following form:

"G. S. L., the plaintiff, by A. B., his attorney, says that the avowry and cognizance filed in this cause is insufficient in law, in that it fails to set forth whether or not the lease therein referred to was or is in writing, what the terms thereof were or are, or what lands were therein demised, but, without waiving his right to except to the said avowry and cognizance, in reply thereto, says that he at no time was and now is not tenant of the said P. A. B. alone, but, on the contrary, is now and, at the time the distrait was made, was a tenant at will or sufferance under the said P. A. B. and G. E. B. jointly; that the rent is not and was not payable in two parts, but was and is payable as a whole, and which said rent has heretofore been collected by and paid to the said G. E. B. or her agent; that the distrait on which this action was founded was without the consent and authority of the said G. E. B.; finally, the plaintiff says that there is now no rent in arrear, and there was no rent in arrear at the time that the distrait was made. And this the plaintiff is ready to verify."

Held, on demurrer, that plea was bad.

Demurrer to plea. C. P. No. 5, Phila. Co., March T., 1901, No. 717.

F. J. Knaus, for plaintiff; *H. Haverstick*, for defendants.

MARTIN, P. J., May 20, 1901.—A distress for rent claimed to be due having been made in this case, a writ of replevin was issued. A *narr* was filed, to which the defendants made an avowry and cognizance in the usual form, alleging rent in arrear, with sufficient detail as to the character of the tenancy: Stephen on Pleading, *242. A plea was filed to the avowry and defendant demurred. The plea is bad in form for several reasons. It commences with a demurrer to the avowry. It is not allowable to both plead and demur to the same matter: Stephen on Pleading, *278. This objection, however, is not of serious moment, as the demurrer was practically overruled by the plaintiff pleading over, and was virtually withdrawn at the argument of the present question.

The plea, however, is, in substance, *non tenuit* in manner and form set forth in the avowry, and then sets up the tenure under which plaintiff claims to have held, and the same plea also pleads *riens in arreir*. This latter plea admits the tenancy upon the terms stated in the avowry: *Hill v. Wright*, 2 Esp. Reps. 669. Pleading must not be repugnant: Stephen on Pleading, *377. These matters, each of which tends to raise a different issue, should be pleaded by a separate plea and not be combined in one.

There is still further objection, well founded, to the plea filed in this case. The denial of the allegation of the avowry that plaintiff is indebted for rent, creates a traverse upon which issue must be tendered (Stephen on Pleading, *230), and upon a negative and affirmative, the pleading should conclude to the country.

"To an avowry or cognizance for rent, the plaintiff may, in one plea in bar, deny the demise or tenancy, and in another, that any part of the rent was in arrear, concluding each to the country:" 1 Chitty on Pleading, *618.

New matter in the plea, when properly set forth in the forms and expressions applicable thereto, should conclude with a verification: Stephen on Pleading, *233. Pleading which is bad in part is bad altogether: Stephen on Pleading, *407.

The demurrer to the plea is therefore sustained and leave granted to plaintiff to amend.

O'Shea et al. v. Flannery et al.

Practice—Equity jurisdiction—Corporations—Officers—Legality of election.

The legality of the election of officers of a corporation must be tried and determined in an action of *quo warranto* and not by a proceeding in equity.

Demurrer to bill. C. P. No. 4, Phila. Co., March T., 1901, No. 2682.

Bill in equity filed against defendants, asking for an injunction to restrain them from exercising the duties of, or qualifying as, members of the board of directors of a corporation, and to appoint some suitable person to re-count the vote cast at an election for members of the board of directors and to procure to petitioners the rights and privileges of members of the board to which they had been elected.

J. Washington Logue and Edward B. Seibertlich, for plaintiffs.

John A. Ward and Joseph P. McCullen, for defendants.

ARNOLD, P. J., June 11, 1901.—We sustain the demurrer and dismiss the bill in this case for the reason that an election contest for directors of a corporation must be begun and carried on in an action of *quo warranto* and not by a proceeding in equity. We could not, under the bill before us, oust the defendants and put the plaintiffs in office, as we are requested by the plaintiffs. The most that a court of equity can do is to enjoin high-handed usurpers who have no color of right to an office, but the legality of an election to an office of a corporation must be tried and determined in an action of *quo warranto*. If the plaintiffs had called their petition a suggestion or information, and had asked for a writ of *quo warranto* instead of calling it a bill in equity, we might have considered the questions raised therein; but in deference to the law which keeps up a difference between the names and forms of actions at law and proceedings in equity, we are required to dismiss the present application.

Demurrer sustained. Bill dismissed with costs.

Pile's Estate.

Decedent's estate—Trustee's account—Including real estate and ground rents therein.

It is improper for a trustee to include in his account real estate and ground rents at an appraised value, as if he had so much cash in his hands. Such a form of accounting is highly irregular and productive of annoyance and additional labor to the court.

Decedent's estate—Commission—Right to same at settlement of final account.

The failure of a trustee to claim the compensation to which he would have been entitled at the settlement of a prior account will not prevent him from claiming that compensation at the settlement of his final account.

Decedent's estate—Loss on investment made by executor—Surcharge—Act of April 13, 1854.

Though it is more prudent to obtain the authority of the court before making an investment, still a trustee cannot be surcharged with a loss upon a sale of real estate when the purchase was made by him in good faith and with the knowledge and approval of all the parties interested, and when subsequently, upon the filing of his account as executor (in which credit was claimed for the investment and approval for the purchase), all parties joined in a written agreement for its confirmation, pursuant to which the account was confirmed by the court; such action is clearly within the purview of the Act of April 13, 1854, § 8, P. L. 368.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1891, No. 212.

John G. Johnson and John A. Toomey, for exceptants.

M. Hampton Todd, contra.

10 DIST. R.

Pile's Estate.

HANNA, P. J., June 15, 1901.—This account was originally prepared in a form, not novel, as counsel too often overlook the elementary rule of accounting to the court for audit and distribution, and charged the trustee, upon the debit side, not merely with a small sum of cash and some investments in securities, which is proper, but actually with ten separate pieces of real estate, houses and lots and ground rents, at an appraised value, as if so much cash in the hands of the trustee. As the court cannot distribute real estate, but only personalty and the proceeds of real estate sold, it is apparent such a form of accounting is highly irregular, productive of annoyance and additional labor to the court, and, in this instance, of a protracted postponement of distribution. This badly framed account was filed in September, 1900, and when soon thereafter reached for audit, owing to the fact that the real estate remained unsold and its conversion was necessary in order to make distribution, the audit was postponed to enable a conversion of the real estate to be made and not resumed until April, 1901, seven months after the filing of the account. Then a supplemental account of the proceeds of sale of the real estate was presented by the trustee, and, with the account filed in the first instance, formed the subject of audit and settlement. In this the trustee claimed to be allowed commissions upon the amount realized from a sale of the real estate and conversion of the personal securities, as to which we discover no good reason for complaint, but also upon a very considerable amount previously distributed upon the settlement of a prior account, and upon which no commissions were claimed or allowed the executors and trustees. While compensation or commissions could then have been claimed and allowed, yet the mere fact that no such claim was made is not conclusive against the right of the trustee, upon the settlement of his final account, to claim the compensation to which he may be entitled. His waiver worked no prejudice to the *cestuis que trust*. They then received more than they were entitled to. And it may well be inferred the trustees were content to wait until the termination of the trust, and then ask to be awarded the full compensation to which they would be entitled. As we think the commissions were properly allowed and in harmony with the rule established by Wister's Appeal, 86 Pa. 160, the exceptions thereto are dismissed.

The remaining exception is to the refusal to surcharge accountants with a loss upon a sale of certain real estate purchased by the executors and trustees as an investment. From all that appears, it is clear the executors made this use of the moneys of the estate advisedly and with the honest belief it was a judicious investment and eventually would prove beneficial to the estate, in which they were personally interested to the extent of one-third. They risked the loss of their own one-third share. Unfortunately, the investment proved disastrous, and the anticipation of certain railroad improvements, which it was believed would enhance not only the value of the properties they purchased, but of adjoining real estate owned by testator in his lifetime, was not realized. The result is, all the properties have greatly depreciated, and those purchased by the executors have been sold for much less than the cost price. The loss thus incurred through no fault of the executors and trustees, from a mistake, and the general depreciation of real estate in the vicinity, suggests the question, should they be obliged personally to pay out of their own estate the amount of the loss. From all the facts developed and conceded, it would be inequitable to thus make them personally liable. It undoubtedly would have been more prudent if the previous authority of the court to make the investment had been obtained. But the purchase was made in good faith and with the knowledge and approval of all the parties interested, and subsequently, upon the filing of the account of the executors, they joined in the written agreement for the confirmation of the account, in which credit was claimed for the investment and

Pile's Estate.

approval of the purchases by the executors. This account was confirmed by the court, and its action is clearly within the purview of the Act of April 13, 1854, § 3, P. L. 368. Furthermore, it is a harsh demand to make a trustee answerable for a deficiency not owing to his willful default. Common skill, prudence and caution are all that is required: *Neff's Appeal*, 57 Pa. 98. If he acts as others do with their own property and in good faith, he is not liable beyond what he actually receives: *Bartol's Estate*, 182 Pa. 407. And especially in the absence of fraud or supine negligence. And a trustee will never be surcharged for a loss arising from mere error of judgment without willful default: *Pleasanton's Appeal*, 99 Pa. 369; *Hinkle's Estate*, 44 Legal Intell. 285. And in the recent case of *Gouldsey's Estate*, 10 District Reps. 216, it is held a trustee is not responsible for the depreciation in value of an investment which was only made after the fullest investigation.

For these reasons, the exceptions are dismissed and the adjudication confirmed.

Sunderland's Estate.

Wills—Maintenance of real estate—Sale—Election to take real estate—Effect of latter on provision for maintenance.

There being no direction in a will that the proceeds of sale of testator's house shall not be received by the original devisees, a positive direction that the house shall be "maintained for one year, if not sold before, as it must be sold as soon as a purchaser can be secured within two years," is not affected by reason of the devisees electing to take the land itself.

Decedent's estate—Counsel fee—Commissions.

Where the collection of a mortgage must precede any distribution, commissions are to be allowed on the mortgage precisely as if the amount was already held in cash.

A commission of three and one-half per cent. on the principal and five per cent. on the income is sufficient when the estate is free from debt or complication, and is composed of a mortgage and a few items collected in cash.

Where the counsel representing the accountants as executors represented the children as legatees, and their services in the former capacity were comparatively insignificant, and the account contains a credit of \$150 for counsel fees, an additional allowance of \$150 will not err on the side of liberality.

Where all the parties were represented by counsel, and the reduction of credits, secured by counsel for one of the parties, was not desired by the others, the compensation of counsel will not be allowed out of the common fund.

Wills—Construction—Life-estate with limitations over—Words importing death.

Tetator bequeathed "to my daughter, M., \$7500 from the aforesaid mortgage. . . . This is absolutely to her after my decease. Should she not have issue, this is to be returned to my estate. Also \$5000 in other securities or cash." He disposed of his residuary estate as follows: "It is my desire that the Mill property be sold before or not less than five years after my decease, and the proceeds, with any balance of my estate, to be divided into seven parts, one to each child except M.'s part. Should she not have issue her part is to be divided to the other six parts. Should she have issue her part goes to that issue." Held, that the gift over of the general legacy to M., if she should not have issue, referred to her death without issue in the lifetime of the testator, and on her surviving him she took an indefeasible interest, but that the same words in the residuary clause referred to her own death as distinguished from the testator's, and she took an estate for her life only in the residuary estate, with limitation to her issue should she have issue at her death, and to her brothers and sisters if she should not.

Exceptions to adjudication. O. C. Phila. Co., April T., 1900, No. 606.

John Weaver, for exceptants.

Robert J. Wright and James Gay Gordon, contra.

PENROSE, J., June 1, 1901.—The testator divides his estate among his seven children as follows: \$15,000 to Emma; certain real estate and \$1500 to William; 10 DIST. R.

Sunderland's Estate.

his residence and furniture, with \$12,500, each, to Mary and Lavinia; certain real estate and \$5000 to John; \$12,500 to Martha; and \$15,000 to Thomas: the residue being given as hereinafter stated.

By a codicil he directs that the house so given to Mary and Lavinia shall be "maintained for one year, if not sold before, as it must be sold as soon as a purchaser can be secured within two years." There is no direction that the proceeds of sale shall not be received by the original devisees; and as a clear gift in the will is not to be cut down by subsequent words or a codicil except to the extent expressed or clearly implied (*Whelen's Estate*, 175 Pa. 23), and as parties to whom proceeds of sale are given may elect to take the land itself (*Burr v. Sim*, 1 Whart. 252), it is not easy to see how the positive provision that the property shall be maintained at the expense of the general estate, for one year, can be affected because the devisees or legatees have so elected. The first exception is, therefore, overruled.

The legacies are expressed as being so much from a mortgage for \$50,000 and so much in cash or other securities. Objection was made to the allowance of any commissions on this mortgage, which, it would seem, has not yet been collected. Its collection, however, as the auditing judge has said, must, necessarily, precede any distribution, and commissions are to be allowed precisely as if the amount were already held in cash. The second exception is also overruled.

But it is further objected that upon an estate so large as this (\$114,035.38), composed of the mortgage referred to and a few items collected in cash, an allowance of commissions at five per cent. is excessive—the estate being free from debt or complication, and, as the account shows, there being but eleven items of credit, including cost of filing account, commissions, and counsel fees. This objection appears to be well founded (*Pusey v. Clemson*, 9 S. & R. 204; *Walker's Estate*, 9 S. & R. 225; *Whelen's Appeal*, 20 P. F. Smith, 410; *Lang's Estate*, 15 Phila. 593). Allowing, under *Stevenson's Estate*, 4 Whart. 98, two and one half per cent. for responsibility, an additional one per cent. will amply compensate the services rendered by the accountants as executors. It is true that questions arise under the will with regard to the share of Martha Walker, one of the daughters: but with this, except in their capacity as legatees, the accountants have no concern. They are mere stakeholders, having no additional labors imposed upon them as executors by reason of questions of distribution. The third exception is sustained, the commissions reduced, on principal, to three and one half per cent. (five per cent. being allowed on income), and the difference, \$——, being added to the balance for distribution.

What has thus been said with reference to the third exception applies also to the fourth. Counsel representing the accountants as executors, represented them and all of the children except Martha as legatees. Their services in the former capacity were comparatively insignificant. The account contains a credit of \$150 for counsel fees, and an additional allowance of \$150 will not err on the side of illiberality,—especially as much of what was done was made necessary by the manner in which the account was stated, restated, and re-restated. The allowance in the adjudication is reduced to \$150, and the difference, \$350, added to the balance of principal. For the sum thus disallowed as against the estate, the parties represented must be looked to in their individual capacity.

The bequests to the daughters are thus expressed:—"To my daughter Emma . . . of said mortgage \$10,000, also \$5000 of other securities or cash absolutely. . . . To my daughters Mary and Lavinia . . . \$7500 to each of the said mortgage . . . also \$5000 in other securities for each or both absolutely. . . . To my daughter Martha Walker \$7500 from the aforesaid mortgage. . . This is absolutely to

her after my decease. Should she not have issue this is to be returned to my estate. Also \$5000 in other securities or cash."

The gifts to the three sons have already been sufficiently stated.

The disposition of the residuary estate is as follows :—"It is my desire that the Mill property be sold before or not less than five years after my decease, and the proceeds with any balance of my estate to be divided into seven parts, one to each child except Martha Walker's part. Should she not have issue her part is to be divided to the other six parts. Should she have issue her part goes to that issue."

The auditing judge, following the well-settled principle, of which *Mickley's Appeal*, *Karker's Appeal*, *Biddle's Appeal*, &c., &c., &c., are illustrations, held that the legacy to Martha being given, in express terms, "absolutely," the limitation to issue, &c., must be understood as referring only to her death in the lifetime of the testator, and the ruling in this respect has not been excepted to. But he also held that Martha took no part of the residuary estate, one seventh of which he directed should be held, principal and income, for her issue, should she leave any, or to the other children of the testator if she should not. It is claimed on behalf of the latter, though they have filed no exceptions, that the share should now go to them, as Mrs. Walker has not, and never has had, issue : while, on the other hand, it is contended that the gift of her residuary share is governed by precisely the same principle which was applied to the legacy, and that it also should be awarded to her absolutely.

It is clear that the award to the executors to hold as above cannot be sustained,—involving, as it necessarily does, a trust not created by the will, and an accumulation, indefinite in duration and not for the benefit of an existing minority, forbidden by statute. If Mrs. Walker is not entitled to any estate, the share must go to the other children of the testator. But it is a fundamental rule in the interpretation of wills that an heir will not be disinherited except by express words or necessary implication, and that all doubts will be resolved in his favor and against his exclusion. That this testator did not intend that his daughter should have no part of his residuary estate is manifest. He speaks of one seventh as "*Martha's part*," and this recognition of her interest is repeated when, in providing for the contingency of her having no issue, it is declared that "*her part*" is to be divided to the other six parts ; and again, "*should she have issue*" "*her part*" "*goes to that issue*"

The will was executed Nov. 27, 1897 : the testator died Jan. 22, 1898,—less than two months later. It is plain that an immediate limitation of Martha's share, to her issue or to his other children, was not contemplated. He knew that she was childless, and the birth of issue is referred to as a future event—"should she not have issue ;" "*should she have issue*:" and of course a construction which suspends ownership and leads to an illegal accumulation will not be adopted if any other is possible. He appears to have been his own scrivener, evidently unskilled in the use of language. He has expressed himself elliptically, but his intention is clear. To all of his children except Martha he gives absolute interests : to her, for life only, with limitation to her issue, "*should she have issue*" (at the time of her death), to her brothers and sisters, if she should not. In this way a meaning is given to every word in the residuary clause.

There is an obvious difference in the language of the bequest to Martha of the \$7500, which, in terms, is declared to be given absolutely ; while in the residuary clause, the limitations to issue, &c., &c., are an integral and original part of the gift.

The seventh and ninth exceptions are sustained,—one seventh of the balance of principal being awarded to Mrs. Walker upon the entry of security for the 10 Dist. R.

Sunderland's Estate.

protection of the interests taking effect at her death, and one seventh of the balance of income to her absolutely.

We do not think that the doctrine of Kennedy's Estate, 28 Crumr. 479, can be applied to this estate. There, there were thirty-two beneficiaries, only one of whom was represented before the auditing judge; and as all had the benefit of the services of counsel thus employed, it was thought proper that his compensation should come out of the common fund. The case was exceptional, and so declared both in the Supreme Court and in the court below. Here all parties were represented by counsel, and the reduction of credits, secured by counsel for Mrs. Walker, was not desired by the other parties. The decision in *Com. v. Order of Solon*, 193 Pa. 240, rules the question.

The first, second, fifth, and eighth exceptions are overruled, the others are sustained, and the adjudication modified in accordance with this opinion.

Construction of Act of May 11, 1901.

Criminal law—Ex post facto laws—Commutation of sentence for good behavior—Act of May 11, 1901.

The Act of May 11, 1901, providing for the commutation of sentences for good behavior of convicts in prisons, penitentiaries, workhouses and county jails, is not in conflict with the constitution of Pennsylvania.

It does not interfere with the pardoning power ordained by the constitution, nor is it an *ex post facto* law.

It is retroactive, and applies to all persons convicted in the courts of Pennsylvania for crimes committed prior to the approval of the Act, but does not apply to persons convicted in the United States courts and confined in the State penal institutions.

Attorney-General's Department. Opinion to Hon. William A. Stone, Governor, in reference to the Act approved May 11, 1901.

ELKIN, Att'y-Gen., June 13, 1901.—There have been referred to this department several communications addressed to you from the Board of Inspectors of State Prisons, asking for instructions in reference to the Act approved May 11, 1901, providing for the commutation of sentences for good behavior of convicts in prisons, penitentiaries, workhouses and county jails, and in answer thereto I beg leave to submit the following suggestions and opinion:

A question has been raised about the constitutionality of the Act referred to, because the commutation therein provided might be construed to interfere with the pardoning power ordained by the constitution.

The answer to this contention is found in the Act itself. The Board of Prison Inspectors makes a monthly report to the Governor, recommending prisoners who are or will be entitled to the benefits of the Act. All the facts are laid before the Board of Pardons, which board, after full hearing upon due public notice, and in open session, makes recommendation to the Governor, who finally grants the pardon or commutation in the manner provided by the constitution. It will thus be seen that every constitutional requirement in the granting of a pardon has been set out in the Act, and therefore the question of the validity of the statute on these grounds cannot be sustained.

A question has been raised as to whether the new Act should apply retroactively; that is to say, whether convicts confined in prisons for crimes committed prior to the approval of this Act, and who are serving out sentences

for pre-existing crimes committed, are entitled to the benefits of the commutation provided under the new Act.

The new commutation Act is general in its terms, and applies to prisoners confined in the penal institutions therein designated, over which the State exercises control. There are no limitations in the Act itself, but it has been suggested that if it were made to apply to prisoners serving out terms for crimes antecedently committed, it would be an *ex post facto* Act, and therefore come within the inhibition of the constitution forbidding the enactment of such laws. This contention cannot be sustained on authority.

Mr. Justice Chase, as far back as 1798, settled this question in an opinion handed down in the case of *Calder v. Bull*, 3 Dallas, 391, wherein, among other things, he states the following principle: "Every law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or pardon. They are certainly retrospective, and literally both concerning and after the facts committed. *But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction.*"

Under this authority and a number of others following in the same line, the principle is well settled that an *ex post facto* law is one which declares an act previously done criminal and punishable, and which was not so when the act was committed, and which declares a much higher punishment than existed at the time; but an Act plainly mitigating the punishment of an offence is not *ex post facto*; on the contrary, it is an act of clemency. Following these decisions, a number of cases may be cited showing that the prevailing doctrine in such cases is that a law is not *ex post facto* which mitigates the punishment in any manner whatever: 7 Am. & Eng. Ency. of Law, 530; *State v. Kent*, 65 N. C. 311; *Dolan v. Thomas*, 12 Allen (Mass.), 421; *McInturf v. State*, 20 Texas Appeals, 335.

From these authorities, it clearly appears that the legislature had the power to enact a law regulating the commutation of sentences, as well of those prisoners who are serving out their terms as those who should be sent to prison after the enactment of the law. That the Act in question applies to all prisoners confined in penal institutions in our State is plainly apparent from its express provisions.

I am of opinion, therefore, that all prisoners convicted in our State courts and serving out their terms of imprisonment in the prisons, penitentiaries, work-houses and county jails of this State, are entitled to the commutation provided in the Act.

The Act repeals all former Acts or parts of Acts in conflict with its provisions, and must therefore be held to take the place of the old commutation Act of May 21, 1869, so that hereafter, in the recommending of prisoners for the benefits of the commutation, the later Act should be followed.

The question has been raised whether the new commutation Act should apply to Federal prisoners confined in our State penal institutions. Persons convicted in the United States courts for the commission of crimes over which such courts have jurisdiction may be sentenced to imprisonment in our State penitentiaries. The power, however, that sent them to prison, as well as the power which can relieve them from such imprisonment, is necessarily lodged in the Federal government. The President alone has the right to grant a

10 DIST. R.

Construction of Act of May 11, 1901.

pardon to such prisoners, and the State authorities have no right to interfere with Federal prisoners confined in our State prisons. There is no provision in the new commutation law applicable to United States prisoners, and such prisoners must look to the Act of Congress for the commutation to which they are entitled. The Act of Congress of May 3, 1875, is in force, and Federal prisoners should receive such commutation as is provided therein.

From Guy H. Davies, Harrisburg, Pa.

Commonwealth v. Buffalo and Susquehanna Railroad Co.

Railroads—Amount of corporate indebtedness—Bond issue—Outstanding stock—Status of paid-up stock of corporation held in its own treasury—Acts of April 4, 1868, and May 7, 1887.

Where a railroad corporation acquired by purchase and held in its treasury all the outstanding paid-up capital stock of three other railroad corporations, and then the four corporations merged, and the consolidated corporation exchanged the stock so held in its treasury for its own capital stock in like amount, and held the same in its place in its treasury, such stock of itself, so held by it, is outstanding stock, and, together with its other capital stock issued and outstanding, represents the amount to which the railroad corporation is authorized to issue its corporate bonds or other certificates of indebtedness, under the Acts of April 4, 1868, § 8, P. L. 62, and May 7, 1887, § 8, P. L. 94.

Corporations—Increase of indebtedness—Act of Feb. 9, 1901.

The Act of Feb. 9, 1901, entitled "An Act to provide for increasing the capital stock and indebtedness of corporations," extinguishes the proportion which the authorized issue of indebtedness must bear to the amount of paid-up capital stock, and restricts an increase of stock or bonds, or both, by a corporation, by two things only, the consent of the stockholders of the larger amount in value and the business necessities of the company, to be determined by the body having authority to issue stock or create corporate indebtedness.

Injunction bill. C. P. Dauphin Co., Equity Docket, No. 278.

James M. Lamberton and John Fox Weiss, for Commonwealth.

M. E. Oltsted and A. C. Stamm, for defendant.

WEISS, J., May 29, 1901.—The Buffalo and Susquehanna Railroad Company was organized pursuant to the general railroad laws of the State, and prior to March 30, 1901, had absorbed by merger the corporate rights and privileges of a number of other railroads, and had, on and prior to that date, issued outstanding and fully paid capital stock amounting to \$3,518,000. It increased its authorized capital stock to 300,000 shares of the par value of \$50 each, and issued, fully paid, 70,360 shares, equal to \$3,518,000.

On March 30, 1901, three other companies were merged into and with it, forming a consolidated company under the same name—Buffalo and Susquehanna Railroad Company. The companies whose powers and franchises merged into the defendant company were the Susquehanna and New York Railroad Company, which had an authorized capital stock, issued and fully paid, of 3100 shares of the par value of \$50 each, equal to \$155,000; the Galetton and Eastern Railroad Company, with an authorized capital stock, issued and fully paid, of 500 shares of the par value of \$50 per share, aggregating \$25,000, and the Northern Susquehanna Railroad Company, with an authorized capital stock, actually issued and paid for in cash at par, of 8575 shares of the par value of \$100 each, or \$857,500, the stock of all which the Buffalo and Susquehanna

Railroad Company had acquired by purchase at not less than par, and held the stocks thus purchased and owned in the treasury of the company, prior to March 30, 1901, the date of the last merger.

The article of agreement, through and by which the merger of the rights and franchises of the three railroads with the defendant company is effected, provides that the authorized capital stock of the consolidated company shall be the aggregate of the authorized amount of capital stock of the four companies, viz., \$16,037,500, and that the amount of stock to be issued should be the amount of stock of the four companies already actually paid up.

It was further provided that the \$1,037,500 stock theretofore issued by the three companies other than the defendant company and purchased by the latter company prior to March 30, 1901, should be surrendered and canceled; and that certificates of stock of the new or consolidated company should be issued by it in lieu thereof, and held in its treasury to be used by the defendant company for its own proper purposes.

A stockholder of the defendant company made complaint in writing to the attorney-general of the Commonwealth, as he had a right to do, in accordance with the provisions of the 4th section of the Act, entitled "An Act to enforce against railroad corporations the provisions of section 7, of art. XVI, of the constitution," approved May 7, 1887, P. L. 94, whose duty it became, and who observed it, to institute proceedings in equity in this case to enforce the provision of this Act of Assembly.

The Commonwealth accordingly filed a bill, stating that the company had issued and had now outstanding capital stock in the amount of \$3,518,000; that it claims to hold in its treasury shares of its own capital stock in the amount of \$1,037,500, which is not capital stock within the meaning of the Acts of April 4, 1868, and May 7, 1887, so as to authorize the company to issue bonds for or against the same, because the said shares are considered as canceled. The 8th section of the Act of April 4, 1868, P. L. 62, and the 3rd section of the Act of May 7, 1887, P. L. 94, enact, respectively, as follows:

"The president and directors of any railroad company created under this Act shall have power to borrow money not exceeding the amount of capital stock subscribed, and issue the bonds of the company therefor in such amounts as shall not exceed double the amount actually paid up of the capital stock subscribed."

"That no railroad corporation of this Commonwealth shall issue its corporate bonds, or other certificates of indebtedness, until after the full amount subscribed of its authorized capital stock shall have been fully paid for, either in money, labor done or property received; nor shall it, at any time, issue such bonds or other certificates for an amount in excess of its capital stock, as shown by its statement on file in the office of the secretary of the Commonwealth, to have been actually paid for, either in money, labor or property received, in accordance with the provisions of the 7th section of art. XVI of the constitution."

The bill further stated that the company had already issued bonds secured by mortgage in the sum of \$3,518,000, and charged that its purpose and intention was and is to issue additional bonds to be secured by mortgage in and to an amount not less than \$3,750,000, without the issuance, subscription or payment of any further or greater amount of capital stock than is now issued and outstanding; and that the issue of bonds in excess of \$3,518,000, heretofore issued and outstanding, is violative of the Acts hereinbefore referred to and cited.

The Commonwealth prays that the defendant company be enjoined and restrained, preliminary until hearing and perpetually thereafter, from issuing and disposing of any bonds in excess of \$3,518,000, or at least until such time as the company defendant may authorize capital stock to be subscribed for in 10 Dist. R.

amount beyond, and in addition to, that already outstanding and paid in, and for further relief.

The motion to continue the injunction must prevail if the stock of the consolidated company, and held by it in its treasury, had lost or does not possess qualities against which loans may be made by bond or mortgage, or both, in the manner prescribed by law; or if, notwithstanding its possession of bonding characteristics, no statutory authority exists to enable the company to increase its bonded indebtedness.

The Buffalo and Susquehanna Railroad Company as it existed prior to March 30, 1901, purchased the shares of the three companies named, aggregating in amount \$1,037,500, and held them until the merger of the four companies on that day, when they were exchanged, or agreed to be exchanged, being fully paid up, for shares in like amount of the consolidated company, and thereupon they were surrendered and canceled, and the shares issued by the defendant company substituted and placed in their stead. It is not gainsaid that the stock issued by the three companies was valid and fully paid up. It was purchased by the then Buffalo and Susquehanna Railroad Company and held by it. The defendant company issued new stock in like amount in exchange for, and in substitution of, the surrendered and canceled stock for the uses of the corporation. Of necessity, the new stock was fully paid up, and we are of the opinion that this stock was outstanding and was held and owned by the defendant company, just as the shares of the three other companies were held and owned prior to the consolidation, and just as though the \$1,037,500 were stock issued by other corporations, and represented, as it did, actual cash investments, and bought by the company defendant.

That the defendant company had the right to purchase and hold the shares of stock of the three companies is manifest from the provisions of the 1st section of the Act of Assembly, approved March 17, 1869, P. L. 11, which enacts as follows:

"That it shall and may be lawful for any railroad company or companies created by, or existing under, the laws of this Commonwealth, from time to time, to purchase and hold the stock and bonds, or either, . . . of any other railroad company or companies chartered by it, or existing under the laws of any other State."

It is equally certain that the company can hold shares issued by itself, under the powers enumerated and conferred upon companies by the Act of Assembly, approved March 31, 1868, P. L. 50, which provides as follows:

"That it shall and may be lawful for . . . the directors, managers or trustees" of "any and all companies incorporated or organized under the laws of the Commonwealth, . . . with the approval of the stockholders, to invest the surplus or other funds or earnings of such companies in mortgages on improved real estate, in ground rents, in the loans of the United States, in the purchase from holders thereof any of the shares of the capital stock of the respective company, and also in the public debt of the State of Pennsylvania, or of the city of Philadelphia, or in other good stocks or securities, and to sell and transfer the same, and to reinvest the proceeds of such sales in securities or stocks of the like kind."

It is undisputed that the Buffalo and Susquehanna Railroad Company, as it existed prior to March 30, 1901, had an outstanding capital stock issued and fully paid up of \$3,518,000, which, with the shares of stock aggregating \$1,037,500, acquired and held as before stated, aggregates stock outstanding and fully paid-up of \$4,555,500; and that, we find, is the amount of capital stock subscribed, issued and fully paid up, for and against which it is authorized and empowered by law to issue its corporate bonds or certificates of indebtedness.

DISTRICT REPORTS.

Commonwealth v. Buffalo and Susquehanna Railroad Co.

The Act of April 4, 1868, authorizes the company defendant to issue bonds in an amount not exceeding "double the amount actually paid up on the capital stock subscribed," and the company does not now purpose to issue bonds in excess of the amount authorized by that Act. Nor does the defendant company intend to issue its corporate bonds "for an amount in excess of its capital stock" fully paid for, as provided in the Act of May 7, 1867, so far as its provisions relate to or are in force and binding upon it.

The Buffalo and Susquehanna Railroad Company as it was prior to March 30, 1901, clearly had the right to have an indebtedness of \$3,518,000, that being the amount of its paid-up capital stock. The other three companies clearly had the right to an aggregate indebtedness of \$1,037,500, the amount of their actually paid-up capital stock. The defendant by the merger acquired all their rights to the issue of an indebtedness aggregating \$4,555,500, unless the paid-up stock was decreased, and it certainly was not, as the merger agreement shows that it was maintained at precisely the aggregate amount of the actually paid-up stock of the four companies uniting in the merger. And we are of the opinion that the stock of the three companies, whose rights and privileges became merged into and with the Buffalo and Susquehanna Railroad Company as it then was, was fully paid, live stock before the consolidation; that it retained its vital characteristics in its transit into the treasury of the defendant company; and that the latter may and has the authority of law to issue its corporate bonds, or certificates of indebtedness, to the full amount of its paid-up capital stock issued and outstanding, viz., \$4,555,500.

This much may confidently be said respecting the laws in force prior to the Act of Assembly entitled "An Act to provide for increasing the capital stock and indebtedness of corporations," approved Feb. 9, 1901, the 1st section of which enacts:

"That the capital stock, or indebtedness, or both, of any corporation created by general or special law may, with the consent of the persons or bodies corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of the corporation. Such increase of either may be made at once, or from time to time, as the stockholders aforesaid may determine."

Whenever the holders of the larger amount in value of the stock of a corporation consent, the company may increase its indebtedness to such an amount and extent as may be deemed necessary for the furtherance of its business and corporate aims and purposes. It is a limitation and restriction upon an increase of stock or bonds, or both, by a corporation, by two things only—the consent of the stockholders of the larger amount in value, and the business necessities of the company, to be determined by the body having authority to issue stock or create corporate indebtedness. The defendant has accepted the provisions of art. XVII of the Constitution, which is a prerequisite to the derivation of any benefit by a railroad company under the same, and reference is made to this Act to indicate the extended and enlarged powers given to corporations in respect to the increase of capital stock or indebtedness.

The defendant company made application pursuant to its provisions in respect to the proposed increase of its indebtedness, and acted throughout in conformity with that Act, and made return of the doings by the holders of the larger amount in value of the stock to the secretary of the Commonwealth, in whose office the certificate thereof was filed on April 17, 1901.

While the right of the defendant company to issue bonds in extent to its paid-up stock of \$4,555,500 is predicated upon the provisions of the Acts of Assembly referred to, yet the power to increase the bonded indebtedness to an

10 DIST. R.

Commonwealth v. Buffalo and Susquehanna Railroad Co.

amount circumscribed only by business requisites, is expressly given by the Act of Feb. 9, 1901, and that, too, uncontrolled by the amount of capital stock issued.

The tendency of legislation in this respect is the extinguishment of the proportion which the authorized issue of the indebtedness bore to the amount of the paid-up capital stock.

The Act broke down the partition wall between paid-up capital stock and corporate debt; and, to proclaim against possible amendatory construction, it repealed all Acts and parts of Acts inconsistent with its provisions.

Our opinion is, that the Buffalo and Susquehanna Railroad Company, defendant, having complied with the provisions of the Act of Feb. 9, 1901, is authorized and empowered by its terms to increase, *bona fide*, its indebtedness to such an amount "as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of the corporation" defendant.

The motion to continue the injunction is overruled and the bill dismissed, at the costs of the complainant.

A decree may be drawn in accordance with the foregoing opinion and findings, which, when made, the prothonotary will enter *nisi*, and to which exceptions may be filed within the time prescribed by the equity rules.

From William M. Hargest, Harrisburg, Pa.

Ebe's Appeal.

Municipal corporations—Streets—Vacation of—Act of May 16, 1891, construed—Appeals under.

The Act of May 16, 1891, P. L. 75, providing "for the opening, widening, straightening, extending, grading, paving, macadamizing or otherwise improving any street or alley," is not applicable to a petition for an ordinance for the vacation of a street, and hence no appeal lies from the decision of the borough councils that the petition for such vacation is sufficient.

Conveyances—Construction of—Base fee—Reversioners of are not such owners as are required to petition for vacation of street.

Where a person agreed with a railroad company to convey to it for its use a strip of land, held, that such agreement passed a base fee in the land, determinable upon its ceasing to use it as a railroad, and therefore the signature of a subsequent sheriff's vendee of the land on both sides of the railroad was unnecessary to a petition for the vacation of a street crossing the railroad.

Municipal corporations—Right of husband to appeal when title is in wife's name—Amendment of parties after expiration of time for taking appeal—Husband and wife—Parties—Amendments.

The husband of a woman whose land will be injured by a proposed vacation of a street is not the proper person to appeal in his own name, either as tenant by the curtesy initiate or as agent for his wife, from the action of councils in enacting such an ordinance, and the adding of his wife's name as an appellant by amendment after the time given by the Act for an appeal is of no avail to remedy the matter.

Appeal from ordinance of borough of Edgewood. C. P. No. 2, Allegheny Co., Oct. T., 1900, No. 441.

John S. Wendt (Watson & McCleave with him), for appellant.

David S. McCann and George B. Gordon, opposed.

SHAFFER, J., Feb. 7, 1901.—The borough of Edgewood lies on both sides of the Pennsylvania Railroad, and there is but one grade crossing over the railroad within the lines of the borough, which is the crossing of Swissvale avenue. This crossing is alleged to be much frequented and dangerous. As a result

Ebe's Appeal.

of negotiations between the borough authorities and the railroad company, it appears to have been agreed that the railroad company shall put a tunnel under the railroad some 300 feet north of the crossing of Swissvale avenue, and that the crossing of Swissvale avenue shall be vacated, and the grade crossing thereby abolished.

The title of the Pennsylvania Railroad to the lands occupied by it for its tracks is derived from an agreement, duly acknowledged and recorded, made by James Kelly in 1847, he being the owner of a large tract of land on each side of the proposed railroad. His agreement is "to convey to the said company for the use of the said Pennsylvania Railroad a strip of land four rods in width," &c., as soon as said conveyance may be demanded after the road has been permanently located, and releasing all claim for damages by reason of the appropriation or occupancy of said strip of land. A long time thereafter all the interest remaining in James Kelly in a large tract of land (of which the crossing in question is a part) became vested in the National Bank of Commerce by sheriff's sale of the interest of James Kelly.

In June, 1900, a petition for the vacation of Swissvale avenue, between the western and eastern lines of the right of way of the Pennsylvania Railroad, duly signed by the Pennsylvania Railroad Company, and also signed "A. C. Knox, Vice President, Pgh. Ntl. Bk. Com.," was presented to the councils of the borough of Edgewood, as being a petition signed by a majority in interest and number of the owners of property abutting on the part of the street to be vacated, and in pursuance thereof an ordinance was passed, which was approved by the burgess on July 10, 1900, for the vacation of that part of the street lying between the western and eastern lines of the right of way of the railroad company.

On Sept. 8, 1900, R. A. Ebe presented his petition, alleging that he was a person interested in the matter of the ordinance above mentioned, and that the petition for said ordinance was not signed by a majority in interest and number of the owners of property abutting upon the part of the street proposed to be vacated, and appealing to the court from the action of the burgess and councils in enacting the ordinance in question. After a commissioner had been appointed to take testimony, on Nov. 20, 1900, Aurelia Ebe, wife of R. A. Ebe, presented her petition jointly with her husband, alleging that the appeal of R. A. Ebe had been taken in virtue of his interest and estate in a certain lot of ground on Swissvale avenue, which is about 400 feet from the part proposed to be vacated, and that he had inadvertently overlooked the fact that the title to the lot was in the said Aurelia Ebe, and praying the court to allow the record to be amended by joining the name of Aurelia Ebe as appellant jointly with her husband, which was allowed, without prejudice to any claim of the borough or others interested as to the time for taking the appeal.

As we understand from the arguments and briefs of counsel, the appeal herein is taken under the provisions of the 10th section of the Act of May 16, 1891, P. L. 75. Counsel for both parties seem to have taken for granted that this section gives such appeal to this court in case of an ordinance for the vacation of a street, and whether it does so or not was not discussed by them. Its words are: "After the passage or approval of any ordinance for the opening, widening, straightening, extending, grading, paving, macadamizing, or otherwise improving any street or alley," notice shall be given and an appeal may be taken to the Common Pleas within sixty days by any person interested. There is here no mention of an ordinance for the vacation of a street, unless, indeed, vacating can be said to be "otherwise improving;" but the words "opening, widening, straightening and extending" refer to the 9th section of the Act, which gives the power to vacate streets, and the words "grading, paving, 10 DIST. R.

Ebe's Appeal.

macadamizing or otherwise improving" are taken from the 8th section of the Act, which gives power to improve streets in those ways; and the words "otherwise improving," being taken from the 8th section, must refer to the same kind of ordinances as are there authorized to be enacted, and are undoubtedly intended to include other methods of improving streets, similar to paving, macadamizing, etc. No one would contend that the words "otherwise improving," in section 8, would give authority to the city councils to vacate a street, and the words "otherwise improving," in section 10, cannot be held to include a vacation, unless they are interpreted to mean something else than that which they plainly mean in section 8. And if the word "improving," in section 10, was intended to cover all the various Acts in regard to streets authorized by previous sections, it would have been sufficient to have used that word alone in section 10, without enumerating the various kinds of ordinances of which notice should be given. In *Gant's Appeal*, 40 Pitts. L. J. 219, a case arising in this court, the question principally discussed appears to have been whether the petition was to be signed by those abutting on the part of the street to be vacated or upon the whole street, and a suggestion that the section did not apply to a vacation was dismissed, apparently without argument. Why the legislature should give an appeal in the enumerated cases, and not in that of a vacation, may not be apparent; but the vacation of a street is of so different a nature from any of the other cases enumerated that it may well have intended to leave to the judgment of the councils matters which, in regard to new improvements, were to be subjected to the scrutiny of the court. But whether there is any apparent reason for it or not, we cannot read into the Act something which is not there, but which we may surmise was an unintentional omission.

Subject to correction, therefore, in case the matter has been decided in some case or provided for by some legislation not called to our attention, we are of opinion that section 10 does not apply to a petition for an ordinance for the vacation of a street, and that the Act gives no appeal from the decision of the councils that a petition for such vacation is sufficient.

If, however, the Act does give an appeal in such case, the questions which arise are, first, is the petition sufficiently signed? and secondly, is R. A. Ebe a party interested having a right to appeal?

As to the first question, we are of opinion that the agreement of James Kelly with the railroad company gives the railroad company more than a mere easement, and at least a base fee in the land, determinable upon their ceasing to use it as a railroad. The conveyance is not of a right of way, but of a strip of ground, and we are of opinion, therefore, that the signature of the bank was unnecessary. If this be correct, it is not necessary to discuss the question whether the signature of the bank by its vice-president, made without express authority from the bank, is sufficient, or whether the subsequent ratification by the bank would make it good for the purpose of this proceeding, if it were not otherwise sufficient.

Conceding that the land of Mrs. Ebe will be injured by the vacation of the street, and that she may have a right to recover damages for the same, and that the owner of that land would be a proper appellant, we do not think that her husband, as tenant by the courtesy initiate, or as agent for his wife, as he alleges himself to be, was the proper person to appeal in his own name from the action of councils in enacting the ordinance in question, and the adding of his wife's name as an appellant, by amendment, after the time given by the Act for appeal, did not mend the matter in the least.

And now, Feb. 7, 1901, it appearing to the court that if the Act of Assembly gives an appeal in this case, the "improvement" of Swissvale avenue in ques-

VOL. 10—24

Ebe's Appeal.

tion was petitioned for by the requisite majority in number and interest, and, so far as the court has authority in the premises, the said ordinance is approved.
From Edwin L. Mattern, Pittsburgh, Pa.

Ebe's Appeal.

Municipal corporations—Streets—Act of May 16, 1891—Appeals under—Who liable for costs of.

Though the Act of May 16, 1891, P. L. 75, relating to street improvements in boroughs, does not specifically or separately provide for the costs of appeal thereunder, a fair consideration of its terms makes the borough properly chargeable with such costs.

Appeal from ordinance. C. P. No. 2, Allegheny Co., Oct. T., 1900, No. 441.

John S. Wendt (Watson & McCleave with him), for appellant.

David S. McCann, opposed.

SHAFER, J., April 12, 1901.—Our attention has been called to the fact that, in the opinion heretofore filed (*ante*, page 367) and the order approving the ordinance herein, no disposition was made of the costs of the case, and the parties herein have been heard, upon the motion of the borough to have an order disposing of the costs.

The proceeding was under the 10th section of the Act of May 16, 1891, P. L. 75. After the filing of the petition for appeal herein, a commissioner and examiner was appointed, a considerable amount of testimony was taken and a report made by him. Each party now claims that the compensation of the commissioner and the other costs of the appeal should be paid by the other party, if at all.

It must be admitted that the Act does not specifically or separately provide for the cost of appeal. The only provision in the Act appears to be that contained in section 4, which provides that all court costs "incurred in the proceedings aforesaid" shall be paid by the borough, the proceedings aforesaid being those, among others, upon the vacation of streets authorized by the 1st section of the Act.

While the proceedings on an appeal are not provided for until the 10th section, yet that section and those immediately preceding it are but an extension and specification of the powers given in the 1st section, and the proceeding to ascertain whether an ordinance is valid or not is a part of the proceedings preliminary to the appointment of viewers, and necessary to be disposed of before viewers can be appointed. In the 10th section the court is directed to "inquire and determine" whether the petition was signed by the requisite majority, and this, in many cases, could obviously not be done without the appointment of a commissioner.

We think, therefore, that the fee of a commissioner is properly chargeable as a part of the court costs of such proceeding, and is to be paid by the borough. It is true that in the present case we held that the 10th section does not apply to a vacation of a street, but that was not raised or suggested until after all the expense had been incurred.

If we deemed ourselves to have in this case the power of a court of equity to dispose of the costs, we should have no hesitation, under the circumstances of the case, in putting one-half of the costs on each party; but as we do not consider ourselves as having such power, we have endeavored to arrive at a conclusion as to the legal disposition of the costs, and being of opinion that, on a fair consideration of the Act, it is sufficient to cover the costs in question, an order will be made directing the costs, including a commissioner's fee of \$200, to be paid by the borough.

From Edwin L. Mattern, Pittsburgh, Pa.

Com. ex rel. Seibert et al. v. Manager of House of Correction.

Magistrates—Record—Return—Summary conviction—Appeal.

To sustain a summary conviction by a magistrate, it is necessary that his record should fully disclose the facts. The magistrate sits as a jury, but he must decide upon legal evidence, and such as would be left to a jury to determine. As a part of his return, he should note the oath or information, the warrant, the arrest or appearance, that the information was read to the defendant, that he was asked whether he desired to plead or defend, the whole of the evidence on either side, and the finding or adjudication. By so doing, the appellate court will, on appeal from a conviction by him, be able to judge whether or not the conviction was well founded.

Hence, when the record contains no definite facts, but only a legal conclusion from unrecorded facts, the defendants will be discharged.

Summary conviction—Information—Evidence.

The information and evidence ought to be kept perfectly distinct, and the information or charge must be clearly and satisfactorily proved by the evidence, and the evidence must go to establish the identical offence which forms the subject of the information.

Appeal from magistrate. Q. S. Phila. Co., July 8., 1901.

John R. K. Scott, for plaintiffs.

Henry J. Scott, assistant district-attorney, for defendant.

STEVENSON, J., July 15, 1901.—The American people like fair play, and public opinion will not suffer the straining of the law to perpetrate injustice.

The constitution and laws are for the protection of all citizens alike, not the prominent, the wealthy, the powerful alone, but the obscure, the poor, the lowly as well, and those laws when life and liberty are at stake must always be construed strictly. It is wise that criminals should be promptly and adequately punished; but it is no less wise that they be tried and punished according to law, and not otherwise, more especially when deprived of that inestimable right of the people—trial by jury.

The examination and punishment of offences in a summary manner by magistrates, who are also *ex officio* justices of the peace and without the intervention of a jury, is founded entirely upon a special authority conferred and regulated by statute. No new offence is cognizable in that manner unless expressly made so by the Act of Assembly, and all the proceedings under an authority so created must be strictly conformable to the regulations prescribed by the special law in each instance, from which all their force is derived. Summary convictions are different from and opposed to jury trials, the fundamental privilege of all English speaking peoples. Lord Chief Justice Holt voiced not alone the sentiment of his own time, but the common sense of ours, too, when he said: "Where a penalty is inflicted and a different manner of trial from *Magna Charta* instituted, and the party offending, instead of being tried by his neighbors in a court of justice, shall be convicted by a single justice in a private chamber upon the testimony of one witness, I fain would know if, upon the consideration of such a law, we ought not to adhere to the letter without carrying the words farther than the natural sense."

Our bill of rights provides: "In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

And art. v, § 14, of the Constitution, also provides that "In all cases of summary conviction in this Commonwealth, or of judgment in suit for a penalty before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof upon cause shown." It would appear to follow logically that an

Com. ex rel. Seibert et al. v. Manager of House of Correction.

appeal means a record to be reviewed. As the record of conviction is intended to exhibit an exact account of the magistrate's proceedings, and to show that the judgment has been legal and regular, it is most material that the facts should be fully disclosed, in order that the judgment upon them may appear to be well founded. Accordingly, it is now established as a general rule, that the evidence must be set out particularly, and that sufficient proof must appear upon the face of the record to sustain every material part of the charge and to warrant the adjudication. It is laid down by Lord Mansfield as "an undoubted maxim, that in a conviction, the evidence must be set out in order that the superior court may judge of it: 2 Burr. 1163.

The Supreme Court uses nearly the same language in *Com. v. Nesbit*, "but it is still essential that a summary conviction shall contain a finding that a special act has been performed by the defendant; and it shall describe or define it in such a way as to individuate it, and to show that it falls within an unlawful class of acts; without this, a judgment that the law has been violated goes for nothing."

Now, that is not merely a formal or technical rule of summary convictions, but a most essential and substantial one. No citizen could have any sort of protection against the ignorance or wickedness of inferior magistrates if these were authorized to convict citizens of offences, and yet allowed so to record their proceedings that the very act done cannot be ascertained, and thus their judgment cannot be tested by their judicial superiors.

The most common purpose for which inferior tribunals are reviewed by their superiors is, in order to correct their erroneous applications of law to ascertained facts. But when the record contains no definite facts, but only a legal conclusion from unrecorded facts, the superior court cannot, without compelling a return of the evidence, or taking testimony of what it was, decide whether the legal conclusion, that is, the conviction of the offence, is right or wrong. In such a case, for the safety of the citizen, they usually reverse the conviction, simply because no act appears upon it that justifies the judgment: *Com. v. Nesbit*, 34 Pa. 403.

The magistrate sits as a jury, but he must decide upon legal evidence, and such as would be left to a jury to determine; the material parts of the testimony must be noted and returned with the conviction. As a part of his return, he should note the oath or information, the warrant, the arrest or appearance, that the information was read to the defendant, that he was asked whether he desired to plead or defend, the whole of the evidence on either side, and the finding or adjudication.

The witnesses should swear to the facts and not the law. The information and evidence ought to be kept perfectly distinct, and the information or charge should be clearly and satisfactorily proved by the evidence, and the evidence must go to establish the identical offence which forms the subject of the information. It is material that a conviction should be thus fully and certainly noted and returned for another reason, and that is that the defendant may not be subjected to a second conviction for the same offence. How can a defendant plead former acquittal or former conviction if the record is vague and uncertain? Vice and crime can be controlled only by the prompt, steady and certain execution of all laws. Spasmodic and sensational efforts do no good. Nor is it wise to cover the dockets of the courts with a mass of petty offences when there are many cases of murder, rape, robbery, burglary and larceny and attempted murder awaiting trial; but if these petty offenders must be arrested and tried, especially in a summary way, it must be strictly according to law. Thousands of citizens have been illegally committed to the House of Correction, the rights of the weak, the poor and the obscure have been invaded over and over again.

Com. ex rel. Selbert et al. v. Manager of House of Correction.

It is time to stop it; the plain people should have the fullest protection from the law. People of prominence and influence do not need it; the poor and helpless do, and they must get it.

It is clear from the evidence and an examination of the record in these cases that none of the requirements of the law have been complied with. The convictions are, therefore, illegal and void, and the prisoners are discharged.

Sheetz v. Chesapeake and Ohio Railway Company.

Practice, C. P.—Plea in abatement—Jurisdiction.

A plea in abatement is the correct way to raise the question of jurisdiction. The practice is unchanged by the Act of 1887.

Jurisdiction—Foreign corporations—Acts of March 21, 1849, April 8, 1851, and April 21, 1858.

The mere maintenance in Philadelphia, by a railroad company whose line of railway is wholly outside of Pennsylvania, of a freight solicitor to engage freight to move in other states and issue bills of lading therefor, without authority to collect the moneys for such carriage, is not such a doing of, or engaging in, business in Pennsylvania, within the meaning of the Acts of March 21, 1849, P. L. 216, April 8, 1851, P. L. 354, and April 21, 1858, P. L. 408, as will subject it to the jurisdiction of the courts of this State.

Demurrer to plea in abatement. C. P. No. 3, Phila. Co., Dec. T., 1900, No. 227.

Charles E. Lex, for plaintiff; *Theodore W. Reath*, for defendant.

MCMICHAEL, J., June 1, 1901.—A plea in abatement is the correct way to raise the jurisdictional question in this case: *Benwood Ironworks Co. v. Hutchinson*, 101 Pa. 359; *Phillips v. Library Co.*, 141 Pa. 462. This practice is unchanged by the Practice Act of 1887: See *Fitzpatrick v. Riley*, 163 Pa. 65, and *Deshong v. Deshong*, 186 Pa. 227.

In the plea, defendant admits that Harris, upon whom service of the writ for the defendant was attempted, was a freight solicitor in Philadelphia, whose only duties were to solicit inter-State freight and issue bills of lading therefor to move over defendant's line of railway, wholly outside of Pennsylvania.

This was not maintaining an "office, depot or usual place of business" (Act of March 21, 1849) "having an agency or transacting any business" (Act of April 8, 1851) or engaging "in business" (Act of April 21, 1858) within the meaning of the three Acts permitting service of writs on foreign corporations.

All the Acts contemplate foreign corporations doing or engaged in business in this State, so that it is very plain that, unless the defendant is doing business here, there is no jurisdiction of our courts: *Branson v. Machine Co.*, 16 Phila. 112; *Phillips v. Library Co.*, 141 Pa. 462.

No part of the railway of the defendant is in Pennsylvania. The corporate business of defendant, as disclosed in the plea, is to operate a railroad in certain States other than Pennsylvania. The mere maintenance in Philadelphia of a freight solicitor to engage freight to move in other States and issue bills of lading therefor, without authority to collect the moneys for such carriage, is not a doing of or engaging in business in this State, such as will subject defendant to the jurisdiction of our courts: See *Branson v. Machine Co.*, 16 Phila. 112; *Blakeslee Manufacturing Co. v. Hilton*, 5 Pa. Superior Ct. 184; *Pavillon Co. v. Hamilton*, 15 Pa. Superior Ct. 389; *Mearshon v. Lumber Co.*, 187 Pa. 12; *Wolff Dryer Co. v. Bigler*, 192 Pa. 466.

We have not considered the constitutional questions raised by the plea, because, in the view we take of the Acts providing for service on foreign corporations, those Acts are unquestionably valid. As was said by Wickham, J.,

Com. ex rel. Seibert et al. v. Manager of House of Correction.

in *Blakeslee Manufacturing Co. v. Hilton*, 5 Pa. Superior Ct. 184: "The Act of 1874 need not be so understood as to render it invalid. The business to which it refers does not include the taking of orders or contracting for the sale of goods, to be shipped from another State."

Demurrer overruled, with leave, &c.

In re Mary Wood.

Lunatics—Weak-minded persons—Act of June 25, 1895.

The Act of June 25, 1895, P. L. 300, only applies where a person "shall become or be so *weak in mind* that he or she is utterly unable to take care of his or her property, and is therefore liable to dissipate or lose the same and to become the victim of designing persons."

It does not apply where the evidence shows that the condition of the person for whom protection is sought is one of *mental disease*, either mania or dementia, whether such unsoundness of mind has existed from the nativity of such person or has been subsequently occasioned from any cause whatever; such cases fall within the Act of June 13, 1836, P. L. 589, and the proceedings must be as therein provided.

Petition for appointment of guardian. C. P. No. 3, Phila. Co., March T., 1901, No. 3184.

Harry Green, for petitioner.

MCCARTHY, J., July 13, 1901.—The petition in this cause is for a hearing and appointment of a guardian under the provisions of the Act of Assembly approved June 25, 1895, P. L. 300. It avers that "Mary Wood is of weak mind and totally unfit to take care of her person or estate." At the hearing, a physician, called on behalf of the petitioner, testified that, as the result of a severe fracture of the right hip and a contusion of the head sustained by Mary Wood on Jan. 23, 1900, she developed peculiar mental conditions very shortly thereafter, and that her state of mind is a mild form of dementia; that she is at times violent to a certain degree, but that the condition rapidly passes off; that he would pronounce her to be a lunatic with lucid intervals, and that she has shown evidences of a probable beginning of softening of the brain.

This evidence clearly shows a case of lunacy and not a case of mere weakness of mind without mental disease. It therefore falls within the class of cases provided for by the Act of June 13, 1836, P. L. 589, entitled "An Act relating to lunatics and habitual drunkards," and not within the class of cases of weak-minded persons, to which the Act of 1836 has been decided not to apply, and for which provision has been made by the later Act of 1895.

The distinction between these Acts has been clearly pointed out in *re Albro*, 7 District Reps. 763, decided in the Court of Common Pleas No. 1 of this county in 1898, and in *re McLaughlin's Estate*, 8 District Reps. 113, decided by this court in 1899. Notwithstanding this, however, it seems necessary to again call the attention of the bar to the fact that the Act of 1895 applies only to a class of cases where a citizen "shall become or be so *weak in mind* that he or she is utterly unable to take care of his or her property, and is therefore liable to dissipate or lose the same and to become the victim of designing persons," as expressly stated in the Act itself, and that this court will not entertain applications purporting to be under the Act of 1895, where the evidence shows that the condition of the person for whom protection is sought is one of *mental disease*, either mania or dementia, whether such unsoundness of mind has existed from the nativity of such person or has been subsequently occasioned from any cause whatever.

As the present case does not fall within the provisions of the Act of June 25, 1895, the prayer of the petition is refused.

10 DIST. R.

Githens's Estate.

Decedent's estate—Payment of more than proper share—Correcting error—Personal estate distributed—Proceeds of realty remaining—Practice, O. C.

Where an award of a deceased distributee's share of an estate to which he was entitled in his own right should have been made to his executrix, but instead was made to his children under a trust in the will, and the personal estate has been distributed, but the proceeds of realty are still held by the trustee appointed to make partition, the amounts paid in excess of their shares of the personal estate to the children can be retained from their shares of such proceeds and paid to the executrix.

Petition for review and restitution. O. C. Phila. Co., Jan. T., 1899, No. 62.

Gustavus Remak, Jr., and Adolph Eichholz, for petitioner.

PENROSE, J., June 1, 1901.—The death, without issue, in the lifetime of the testator, of one of his children for whom he had created a trust for life with remainder to issue, caused an intestacy as to that share of the residuary estate, and it was manifestly erroneous to include it, in whole or in part, in the shares directed to be held in trust for his other children, who, to this extent, were entitled absolutely. The distribution under the account of the trust for the son, John F. Githens, was made in ignorance of this error, and as the sixth to which he was entitled in his own right should have been awarded to his executrix, instead of to his children under the provisions of the trust, it is clear that the former is entitled to a decree in her favor. The personal estate was distributed by the adjudication of February, 1899: but the proceeds of sale of realty are still held by the trustee appointed to make partition, and the amounts paid in excess of their shares of the personal estate to the children of John F. Githens can, under well settled principles of equity, be retained from their shares of such proceeds and paid to his executrix: *Grim's Appeal*, 13 Outerb. 391; *Grim's Estate*, 9 Pa. C. C. Reps. 523; s. c., on appeal, 147 Pa. 190; *Yetter's Estate*, 160 Pa. 506.

The necessary decree will be prepared by counsel.

Stoker's Estate.

Practice, O. C.—Equity rules—Special replication.

The equity rules of the Supreme Court forbid the filing of a special replication. Therefore, when one is filed to an answer to a petition for a citation, the court will disregard the special replication, and treat the case as coming before it on petition and answer—the averments of the answer being accepted as verity.

Practice, O. C.—Refusing petition for account—Insufficient personal estate to pay funeral expenses—Lien of debts having expired.

Where the personal estate coming to the hands of a deceased executrix does not exceed \$25, and she has been compelled to borrow money to pay funeral expenses, and the lien of debts has expired, a petition for an account will be refused.

Petition for account. O. C. Phila. Co., Jan. T., 1901, No. 427.

A petition was filed for citation to show cause why the executrix should not file an account. The executrix filed an answer, to which the petitioner filed a special replication. The case was then placed on the argument list and heard.

F. C. Menamin, for petitioner; J. B. Rettew, for respondent.

PENROSE, J., April 27, 1901.—The equity rules of the Supreme Court, which are part of our own rules (rule XII, section 4), forbid the filing of a special replication, and we must, therefore, treat the present application as coming before us on petition and answer,—the averments of the answer being accepted as verity. If, as it alleges, the personal estate coming to the hands of the deceased executrix did not exceed \$25, and she was therefore compelled to

borrow the amount required to pay funeral expenses, an account, if ordered, could be of no advantage to the petitioner, while it would subject the respondent to useless trouble and expense; and as the lien of debts has expired, the real estate of the decedent is absolutely vested in the heir or in those claiming from her as purchasers (Bartley's Estate, 7 District Reps. 36), freed from any claim by creditors of the original owner. Petition dismissed.

Philadelphia v. Atlantic and Pacific Telegraph Company.

Statute of limitations—Actions of debt.

The statute of limitations does not apply to an action of debt brought to enforce an obligation imposed by law, as distinguished from one arising out of an agreement voluntarily assumed by the defendant.

The city of Philadelphia passed ordinances imposing charges of \$2.50 per mile on electric wire suspended over highways of the city, and \$1 per telegraph pole erected in the highways, and directed that all companies or individuals maintaining wires or poles should pay this charge. A suit was brought by the city for the aggregate of such charges during a period of seven years. *Held*, that the claim for the charges accrued in the first year, although they had become payable more than six years before suit brought, was not barred by the statute of limitations.

Motion by defendant to enter judgment, with the reduction specified in the reserved point. United States Circuit Court, Eastern District of Pennsylvania, Oct. Sess., 1891, No. 340.

E. Spencer Miller, for plaintiff; *S. W. Pettit*, for defendant.

MCPHERSON, Dist. J., May 29, 1901.—This is an action brought by the city of Philadelphia to recover license fees charged against the defendant in respect of its poles and wires by virtue of certain ordinances. When the suit was brought, the fees for the year 1885 were more than six years overdue, and the question for consideration under the reserved point is, whether recovery of fees for that year is barred by the Pennsylvania statute of limitations.

The suit is in *assumpsit*, but as the Practice Act of 1887 has applied this name indifferently to the three forms of action that were known as covenant, debt and *assumpsit*, the name does little more than advise us that the action is *ex contractu*. The court is still required to scrutinize the cause of action, in order to determine to which of the three classes of contractual suits the present action belongs. Thus examined, it becomes clear that, before the Act of 1887 was passed, the action of debt would have been the proper remedy to recover these fees, the ordinances providing no method of collection. I had occasion to consider this question in *Taylor Borough v. The Central Penna. Telephone and Supply Co.*, 8 District Reps. 92, and as my views have not changed since that decision was made, I may be permitted to repeat part of what was then said:

"It is true that the method of collecting the fee from the delinquent's property is not specified, but we see no difficulty in this silence. If the borough had the lawful authority to impose such a fee, the defendant's duty to pay would at once arise; and as this duty would have been enforceable before the Procedure Act of 1887 by an action of debt (5 Am. & Eng. Ency. of Law, 167; 3 Bl. Comm., 159, 160), it is now enforceable by an action of *assumpsit*. It seems to us a contradiction in terms to hold that the defendant is not obliged to pay unless the ordinance specifically declares by what method payment may be enforced. Save perhaps in exceptional cases, to say that a borough has authority to impose a fee, means that the citizen must pay or be subject to the compulsion of a suit. No doubt, in the interest of personal liberty, fines and penalties cannot be exacted without express provision in the ordinance; but the right to bring a civil suit, directed against the delinquent's property, seems to spring of

10 DIST. R.

Philadelphia v. Atlantic and Pacific Telegraph Company.

necessity out of the right to levy the fee. Under the ordinances now being considered, the borough had no other remedy than the action of *assumpsit*."

The action now before the court is, therefore, the well known action of debt, although it is labeled *assumpsit*, and the next step is to inquire whether an action of debt for license fees that are imposed by virtue of the police power of the city is within the Pennsylvania statute of limitations; for it is to be observed that this statute does not bar all actions of debt, but merely "all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit rents." It does not seem necessary to refute at length the proposition that such an action of debt as is now under consideration is grounded upon "any lending or contract without specialty." It is an action upon an obligation imposed by law, and not upon an agreement voluntarily entered into by the defendant. It is contracts in fact, and not quasi-contracts, that are included in the phrase just quoted, as the Pennsylvania courts have several times decided. The statute does not limit actions of debt that are not founded upon a lending or a contract in fact: *Richards v. Bickley*, 13 S. & R. 396; *Roller v. Meredith*, 4 Pa. Superior Ct. 461.

The reserved point must be decided in favor of the plaintiff, and judgment will accordingly be entered upon the verdict without diminution.

Deckard's Estate.

Orphans' Court—Jurisdiction—Act of May 17, 1868—Partition—Owelly—Recognizance.

The Act of May 17, 1868, P. L. 1096, entitled "An Act enlarging the powers of the Orphans' Court so as to discharge liens on real estate," gives that court jurisdiction by petition over recognizances entered into by a coparcener to secure his coparceners their shares in the realty of an estate, and taken by them as their shares in lieu of a division thereof.

Hence, where certain real estate of a decedent was adjudged to a coparcener at a certain valuation, and he entered into recognizances to pay to the other parties in interest their proportionate shares of the valuation, the Orphans' Court ordered him to pay the recognizances, and, in default of payment, directed an execution to issue against him.

Recognizance—Nature of—Set-off.

A recognizance is in the nature of a judgment, and a claim cannot be set off against it which is not attached to it nor to the consideration on which it rests.

Petition and answer. O. C. Dauphin Co., in partition.

B. F. Etter and M. W. Jacobs, for citation; *Levi B. Alricks*, contra.

WEISS, J., April 5, 1901.—On Oct. 12, 1897, certain real estate was adjudged unto Israel K. Deckard, a son of the deceased, at the valuation of \$1833.33, made by an inquest, who, on the same day, entered into recognizance conditioned to pay the other parties in interest their proportionate shares of the valuation on or before Oct. 12, 1898.

One of those interested is Jacob B. Deckard, also a son of Israel Deckard, deceased, whose share is \$349.55, upon which there is claimed interest from Oct. 12, 1897. He presented a petition, averring that Israel K. Deckard had not paid either the principal or interest, and prayed the court for a citation upon him to show cause why the same so charged upon the real estate should not be paid.

The respondent made answer that the remedy lies in the Common Pleas, and that the Orphans' Court has no jurisdiction of the subject-matter. The answer further sets forth that Jacob B. Deckard, as executor of the will of Israel Deckard, deceased, received large sums of money, merchandise and other personal effects belonging to the decedent's estate, and with them or some of

Deckard's Estate.

them carried on the store business—in which the deceased was in his lifetime engaged—for a number of years; that he never properly accounted for the property, and that he thus became indebted to the recognizor in a sum in excess of the distributive share due unto him.

Neel's Appeal, 88 Pa. 94, settles the question that under the provisions of the Act of May 17, 1866, P. L. 1066, the Orphans' Court has jurisdiction. "The remedy in the Orphans' Court is full and ample under the provision of the Act of 1832, jurisdiction having attached under the Act of 1866; but it is not exclusive. If the petitioner chose to pursue this remedy, it was open to him, and he was not bound to sue upon the recognizance. There is nothing in the Act of 1866 which excludes a resort to the other remedies pre-existing for the recovery of the sum so charged."

The matters of defence set forth in the answer do not attach to the judgment nor the consideration on which it rests. They arise from alleged misconduct on the part of the petitioner, acting in the capacity and relationship of executor of the will of the father, and the conclusion reached is, that the respondent cannot abate what he owes to the petitioner upon the recognizance, by a claim which he asserts against him, wholly disassociated from the obligation entered into.

"Unquestionably, the recognizance in the Orphans' Court is in the nature of a judgment," says the court in *Beatty v. Smith*, 4 Yeates, 102.

In *Beatty v. Bordwell*, 91 Pa. 441, it is held that "the mere fact that a person has a debt against his judgment creditor, gives no right against the will of the one holding the judgment to apply the debt as a payment thereon. . . . In some manner, either at law or in equity, the subject-matter of defence must have attached to the judgment or the consideration upon which it rests."

It is accordingly ordered and decreed that Israel K. Deckard, the recognizor, pay unto Jacob B. Deckard the sum of \$349.55, which is the distributive share due unto the latter out of the charge, by recognizance, upon the real estate adjudged unto the respondent, with interest thereon from Oct. 12, 1897, within thirty days; and, in default of payment, that execution may issue for the sum so charged, with interest upon the real estate so adjudged.

From William M. Hargest, Harrisburg, Pa.

Clark's Estate.

Wills—Construction of—Legacy—When compensatory and when gratuitous—Tax on collateral inheritance.

Testator provided by his will, *inter alia*: "I give and bequeath unto my brother-in-law, F. S., the sum of \$10,000, upon condition that he act as one of my executors and trustees, and if he should die before my decease or refuse to act as such executor and trustee, this legacy shall lapse and become part of my residuary estate." Held, that said legacy was in the nature of a bonus or compensation for acceptance of the trust, and, not being gratuitous, was therefore not liable to collateral inheritance tax.

Audit of executor's account. O. C. Allegheny Co., May T., 1901, No. 73.

The only question raised in this case is whether or not legacies given the executors on condition of their acceptance of the trust are liable for collateral inheritance tax.

Testator provided, *inter alia*, as follows:

"4. I give and bequeath unto my brother-in-law, Frank Semple, the sum of \$10,000, upon condition that he act as one of my executors and trustees, and if he should die before my decease or refuse to act as such executor and trustee, this legacy shall lapse and become part of my residuary estate.

"5. I give and bequeath unto my kinsman, J. Denniston Lyon, the sum of \$10,000, upon condition that he act as one of my executors and trustees, and if

10 DIST. R.

Clark's Estate.

he should die before my decease or refuse to act as such executor and trustee, this legacy shall lapse and become part of my residuary estate.

"13. I hereby nominate, constitute and appoint my brother-in-law, Frank Semple, and my kinsman, J. Denniston Lyon, executors and trustees of this my last will and testament, and direct that they shall each receive as full compensation for their services, both as executor and trustee, the sum of \$1000 per annum, and, in addition thereto, they shall be allowed to spend \$500 per annum for a suitable clerk."

The estate amounted to nearly \$3,000,000, and the trust created by the will was to continue during the life of Mrs. Clark, who survived testator.

It was insisted on behalf of the Commonwealth that the legacies of \$10,000 each, in the fourth and fifth clauses of the will, to Messrs. Semple and Lyons, were mere gratuities, and therefore liable to tax, which was denied on behalf of the legatees.

O. D. Thompson and R. B. Scandrett, for Commonwealth.

Patterson, Sterrett & Acheson, for executors.

HAWKINS, P. J., June 3, 1901.—It is conceded that collateral inheritance is only chargeable against testamentary gratuities, and therefore that legacies given by way of compensation are exempt. This being the purpose of the law, the question raised seems easy of solution. These legacies were plainly offered as inducements to acceptance of the trust, because of the peculiar fitness of the legatees for its execution, and their amount was testator's measure of compensation for acceptance as distinguished for compensation for services which might be required afterward. The language used by the testator, that the legatees shall each have \$10,000, upon condition that they act as executors and trustees, leaves no room to doubt this is the correct construction. The importance of securing the services of competent men to administer trusts is recognized everywhere for obvious reasons; but, as a general rule, such men are reluctant to accept these positions because they often involve the sacrifice of private interests. Mr. Clark himself rarely appeared in that character, and evidently appreciated the importance of securing the services of men whose relations with him made them familiar with his business and were thoroughly competent to manage his estate. Whether or not the premium or bonus, if it may be so called, of acceptance is excessive is not an open question as the record stands. In the absence of evidence to the contrary, it is assumed that Mr. Clark's valuation was correct; when the value of the estate, the probable duration of the trust and the small provisions made for compensation for services which would be required after acceptance are taken into consideration, these legacies would seem rather below than above just compensation for acceptance of the trust. Experience has shown that, as a general rule, cheap trustees are poor trustees, for the simple reason that the measure of skill and attention lies in the compensation. Gratuitous services are not to be expected in business relations. Disinterested benevolence is as rare as human gratitude. The law is formed, not on exceptional, but prevailing types. Hence, a policy of allowing compensation commensurate to the services and responsibility required is essential to secure the best results. Testators are not alone concerned; creditors have superior rights; and executors are therefore quasi-public officers whose efficiency ought not to be hampered by private restrictions. The growing disposition to limit compensation of trustees by will ought, on grounds of public policy, be discouraged. No man can anticipate what will be required in the settlement and management of his estate. Self-interest, sometimes consciously, sometimes unconsciously, will have a tendency, with rare exceptions, to stint the allowance; and unexpected complications, litigation

Clark's Estate.

and enhancement in values will make an allowance, apparently reasonable on acceptance of the trust, grossly inadequate afterward; and yet the trustee, having accepted on those terms, must submit or resign. The allowance in the present case of \$1000 a year compensation for management of an estate of \$3,000,000 would tempt few competent men to accept the trust, even though there could be any assurance, which there could not, that the services and responsibilities required would not increase. The services and responsibility incident to making safe investments of so large an estate would of itself be a formidable undertaking, and probable complications, litigation and increase in value will increase the burthen without any corresponding increase in compensation. On the other hand, the general rule, based as it is on the theory of reasonable compensation, readily adjusts itself to the circumstances of each case, and works out the equities of the parties.

The objection that the provisions for compensation, contained in the thirteenth paragraph of the will, is inconsistent with that of the fourth and fifth, is without merit. It is apparent on the face of the will that the two provisions had a very different subject; the one, by its terms, relates solely to the compensation of "acceptance," while the other related to the compensation of services which might be required in the execution of the trust. It is obvious, therefore, that, while the purpose of the two provisions were different, they were entirely consistent with each other.

The two legacies of \$10,000 each having then been given by way of compensation, it follows that they are not liable to collateral inheritance tax.

From Edwin L. Mattern, Pittsburgh, Pa.

Lehigh Coal and Navigation Company v. Zehner.

Arbitration and award—Fraud—Setting aside award.

To set aside an award, it is insufficient to show that the arbitrator was partial and unfair and knowingly made an improper decision, without evidence that the party benefited colluded with the arbitrator or practiced a fraud to procure the award.

Bill to set aside award of arbitrators. Equity hearing on bill, answer and proofs. C. P. Schuylkill Co., Jan. T., 1899, No. 1.

F. G. Farguhar, for complainant.

S. H. Kaercher and *W. F. Shepherd*, for respondent.

BECHTEL, J., May 30, 1901.—David Zehner, now deceased, brought suit to No. 143, Jan. T., 1890, and on Aug. 28, 1896, entered into an amicable or voluntary submission with the Lehigh Coal and Navigation Company, submitting "the question of damage done to the said property, saw mill and grist mill" of the said Zehner. Under this submission, proceedings were had and a number of meetings held, and testimony submitted, cause argued and submitted to the arbitrators. The result of these meetings and hearings was an award in favor of said Zehner for \$18,000, signed by two of the arbitrators, which was filed in the Common Pleas, and judgment entered thereon. On June 28, 1897, a motion to strike off the agreement was made by the defendant, and Oct. 12, 1897, after hearing before Judge Koch, the rule was made absolute. On Oct. 17, 1896, a decree of the Supreme Court was entered, reversing the order of this court, and reinstating the agreement, award and judgment. This was followed by an execution, and then the defendant (the Lehigh Coal and Navigation Company), on Nov. 11, 1896, applied for a rule to show cause why "the award and judgment thereon should not be stricken from the record because of the misbehavior of the arbitrators, Haber and Schlicher." After full hearing upon this application before the author of this, on Nov. 14, 1898, the application was refused and 10 Dist. R.

Lehigh Coal and Navigation Company v. Zehner.

a written opinion filed. We desire now that the opinion filed at that time shall be considered as part of the opinion in this case, especially as it points out the grounds of the application then made, and shows how nearly they are identical with the grounds of relief set forth in the present bill. And also because of the quotations from the opinions of our Supreme Court in *Hostetter v. Pittsburgh*, 107 Pa. 433; *English v. Wilmerding Borough School District*, 165 Pa. 21, and *Hartup v. Pittsburgh*, 131 Pa. 535. Since that decision, which was never appealed from, the plaintiff claims to have obtained additional information, and now says that, "from such information, is satisfied that the said award is fraudulent, and that the said arbitrators, Wm. Haber and Edwin Schlicher, misbehaved themselves in the making thereof." There are other allegations bearing upon communication with counsel and entertainment at Haber's Hotel, &c., but the above appears to be the more important. To this bill an answer was filed by the defendants, and without referring to each paragraph separately, we sum it all up by saying it is a denial of every important averment of the bill, and puts the complainant upon proof to sustain the charges made in the bill. Charging "fraud and misbehavior" is one thing, proving it an entirely different thing. We think we may justly say there is no evidence that can be considered as tending to establish fraud or gross misconduct upon the part of the arbitrators. In reality, outside of the evidence relating to phoning to counsel, and the evidence of Silliman as to his conversation with Haber, there is nothing touching what occurred before the award. The alleged declarations of Haber, made upon the streets, to the idle and curious, after the award had been filed, as to the amount each of the arbitrators wanted to award, and how the figuring to make up the award was done, cannot affect the validity of the award. If arbitrators or jurors, after they cease to have official existence, can invalidate their official acts in this way, verdicts, instead of being the closing of trials, would be but the beginning, and plaintiffs would be required not only to prove their causes of action to obtain verdicts, but, in addition, to guard arbitrators and jurors thereafter, lest by their street talk they blot them out. To say, if Mr. Shepp had not withdrawn, the award would likely have been different, does not prove nor tend to prove that it is fraudulent. Expressing the opinion that Shepp's influence or efforts might have reduced the amount will not invalidate the award. Nor is there anything before us to show that Mr. Shepp's judgment as to the amount was any nearer, if as near, correct as that of Haber and Schlicher. Why should his judgment control that of the other two? And how is Zehner responsible for his action in withdrawing when he discovered he could not? Neither the statements of Haber after the award, and, in part, after the decision of the Supreme Court, nor Shepp's action, can be visited upon Zehner. It is not what Haber said after he ceased to be an arbitrator, but what he did while acting as an arbitrator, that is to be considered. We cannot, therefore, see how such statements can be considered sufficient to set aside the award at this or any other time. As to "phoning" to an attorney to ascertain whether two arbitrators could make up an award, the third refusing to act, there is nothing shown that would in any way affect the validity of their proceeding or vitiate the award. An examination of the testimony of Mr. S. H. Kaercher will show that no improper steps were taken, nor any improper influence exercised, but simply a statement to the effect that an award could be legally given by two arbitrators. As to the evidence of Silliman, it is to the effect that he talked with Haber before the finding of the award, that Haber "figured," and he called off items, and he thinks the amount thus ascertained amounted to "around \$13,000," and that was about what occurred. He also says he asked my opinion about the award as to what it should be, and I gave it to him. If \$13,000 was an amount spoken of by these two parties before

Lehigh Coal and Navigation Company v. Zehner.

the award, it does not seem to have entered into the award, as that is \$18,000. Nor does it anywhere appear that Haber ever communicated anything concerning any conversation to either of the other arbitrators, or that he, himself, was in any way influenced by such conversation. Upon the contrary, it does appear that he was not so influenced; that he did not communicate with the other arbitrators, because he testifies positively that his conversation with Silliman occurred after the award and not before.

We fail to find anything in the evidence to justify interference with the award at this time. The amount cannot in itself be regarded as evidence of fraud or misbehavior, since the evidence of Zehner showed a much larger amount of injury, and, of course, the arbitrators must have accorded them the privilege of finding the facts. Nor can we say the arbitrators exceeded their authority by considering matters not submitted upon the question of damages. The submission says, "the question of damages done to the said property, saw mill and grist mill." If the defendant, in an attempt to show that steam could be furnished for less than the plaintiff claimed, put evidence relating thereto upon the record, and, consequently, before the arbitrators, Zehner cannot be held responsible therefor. True, its presence would not justify the improper use thereof, but there is no evidence to show that it was thus used. We cannot, therefore, say that anything now before us would justify our attempting to undo that which has been done upon the law side of our courts. After judgment has become final by a course of litigation here and in the Supreme Court, and payment has been made under execution process, a clear, strong case should be presented to justify interference, if, indeed, it may be interfered with at all. The unsupported evidence of Silliman, contradicted by Haber, and especially as to time of occurrence, does not present such clear and satisfactory evidence as would warrant an attempt to now brush aside the proceedings in the Common Pleas. We have thus considered this case as though all the amendments applied for had been formally allowed, and we treat the case as in that position, for the averments of the bill are of no avail when there is no evidence to support them. By this course we really present the question of the consideration of the testimony and its sufficiency to affect Zehner, and that we have hereinabove considered and discussed. The conclusion arrived at as to the evidence renders it unnecessary to consider the authorities relating to the question of the right of amendment, as well as the question as to whether equity has power now to interfere. We have resolved these questions in favor of the plaintiff. Of the three cases cited hereinabove, to wit, *Hostetter v. Pittsburgh*, 107 Pa. 433; *English v. Wilmerding Borough School District*, 165 Pa. 21, and *Hartup v. Pittsburgh*, 131 Pa. 535, we will quote from the latter only. It is there said upon a charge of fraud, "it is essential to aver and prove that the party benefited by the award participated in the fraud charged; but evidence that the arbitrator was partial and unfair and knowingly made an improper decision, is insufficient for that purpose, without evidence that the party benefited colluded with the arbitrator or practiced a fraud to procure the award." The most searching examination of the evidence will fail to show that David Zehner is in any way responsible for the statements of Haber after the award, or for any statements by Haber, Schlicher or Shepp, either before or after the award, or that he is guilty of any improper conduct in connection with the award or any branch of the case. Counsel argued this case most earnestly, the court considered it just as earnestly, and here is the conclusion.

And now, May 30, 1901, after full hearing on bill, answer and evidence, the court, for reasons above given, declines to grant the relief prayed for, and further order and direct that the bill be dismissed, at the costs of the complainant.

From J. O. Ulrich, Tamaqua, Pa.

Kiefaber, to use, v. Armour & Co.

Landlord and tenant—Assignment of lease—After-accruing rent—Debt due from lessor to lessee—Set-off.

Rent accruing after an assignment of the lease by the lessor accrues to the assignee of the lessor in his own right, and is not subject to abatement by way of set-off of an indebtedness due by the lessor to the lessee at the time of the assignment.

Sept. 20, 1900 K., the owner of certain real estate, assigned all rents, issues and income arising therefrom and the leases thereof to the use-plaintiffs, of which the tenants were notified Oct. 14. Notwithstanding such notice, they refused to pay the use-plaintiffs rent for the months of January, February, March and April, 1901, amounting to \$338.32, upon the ground that when they were notified of the assignment, the assignor was indebted to them in the sum of \$665.24; whereupon this suit was brought against them by the assignor to the use of the assignee. *Held*, the rents were not subject to the set-off.

Case stated. C. P. No. 4, Phila. Co., March T., 1901, No. 2120.

Furth & Singer, for plaintiff, cited *Lea's Appeal*, 164 Pa. 408.

Dimmer Beeber, for defendant, cited *Jordan v. Sharlock*, 84 Pa. 366; *Skiles v. Houston*, 110 Pa. 254; *Chipman v. Ninth National Bank*, 120 Pa. 86.

ARNOLD, P. J., June 20, 1901.—Rent accruing after an assignment of the lease by the lessor accrues to the assignee of the lessor in his own right, and is not subject to abatement by way of set-off of an indebtedness due by the lessor to the lessee at the time of the assignment. While future rent becomes due by virtue of an *assumpsit*, express or implied, yet it does not become due until the time fixed by the lease. As the landlord to whom such rent is due is not entitled to a dividend out of the estate of the lessee in the hands of his assignee for the benefit of creditors (*Weinmann & Co.'s Estate*, 164 Pa. 405) because the rent was not due at the time of the assignment, so such future rent cannot be diminished for the purpose of paying debts of the assignor; otherwise the holder of one debt might be paid in full and that out of a fund due to another person. Here the assignee, the building association, is a *bona fide* assignee of the rents to accrue under the lease for a valuable consideration. Notice of the assignment was duly given to the lessee, and rents accruing since the time of notice given go to the assignee of the lessor.

Judgment for plaintiff.

Lamb v. Knights of Birmingham of Pennsylvania.

Beneficial order—Membership—Disbandment of subordinate lodge.

If a member of a subordinate lodge of a fraternal order, whose constitution provides for the transfer of members from lodge to lodge, desires to retain his membership in the order upon the disbanding of his own subordinate lodge, he should procure his transfer to, or associate himself with, some other lodge of the order.

The fact that his own lodge has disbanded does not avoid the obligation of paying assessments to retain his membership and the right to claim benefits from the association.

Motion for new trial. C. P. No. 4, Phila. Co., June T., 1900, No. 937.

George Thorn Hunsicker, for plaintiff; *Charles H. Downing*, for defendant.

AUDENRIED, J., July 1, 1901.—If, when he died, Dr. Lamb was a member of the defendant association, his widow, Elmira W. Lamb, would, under the by-laws of the Order, have been entitled to receive from it a death benefit of \$500. This action is brought against the Knights of Birmingham of Pennsylvania by the executrix of Mrs. Lamb to recover that sum.

Dr. Lamb had been a member of the Knights of Birmingham for seventeen years. The members of that organization are distributed among subordinate lodges. Dr. Lamb belonged to Richmond Lodge No. 16. The members of the

Lamb v. Knights of Birmingham of Pennsylvania.

Order may pass from one lodge to another, under the provision of the constitution of the defendant, that any member may "receive a demit card upon application at any regular lodge meeting of his lodge, and deposit the same with any other lodge."

The constitution of the Order provides that a member shall, *ipso facto*, forfeit his membership by failing to pay any assessment levied on him at or before the second stated meeting of his lodge held thereafter, and may not be reinstated except by a majority vote of the members present at a stated meeting of his lodge, upon payment by him of his arrearages during the interval between forfeiture and reinstatement. The defendant's lodges hold their meetings monthly. Assessments levied on the Order's members for any month are due at the next stated meeting of the several lodges. Failure to pay these assessments at the stated meeting in the month subsequent works a forfeiture of membership.

All assessments and dues payable by Dr. Lamb up to and including those levied in November, 1899, were paid by him. His last payment, which included November's assessment and his semi-annual dues, was made at the stated meeting of his lodge held Dec. 12, 1899. He died on Feb. 15, 1900. His assessments or dues for December, 1899, were not paid at his death.

At first sight, it would seem to be clear that as the December dues were not paid when he died, Dr. Lamb was not entitled to the benefits of membership in the Order. It is argued that the by-law inflicts the penalty of forfeiture of membership only when default has been made in paying dues at or before the second stated meeting following the date of their assessment, and that, as Richmond Lodge No. 16 surrendered its so-called charter to the defendant association and held no meeting after December, 1899, Dr. Lamb did not lose his membership in the Knights of Birmingham by his failure to pay that assessment.

The fact appears to be that, for reasons which do not appear, and which at any rate are unimportant, it was deemed desirable by the general officers of the Knights of Birmingham of Pennsylvania to reduce the number of lodges into which its members were organized by abolishing certain of those subordinate organizations and transferring the members associated therein to other lodges. At the stated meeting of Richmond Lodge No. 16, held Dec. 12, 1899, a communication was received by its officers from the head of the defendant Order, suggesting that they surrender their charter, and that the members be demitted or transferred to one of the consolidated lodges. This proposition was laid before the members of the lodge by printed notices sent out by its secretary, and they were assembled on Dec. 19, 1899, to discuss the matter. At this meeting it was resolved that the members of the lodge would secede from the Knights of Birmingham and form a separate organization. This action, however, was not regarded as final by the officers of the lodge, who called another meeting for Dec. 26, 1899, and, in their notices thereof, apprised the members of the lodge that the question they were called to consider was the formation of a new beneficial organization and the surrender of the charter from the Knights of Birmingham. In those notices, it was stated that all members desiring to continue their membership in the Knights of Birmingham would receive "demit" upon settling their accounts, and that all desiring to join the new organization might do so at the meeting by then signifying their intention so to do. At the meeting of the lodge, Dec. 26, 1899, the resolution to surrender the charter and to demit those members who desired to continue their membership in the Knights of Birmingham to other lodges was adopted, and the lodge thereupon, in the language of its minutes, "Adjourned forever."

Dr. Lamb had been in the habit of sending his dues to the lodge by his daughter. She learned on Jan. 9, 1900, that the lodge had disbanded. When this fact was reported to her father, she says, he told her that "as long as they

Lamb v. Knights of Birmingham of Pennsylvania.

were disbanded, there was no use in sending his money up." He made no endeavor to be transferred to another lodge of the Knights of Birmingham. On Jan. 15, 1900, he became paralyzed, but retained consciousness for one week. Shortly before his death, in response to a notice from the Knights of Penn., the organization formed by the seceding officers and members of the Knights of Birmingham, who had composed Richmond Lodge No. 16, his family paid one month's dues to that Order. Of this fact, however, Dr. Lamb had no knowledge.

We are of the opinion that if he desired to retain his membership in the Knights of Birmingham, Dr. Lamb should, upon the disbanding of Richmond Lodge No. 16, have associated himself with some other lodge of the Order, and, as he failed to do this, it cannot be said that the payment of his December assessment was prevented by the failure of his lodge to hold further meetings. He would have had an opportunity to pay that assessment if he had connected himself with some other lodge of the defendant association, and he was offered an opportunity to be transferred to another lodge, but failed to avail himself of it. To say that, by ceasing to hold meetings, the members of one of the association's lodges could suspend their obligation to pay assessments without losing their right to claim benefits from the association would be absurd.

The question whether, at his death, Dr. Lamb was a member of the defendant association is purely a question of law. There was no dispute of fact presented at the trial for the consideration of the jury. We think that, by reason of his failure to pay the assessment charged against him for the month of December, 1899, and to secure his transfer from his lodge upon its disbandment to some other lodge of the Knights of Birmingham, Dr. Lamb ceased to be a member of the defendant Order.

We see no error in the trial judge's disposition of this case, and accordingly refuse a new trial.

Lukens et al., Trustees, v. Lasher.

Party-wall—Main wall built within the lines of its own lot—Foundation wall extending into adjoining lot.

A party-wall is a wall erected on the line between two adjoining estates, belonging to different persons, for the use of both estates. The character of the wall is not altered because of the fact that the main wall of a building erected on one of two lots does not project over the division line, but instead is eight inches distant therefrom and constructed wholly within the lines of its own lot, when such wall is built upon a foundation which extends into the adjoining lot for the distance of eleven inches from its lowest point to the surface of the ground.

Hence, in such case, the adjoining lot owner, on payment of the full amount which the measurers who measured the wall ascertained to be due for its contemplated use, is entitled to use it for the purpose of placing joists in it and to support the roof of the building, and a preliminary injunction forbidding such use will be dissolved.

Bill for injunction. C. P. No. 3, Phila. Co., June T., 1901, No. 1504, in Equity.

John G. Johnson, for plaintiffs; *Henry Budd*, for defendant.

MCCARTHY, J., July 19, 1901.—This cause was tried before me, sitting as chancellor, on July 8, 1901. The parties, both plaintiffs and defendant, were represented by counsel. Evidence was given in open court on behalf both of the plaintiffs and of the defendant. After hearing the evidence, the case was fully argued by counsel.

Abstract of pleadings.

The amended bill filed in the cause sets forth that the plaintiffs are owners in trust of a ten story messuage, situate on a lot of ground on the southeast corner

VOL. 10—25

of Broad and Cherry streets, in the city of Philadelphia; that the easterly wall of the message from the ground upward is erected wholly upon the plaintiffs' premises, and, except as to a small portion, is 8 inches west of the line separating their lot from the lot adjoining to the eastward; that the foundation beneath the wall extends over the dividing line 8 or 10 inches; that the defendant is owner of the lot adjoining to the eastward, and is about to erect thereon a building eight stories high; that he has broken into and used not only the foundation of plaintiffs' wall, but part of the wall itself, without their permission and in violation of notice to refrain from trespassing upon plaintiffs' premises, and that plaintiffs believe he intends to break into and use other parts of the wall, and roof over and occupy 8 inches of their ground from the surface to the height of about 100 feet, without any right or authority; that, in ignorance of the fact that the wall was built 8 inches to the westward of the dividing line, and believing it to be a party-wall, and the defendant having so represented it and tendered plaintiffs a certain sum in payment for the use of it, they received the said sum with the understanding that they might have the wall measured and be further compensated if such measurement showed further sums to be due for the use of the said wall as a party-wall, but, having subsequently discovered that the said wall is not a party-wall, they notified the defendant to that effect, and offered to return the moneys paid them for the use of the wall, except such part of it as related to the foundation, and warned him not to trespass upon their premises or break into or use their wall, to which notice he has paid no attention.

The prayers are: (1) For an injunction preventing the defendant, his agents and employees, from entering upon, using or breaking into so much of the said wall as is erected above the level of the ground and distant 8 inches or more from the dividing line; (2) a decree directing the defendant to remove the building materials he has attached to the wall and to repair all breaches heretofore made in it by him, and (3) general relief.

The answer admits the ownership by the plaintiffs of the premises adjoining defendant's lot on the west; denies that plaintiffs' wall is a private wall, and avers that it is a wall resting upon foundations which are extended 11 inches into defendant's land; admits that the plaintiffs' wall above the surface of the ground does retire to a distance of 8 inches from the dividing line between the two lots; admits defendant's ownership of the lot adjoining plaintiffs' lot, and that he is erecting a building thereon and using the wall of the plaintiffs; denies that such use is without the plaintiffs' authority, and avers that he has paid for the use of the wall, and that if for such use it is necessary to cover any portion of the plaintiffs' lot, permission so to cover has been given, as the wall could not be used without it, and if any additional compensation for such use should be made to plaintiffs, he is ready to make it; avers that plaintiffs well knew, in March or April, 1901, that defendant intended to use the wall as a party-wall, and sets forth in detail the history of his interviews and dealings with the plaintiffs and the board of building inspectors in reference to his contemplated use of the wall as a party-wall, culminating in the payment, on June 21, 1901, by defendant, and acceptance by the plaintiffs, of the sum of \$1951.98 for the use of the wall as a party-wall, as per measurement; denies that he has in any way misled the plaintiffs, either as to the fact or to the law, and avers that he is in lawful possession of the use of the wall and of the few inches of plaintiffs' land necessary to render that use available, subject only to an obligation to pay whatever sum may be a proper compensation, when ascertained by proceedings in a proper tribunal.

A preliminary injunction was granted to restrain the defendant from entering upon, using or breaking into the said wall.

10 DIST. R.

Findings of fact.

The following facts are clearly established from the evidence :

1. In 1894 or 1895 the Odd Fellows' Temple was built upon the lot situate on the southeast corner of Broad and Cherry streets, in the city of Philadelphia. In constructing the east wall of that building, the builders entered upon the adjoining lot to the eastward and built a foundation wall, the footing of which extends for a distance of 11 inches to the eastward of the division line between the two lots ; that is to say, the footing of the wall rests for 11 inches upon the ground of the adjoining lot, which will hereinafter be referred to as defendant's lot. Upon this footing the foundation wall was built to the level of the surface of the ground, at which level it still projected 8 inches beyond the division line over upon the defendant's lot. From the surface of the ground a brick wall was constructed, resting wholly upon the foundation wall described, but the easternmost face of this brick wall is at the distance of 8 inches west of the division line between the two lots, so that this portion of the wall is wholly upon the plaintiffs' lot. There are two cornices, at different elevations, projecting eastwardly from this wall, the uppermost of which extends 4 feet 10 $\frac{1}{4}$ inches beyond the division line over upon defendant's lot. Verbal permission to construct this projecting cornice was given by defendant's predecessor in the title, then owning the lot. The thickness of the foundation does not appear in evidence. The thickness of the main brick wall, where it rests upon the foundation wall, is 3 feet, and the wall continues upward of that thickness about two stories ; it diminishes in thickness in the upper part, but to what extent the evidence fails to show.

2. By deed dated Oct. 3, 1898, the Odd Fellows' Hall Association, a corporation, conveyed to the plaintiffs, *inter alia*, the lot of ground on the southeast corner of Broad and Cherry streets, with the premises thereon erected, to hold the same in trust for the uses and purposes specified in the deed.

3. The defendant is the present owner of the lot of ground adjoining the plaintiffs' lot to the eastward, upon which the foundation wall mentioned in the first finding rests in part. He has begun the erection upon his lot of an eight-story building, which will be about 100 feet in height. The plans for the erection of this building call for the use of the easternmost wall of the Temple building as a party-wall.

4. In March, 1901, the defendant had an interview with one of the plaintiffs for the purpose of paying for so much of the wall as it was in contemplation to use for the purposes of the new building, and it was agreed between them that measurers should be employed so that the price to be paid for the use of the wall might be determined. Subsequently, the defendant was notified not to go ahead, in consequence of a complaint having been lodged with the building inspectors that the wall was overweighted. Defendant appealed, and, after hearing, permission was given him by the board on June 20, 1901, to go on with the work. On June 21 defendant paid to the plaintiffs \$1951.98 "for use of party-wall, as per within measurement," with the understanding that plaintiffs might have a re-measurement made, and any difference ascertained to exist thereby should be settled by return of money or additional payment, as the case might require, "work not to be suspended in the interim." Defendant thereupon proceeded to break into and use the wall for the purposes of the construction of his building.

5. On June 29, 1901, plaintiffs notified the defendant, by letter, that the greater part of the east wall of the Temple was 8 inches behind the party line and not merely an inch or two behind it, as they supposed when the payment was made them ; that, consequently, the defendant had no right to use the wall as a party-wall, except to the extent of the foundation, and they notified him to

refrain from trespassing upon the wall, stating that if, upon a re-measurement of the foundation, the valuation should be less than the amount paid them, they would return the surplus. The defendant continued to use the wall, notwithstanding this notice, until stopped by the preliminary injunction issued in this cause.

Findings of law.

1. The wall, which is the subject-matter of the present controversy, is a party-wall. A party-wall is "a wall erected on the line between two adjoining estates belonging to different persons, for the use of both estates:" 2 Bouvier's Dict., 609, cited in *McCall v. Barrie*, 15 W. N. C. 29. In order to build such a wall, our Acts of Assembly authorize the first builder to enter upon the land adjoining his property to lay thereon the foundation of the party-wall, limiting, however, his use of the adjoining lot so that in no case "shall any party-wall be placed on the adjoining lot more than 10 inches for the stone wall or more than 6½ inches for the brick wall:" *Vide* Act of Feb. 24, 1721, § 2, 1 Sm. Laws, 124, and Act of May 7, 1855, § 8, P. L. 464. The plaintiffs' grantor, under the authority of these Acts, did enter upon the defendant's lot and construct thereon a foundation which is admittedly a party-wall from the lowest course up to the surface of the ground. Resting upon this foundation, and wholly supported by it, the main wall of the edifice continues upward. For some reason, which does not appear in the case, this wall does not project over the division line, but its easternmost face is 8 inches to the westward of that line, so that it is constructed wholly within the lines of the plaintiffs' lot. This circumstance, however, does not alter its character as a party-wall. In *Milne's Appeal*, 81 Pa. 54, there was a stone party-wall foundation 9 inches wide, partly on the plaintiffs' lot and partly on the defendant's. A brick party-wall was built upon this foundation, running a distance of 40 feet southward and then receding 4½ inches to the westward, continuing, however, on the stone foundation, and running for a further distance of about 40 feet southward, then advancing again to the party line. The receding part of this wall was wholly on the defendant's ground; he placed in it windows, and the plaintiff filed a bill to abate the nuisance caused thereby. A demurrer was filed to the bill, which the court overruled, holding that the important point to be decided was whether the wall between the properties of the plaintiff and defendant was a party-wall, and concluding that "the character of the wall must be determined in part from its foundation. If the builder starts the latter upon the line, and thus takes the land of the adjoining owner, he must carry it up strictly as a party-wall, or at least in such manner as to give the adjoining owner all the benefits of such a wall. Otherwise the land of the latter would be taken without any corresponding benefit." The case was afterwards heard on bill and answer, and the injunction made perpetual. On appeal, the decree was affirmed by the Supreme Court in a *per curiam* opinion which decides: "The wall mentioned in the plaintiff's bill is clearly a party-wall. The defendant could not, by receding upon the foundation of a part of it, carry up that part within his own line so as to destroy the character of the entire wall, and thus secure to himself the privilege of openings in it inconsistent with its character as a party-wall."

2. The wall in question being a party-wall, placed where it is "for the use of both estates," the defendant is by law entitled to the use of the wall for the purpose of placing joists in it and to support the roof of his building, first reimbursing to the plaintiffs the cost of so much of the wall as he shall have occasion to make use of: *Milne's Appeal*, *supra*; *McCall v. Barrie*, 15 W. N. C. 28; Act of Feb. 24, 1721, § 2, 1 Sm. Laws, 124. The testimony shows that the defendant has paid a substantial sum for his intended use of the wall, being the full amount which the measurers who measured the wall ascertained to be due for 10 Dist. R.

Lukens et al., Trustees, v. Lasher.

its contemplated use. Though the plaintiffs seem doubtful as to whether this amount is correct, there is no evidence in the case to show that their doubt is based upon any real foundation or that the defendant has not paid them the full amount to which they are entitled.

This view of the case renders it unnecessary to consider the course of dealing between the parties as set out in the answer and established by the evidence. The defendant is acting strictly within his legal rights; the plaintiffs are wholly without equity to support their application, and therefore the injunction heretofore issued in this cause must be dissolved and the bill dismissed.

Leaming's Estate.

Orphans' Court—Jurisdiction—Removal of estate and parties to Pennsylvania.

A foreign executor can be sued in Pennsylvania by a resident claimant, and the suit will be sustained unless it trenches unduly on the jurisdiction of another court already attached, or exposes the parties to such jurisdiction to inequitable burdens.

A testator domiciled in New Jersey, by his will proved in that State in August, 1890, gave his entire estate to a Philadelphia corporation in trust, to whom the executors, after filing their account in the proper office, transferred the estate. Subsequently the *cestui que trusts* became residents of Philadelphia. A guardian, by appointment in Philadelphia, of a child of the testator, born after the execution of the will, asked that such part of the estate as he became entitled to under the intestate laws, in this case one-sixth, be awarded to him. *Held*, (1) that granting the relief sought for in Pennsylvania would not trench, unduly or at all, upon the jurisdiction of the courts of New Jersey, nor expose parties subject to such jurisdiction to inequitable burdens; (2) that the claim was not barred by the statute of limitations, as infants are exempted from its provisions; and (3) that the Orphans' Court had jurisdiction.

Marriage—Legitimacy—Presumptions.

The presumption and charity of the law are in favor of the legitimacy of a child, and those who wish to bastardize him must make out the fact by clear and irrefragable proof. There is abundant evidence to establish affirmatively the fact of legitimacy when the seduction of the mother under promise of marriage was followed by a living together as husband and wife—a subsequent request that a marriage ceremony be performed being met with the response that it was unnecessary, that they were already man and wife—where there was not only a reputation of marriage among the neighbors, but repeated declarations by the husband that the mother of the children she bore him was his wife, and where the children were recognized by him, known by his name, and so registered in the public records required by the laws of New Jersey, and were treated by him in all respects as children are by a father.

Petition, answer and proofs. O. C. Phila. Co., Oct. T., 1900, No. 297.

Matthew H. Randall, for petition; *Richard L. Ashhurst*, contra.

PENROSE, J., June 29, 1901.—In the recent case of *Laughlin v. Solomon*, 180 Pa. 177, it was held that while a foreign executor or administrator could not sue in Pennsylvania, neither the Act of Assembly nor the principle upon which it is founded prevents him from being sued by a resident claimant. The subject is there exhaustively considered by Judge Mitchell, by whom the authorities, including *Swearingen v. Pendleton*, 4 S. & R. 389, *Evans v. Tatem*, 9 S. & R. 252, *Bryan v. McGee*, 2 Wash. C. C. 337, *Mothland v. Wireman*, 3 P. & W. 186, *Magraw v. Irwin*, 6 Norris, 139, &c., &c., &c., are referred to and commented on: the conclusion being that the suit will be sustained “unless it trenches unduly on the jurisdiction of another court already attached, or would expose parties subject to such jurisdiction to inequitable burdens.” This is the true test, and, by its application, the solution of the case now before us is much simplified.

A testator domiciled in New Jersey, by his will proved in that State in August, 1890, gave his entire estate to the respondent, a Philadelphia corpora-

tion, in trust for the persons and purposes there expressed; and the executors having filed their account in the proper office, made voluntary payment and transfer to the trustee, without waiting for any adjudication or award of distribution,—all debts having been paid and there being no question of solvency. Subsequently the *cestui que trusts* became residents of Philadelphia, so that now, the estate, the trustee, and all persons having any interest are in this jurisdiction. The petitioner, who is the guardian, by appointment here, of a child of the testator born after the execution of the will, asks, under the provisions of a New Jersey statute, similar in effect to our own, that there may be awarded to him such part of the estate as he became entitled to under the intestate laws, viz., one-fourth of two-thirds, or one-sixth.

All of the *cestui que trusts* who are *sui juris* consent to the application, but the trustee, on behalf of a minor and for the protection of interests not yet in being, suggests various objections. The courts in Pennsylvania, it is said, are powerless to grant the relief prayed for, which can only be had in New Jersey, either by proceeding in the Orphans' Court of the proper county, or by bill in equity in the court of chancery. But as the process of those courts cannot reach the estate or the parties, thus removed from the State, it is evident that there must, if the law be as asserted, be a failure, if not an actual denial of justice.

It is also contended that after the time which has elapsed since the will was proved, the probate has become conclusive, and the application is too late; that the claim is barred by the statute of limitations; and, finally, if there is any remedy in Pennsylvania, it cannot be had in the Orphans' Court. With regard to the plea of the statute of limitations, it is enough to say that both in New Jersey and in Pennsylvania, infants and persons under disability are exempt from its provisions: and where a will is revoked for statutory reasons, *pro tanto* or altogether, its admission to probate has no effect upon the rights thus conferred (*Owens v. Haines*, 199 Pa. 137).

It is obvious, under the facts stated, that the granting of the relief sought for in Pennsylvania will not trench, unduly or at all, upon the jurisdiction of the courts of New Jersey, nor expose parties subject to such jurisdiction to inequitable burdens, and, as to this extent the case is decided by *Laughlin v. Solomon*, *supra*, the only question remaining is that relating to the authority of the Orphans' Court. We had occasion to consider this in *Mayer's Estates*, 10 W. N. C. 281, 284, between wards and their guardian, appointed by the will of a testator domiciled in California, who had brought the estate to Philadelphia,—his own residence, and need not repeat all that was there said. It is conceded in the present case that the entire personal estate of the testator was surrendered by the executors, so that whatever part of it passed to the petitioner was included in what was so surrendered, and forms part of what is now held by the trustee. It must be conceded also that the controversy is one peculiarly within the general jurisdiction of the Orphans' Court, and that if the testator had been domiciled here, such jurisdiction would have been exclusive: hence, if jurisdiction is wanting because of the domicile in another State from which the parties and estate have removed, it is only for a reason purely technical. The disposition of the Supreme Court to extend the jurisdiction of the Orphans' Court in order to make it commensurate with the demands of justice is illustrated by very many recent decisions, among which are *Brooke's Appeal*, 6 Outerb. 150, *Odd Fellows Bank's Appeal*, 8 Crumr. 356, *Marshall's Appeal*, 23 Crumr. 285, *Meeker's Appeal*, 154 Pa. 500, *Watts's Appeal*, 158 Pa. 1, *Luckenbach v. Luckenbach*, 175 Pa. 484, *Pittsburgh Bank's Appeal*, 183 Pa. 260, *Tyson's Appeal*, 191 Pa. 218, 223, *Tyson v. Rittenhouse*, 186 Pa. 137, 143, &c., &c., &c.; and with these decisions before us, if we were in doubt, we should be

10 DIST. R.

Leaming's Estate.

justified, under the maxim, *boni judicis*, in amplifying the remedies of the Orphans' Court in order, in the present case, to "advance substantial justice." But we are not in doubt. The Act of June 18, 1836, § 19, P. L. 792, declares that the "jurisdiction of the several Orphans' Courts shall extend to and embrace . . . all cases within their respective counties, wherein executors, administrators, guardians or trustees may be possessed of, or are in any way accountable for any real or personal estate of a decedent." Nothing could be more general and comprehensive than the language thus used. The Act, which greatly enlarged the powers of the Orphans' Court (*Lewis v. Lewis*, 1 Harris, 82; *Dundas's Appeal*, 14 P. F. Smith, 325; *Musleman's Appeal*, 15 P. F. Smith, 480; *Shugar's Appeal*, 153 Pa. 389), fully covers the present case: "all cases," it says, in which "a trustee" is possessed of "or" "in any way accountable for the real or personal estate of a decedent." There is no restriction, as there is in a previous clause relating to the removal of executors and administrators, to the case of such as "derive their authority from the register of the respective county:" it is "all cases" in which the trustee is "in any way accountable." There seems to be no room for interpretation. As was said by Chief Justice Agnew, in *Turnpike Co. v. McNamara*, 22 P. F. Smith, 280, in speaking of an Act of Congress, "language could not be broader, and no exception or qualification is to be found in the Act, while the design of Congress makes the meaning perfectly clear." See also *Com. v. Randall*, 2 W. N. C. 210, where it was said by Judge Thayer, "A court of law will not make any interpretation contrary to the express letter of such an instrument, for nothing can so well explain the meaning of the makers as their own direct words, since *index animi sermo*, and *maledicta expositio que corrumpit textum*, 4 Rep. 25. It would be dangerous to give scope for making a construction in any case against the express words where there is nothing to assure us that the meaning of the words is opposed to them."

It may be remarked in this connection as a curious circumstance, though it does not at all affect the determination of the question, that not only is the trustee a Philadelphia corporation, but the will, which appoints Philadelphians as executors, appears to have been executed here, in presence of well known citizens; and Philadelphia, as stated in the registry of the births of his children, was the domicile of origin of the testator.

With regard to the suggestion that the petitioner does not come within the provisions of the Act relating to after-born children, but little need be said. Apart from the general presumption in favor of legitimacy (*Pickens's Estate*, 163 Pa. 14; *Wharton's Evidence*, § 1298), there is abundant evidence to establish it affirmatively. The seduction of the mother under promise of marriage was followed by a living together as husband and wife,—a subsequent request that a marriage ceremony should be performed being met with the response that it was unnecessary, and that they were already man and wife. There was not only a reputation among the neighbors that they were married, but the repeated declarations of the husband that the mother of the four children which she bore to him was his wife,—this being continued, until his death, during the fourteen years of the cohabitation. The children were recognized by him, known by his name, and so registered in the public records required by the laws of New Jersey, and were treated by him in all respects as children are by a father. The certificates upon which the registration referred to was made are those of the family physician (the same in the case of each child), manifestly from information furnished by the father, setting forth, in addition to the date of birth, the name of the child, the names of the father and mother, and "the number of children in all *by this marriage*." The certificate, in the case of the child now claiming, states the number so born to be four and gives the names

Leaming's Estate.

of the parents as Stevenson M. Leaming and Florence Mouell Leaming. Every intendment in favor of a marriage and of the legitimacy of the children will be made under the circumstances thus briefly alluded to, and the evidence is infinitely stronger than it was in Strauss's Estate, 168 Pa. 561, Comly's Estate, 185 Pa. 208, Hines's Estate, 7 District Reps. 89; 10 Pa. Superior Ct. 124. See also Bergdoll's Estate, 7 District Reps. 137.

What was said in *Orthwein v. Thomas*, 127 Ill. 554, may well be applied to this case:—"The presumption and charity of the law are in favor of the legitimacy of a child, and those who wish to bastardize him must make out the fact by clear and irrefragable proof. The presumption of the law is not lightly broken in upon or shaken by a mere balance of probabilities: the evidence for repelling it must be strong, satisfactory and conclusive."

As already stated, all the parties beneficially interested who are *sui juris* are willing that the petitioner should have the portion of the estate in the hands of the trustee to which his ward is thus entitled.

The prayer of the petition is granted. Counsel will prepare the requisite decree.

Roush v. Moyer.

Justice of the peace—Appeals—Payment of costs nunc pro tunc—Affidavit required by Act of July 14, 1897—Misleading advice of justice.

Where the failure of the appellant to pay the costs at the time of appeal is due to the misleading advice of the justice, the court will grant relief and permit the costs to be paid *nunc pro tunc*.

When appellant relies upon the justice, who omits to inform him concerning the affidavit required by the Act of July 14, 1897, P. L. 271, the court will allow it to be made and the appeal perfected. The affidavit may be filed in court with the transcript, or, by special allowance, after the transcript is lodged.

Rule to strike off appeal. C. P. Snyder Co., Oct. T., 1900, No. 76.

Frank S. Glass, for rule; *F. E. Bower* and *H. Harris Bower*, contra.

MCCLURE, P. J., July 9, 1901.—The truth of the statements contained in the defendant's answer is practically conceded. From this it appears that the failure of the defendant to pay the costs at the time of taking the appeal was due entirely to the advice of the justice, who informed him that it was not necessary to pay the costs, and that they would abide the event of the suit. Defendant was without counsel, and this statement of the justice misled him. The courts have uniformly granted relief in such cases: *Henderson v. Risser*, 9 District Reps. 505. As the right of appeal involves the right of a trial by jury, the law favors it. Where the appeal is taken in good faith and the requirements of the law have not been strictly complied with through want of knowledge or oversight, the courts have allowed the defects to be amended. This power has frequently been exercised where the appellant has failed to make the affidavit required by the Act of 1876 and various local statutes as a prerequisite to appeal. Indeed, it has been held that where a magistrate has knowledge that an affidavit is necessary and fails to inform the appellant of the fact, it is such misconduct on his part as entitles the appellant to relief: *Swallow v. Red Ash Coal Co.*, 2 Kulp, 369.

The courts have been even more liberal in their interpretation of the Act of 1897. This no doubt because it does not by its terms require the affidavit to be made "before the defendant shall be entitled to an appeal from the judgment," but simply provides that "no appeal shall be entertained from the judgment," &c., unless an affidavit be made. When the court "entertains" an appeal has

Roush v. Moyer.

been considered not so clear as to preclude the filing of the affidavit by special allowance after the transcript is lodged with the prothonotary: *Linhart v. Cunningham*, 6 District Reps. 788. That it need not be filed with the justice, but may be filed in court with the transcript, has been decided in a number of cases, among them *Swift & Co. v. Shylock*, 21 Pa. C. C. Reps. 307; *Black v. Cochran*, 21 Pa. C. C. Reps. 326. Where, as here, there has been an honest effort to take an appeal, and the appellant, ignorant of the law and without counsel, relies upon the justice, who advises him as to certain requirements and inadvertently omits to say anything about an affidavit, we think the court should allow it to be made and the appeal perfected: *Womelsdorf v. Heifner*, 104 Pa. 1; *Hunt v. Reilly*, 20 Pa. C. C. Reps. 88; *Clements v. Miller*, 20 Pa. C. C. Reps. 270; *Swift & Co. v. Shylock*, 21 Pa. C. C. Reps. 307; *Linhart v. Cunningham*, *supra*.

And now, to wit, July 9, 1901, it is ordered that, upon payment of the costs before the justice and filing the proper affidavit within twenty days from this date, the rule be discharged; otherwise, to be marked absolute by the prothonotary.

Commonwealth v. Gillespie.

Criminal procedure—Modification of sentence.

The court has no power to change, modify or alter a sentence after the expiration of the term when it was imposed.

Rule to reduce sentence. Q. S. Schuylkill Co., March Sess., 1901, No. 212.

M. P. McLaughlin, district-attorney, for Commonwealth.

Brumm & Dyson, for defendant.

SHAY, J., May 6, 1901.—The first question which confronts us in the consideration of this case is, has the court the power to change, modify or alter a sentence once imposed after the term in which it was given is passed? We think this question must be answered in the negative, and in this opinion we are fortified by numerous decisions of the Supreme Court and several of the Superior Court of our State.

Com. v. Mayloy and Keating, 57 Pa. 291, was a test case from the courts of Philadelphia county to determine the very question now before us. Prior to that time, a custom had existed in the courts of Philadelphia to enter a rule at the term in which sentence was imposed, and, if the exigencies arose at some subsequent period, the rule was made absolute and the prisoner discharged. The Governor of our Commonwealth, in his message to the legislature, referred to this custom as one of doubtful authority, and Judge Allison, of Philadelphia, to test the question, made absolute a rule for reduction of sentence then pending in the case of *Mayloy and Keating*, sentenced some five months prior to that time to one year imprisonment on a plea of guilty on an indictment of larceny. In rendering the opinion of the Supreme Court, Thompson, C. J., said: "The single question to be decided is as to the power of the criminal courts to reconsider a sentence after the term at which it was announced, and during the progress of its execution, and to modify or diminish its extent, the rule for which being entered at the time of sentence and within the term."

"The first remark which may be made is, that the power exercised is not to be found based on any express authority, constitutional or statutory, nor in any express right of the convicts to its exercise. Courts are founded on express authority, and their duty is to hear and determine according to law. Beyond this, the only express authority to interfere in regard to convicts is the pardoning

power, exclusively in the hands of the executive. The common law principle of the finality of judgments is at once an answer to the argument and a refutation of the idea that the power to interpose exists after the term has passed. This principle of finality is sufficiently apparent in our own reports without the necessity of research. 'There must be a time,' it was said by our brother Strong, in *Mathers v. Patterson*, 9 Casey, 485, 'when the power of a court to open its judgment, obtained adversely, ceases.'

"But it has been argued that the rule to reconsider within the term is a modification, *ipso facto*, of the rule which regards the finality of the sentence. The difficulty is to find authority for the rule. A principle is often limited in its scope by other principles, and, when so, the operation is the result of law. But it is quite another thing to make a rule to control a principle. This is legislation. To go to the extent of the argument would be to set aside the maxims of the law in regard to the finality of judgments and sentences. '*Interest reipublice res judicata non rescindi.*'

"It seems to us, therefore, to result necessarily from these views that the practice is neither sustainable by the common law, as an inherent power in the courts, nor has it ever been received as the common law of the State, nor a good local custom within the county, nor a rule of practice within the power of the court to adopt, either expressly or by usage. On none of these grounds do we think the court sustained in altering the sentence in the cases before us. Indeed, it seems to me, the existence of the pardoning power, conferred on the executive by the constitution, is an argument against the practice. If there be error, it must be arrested by executive clemency, if at all. Approximate accuracy in administering justice is all that is possible in human tribunals, and the practice contended for promises no more if adopted, even in the highest anticipations of its most earnest advocates, and may be fraught with many evils besides that of doing in the name of the law what we think cannot be found to be authorized by law. Judgment reversed."

This case is followed and affirmed in *Schoeppe v. Com.*, 65 Pa. 57; *King v. Brooks*, 72 Pa. 364; *In re Sheppard's Contested Election*, 77 Pa. 302; *In re Kensington, &c., Tpk. Co.*, 97 Pa. 272, in which Mr. Justice Paxson said: "If the court may thus vacate its executed decrees after the term has passed, it may do so after twenty terms have passed. That it has no such power was settled in the case of *Com. v. Mayloy*, *supra*. See also *Lance v. Bonnell*, 105 Pa. 47; *Com. v. Nuber*, 6 Pa. Superior Ct. 420; *Com. v. Dunleavy*, 16 Pa. Superior Ct. 380.

There can be no question from a perusal of the above-cited cases that this court has not the power sought to be invoked by the above rule. The term once ended in which the sentence of the law was passed, the convict is no longer under our control, and if a mistake has been made, if our judgment has been too harsh, if the offender has reformed, the laws of our State have wisely placed in the hands of the executive the pardoning power to remedy whatever error may be committed by the courts in passing sentence. We do not say that error was committed in the trial of this case, and we refrain from discussing the evidence submitted to us for the reconsideration of this sentence, as the above decisions of our highest courts render it unnecessary. It suffices for us to say, in passing, that the prisoner was ably defended and had the benefit of one of those witnesses at the time of trial in his attempt to prove an *alibi*, and the jury found against him.

We would clearly be exceeding the power reposed in us, and would certainly be in error, were we to make this rule absolute and attempt to alter the sentence imposed on the prisoner, and we therefore make the following order:

Now, May 6, 1901, the motion for reduction of sentence in the above case is discharged.

From J. O. Ulrich, Tamaqua, Pa.

Philadelphia, to use, v. Stewart and The Equitable Trust Co.

Principal and surety—Bonds to municipalities for use of sub-contractors and materialmen—Release of surety.

Where a surety executes a bond to the city for the use of sub-contractors and materialmen, who may furnish materials and do work for the principal contractor, and for the payment of such labor and materials in accordance with the provisions of a municipal ordinance, which bond refers to the contract between the city and the principal contractor, by the terms of which the city is permitted, during the progress of the work, to alter, add to or omit any item of work or materials called for by the plans and specifications referred to therein, without avoiding the contract, deviations from the specifications by the sub-contractors, with the assent of the principal contractor and the city, will not release the surety, although it did not assent thereto.

Res adjudicata—Judgments.

The right of a sub-contractor or materialman to recover for a breach of the condition of such a bond is distinct from, and independent of, that of the city: hence the fact that in an action by the principal contractor against the city for the unpaid balance of the contract price, wherein one of the issues was whether or not the work performed by the plaintiff in the case at bar was in accordance with the contract, judgment was rendered in favor of the city is *res inter alios acta* in, and no bar to, an action against the surety on the principal contractor's bond.

Motion for new trial. C. P. No. 4, Phila. Co., Dec. T., 1898, No. 452.

Rich & Boyer, for plaintiffs; *Simpson & Brown*, for defendants.

AUDENRIED, J., July 1, 1901.—George W. Stewart agreed with the city of Philadelphia to do certain work at the almshouse. His contract provided that the city might, during the progress of the work, alter, add to or omit any item of work or materials called for by the plans and specifications, which it referred to, without avoiding the contract, an equitable allowance (to be fixed by the city's engineer and architect) in respect of any changes that might be made to be added to or deducted from the contract price of the work undertaken. In pursuance of his contract with the city, Stewart entered into a bond to the city, reciting the contract, and conditioned to be void if he should promptly pay for all materials furnished and supplied and all labor performed on the work which he had undertaken. In this bond The Equitable Trust Company joined as surety.

This action is brought in the name of the city of Philadelphia, to the use of S. Faith & Co., upon the bond above mentioned, to recover damages for a breach of its condition, by the failure of Stewart to pay moneys alleged to be owing by him to S. Faith & Co. for labor and materials supplied by the latter as sub-contractors on a part of the almshouse work.

There is no question that the use-plaintiffs engaged as sub-contractors to do a part of the work undertaken by Stewart for the city, and that what they were to receive for the performance of their contract was the sum of \$3550. It is not disputed that this money has not been paid them.

The first question presented by the case is whether the use-plaintiffs' sub-contract embraced the setting up of certain panels of glass in one of the almshouse lavatories. It was contended by the defendants that it did, while the use-plaintiffs insist that they agreed only to supply laborers on the work of setting the glass in place, which, however, was to be done at the risk of Stewart. What was agreed upon depends entirely upon parol evidence. Faith & Co.'s letter of Dec. 20, 1897, offers to do certain plumbing work for \$3050, but expressly excepts the erecting of the hammered glass linings and partitions. Stewart's letter, dated Dec. 24, 1897, accepts a proposition to "do all plumbing and furnish all materials to complete the work in connection with the plumbing at the almshouse" for \$3550. Manifestly, Faith & Co.'s original proposition had been

Philadelphia, to use, v. Stewart and The Equitable Trust Co.

modified in respect to what that firm was to do, as well as in respect of the sum which Stewart was to pay them. Both sides admit this, and both admit that the modification was made in the course of a telephone conversation between the use-plaintiffs' representative, Long, and the defendant, Stewart. The testimony of these two men is at variance as to just what passed between them. Long's version of the conversation is to the effect that, in consideration that \$500 was added to the price named in Faith & Co.'s proposition of Dec. 20, 1897, Faith & Co. agreed to supply workmen to set up the glass partitions and linings at the risk of Stewart as to breakage. Stewart swears that Long offered for \$500 to supply and set up this glass work. The question as to what proposition was thus made to Stewart on behalf of Faith & Co. was necessarily for the jury. If the jury found that all that the use-plaintiffs undertook to do was to supply labor, while the defendant, Stewart, was to bear the risk of the laborers' skill and care, the verdict for the plaintiffs was undoubtedly right.

If, however, Stewart's version of the conversation between himself and Long was correct, the question then arises whether, in departing from the specifications as to the mode in which the glass partitions and wainscoting were to be secured in place, Faith & Co. did not break their contract with him, and thus lose their right to demand from him payment of the contract price of the work, at least to the extent of any loss entailed by their attempt to do the work in some other fashion.

The city's specifications provided that the glass should be bolted in place. The plaintiffs tried to fasten it by means of cement. If this deviation was suggested by Stewart, or approved by him, or suggested or approved by some one authorized by him to do so, it is clear that he cannot complain of it, and whatever loss it occasioned should be borne, not by Faith & Co., but by Stewart.

On this question there is no real conflict of testimony. Long states that, instead of the method of securing the glass plates by means of bolts, the suction or cement method was adopted by Faith & Co.'s workmen under the directions of a person named Franklin, who was the Philadelphia representative of the New York house, by which the glass was furnished to the use-plaintiffs for the almshouse work. He further stated that Stewart told him to let the workmen set the glass in accordance with Franklin's instructions. This Stewart, at first, denied. Under cross-examination, however, he admitted that it was true, and he also testified that the plan of bolting the glass plates in place was abandoned by the city's architects, whose representative, Mr. Harris, consented that the glass should be set in position as Franklin might direct, saying that the glass was to be held in position by suction. His testimony that Harris changed the manner of securing the glass provided by the contract was not contradicted. Although Harris was in court and appeared on the stand as a witness, he was not questioned on this point. That such a change from bolts to cement was made by the city's architects seems not to be in dispute.

It is urged that, no matter what might be the effect of the use-plaintiffs' deviation from the specifications in this matter, so far as Stewart is concerned, this modification of the agreement between Stewart and Faith & Co. operated to discharge Stewart's surety and co-defendant, The Equitable Trust Company. It is a sufficient reply to this argument to point out that the contract between Stewart and the city, which by relation was read into and became a part of the contract between Stewart and Faith & Co., provides for the alteration, addition to or omission of any item of labor or materials specified without avoiding the contract, and that Stewart's action in directing Faith & Co. to follow Franklin's instructions was pursuant to an alteration of the city's specifications by the architect in charge of the work. The surety's bond, which incorporates the contract between Stewart and the city, covers all such changes and alterations.

Philadelphia, to use, v. Stewart and The Equitable Trust Co.

The trial judge, therefore, committed no error in refusing to charge as requested by the defendants, that "If the provisions of the specifications between the city and Stewart, as to the bolting of the glass in place, were waived by Stewart, said waiver would not be binding on The Equitable Trust Company, and such alteration in the contract would release The Equitable Trust Company."

The remaining question presented at the argument of the motion for a new trial is whether the claim of the use-plaintiffs on this bond is precluded, because in an action between the defendant, Stewart, and the city of Philadelphia, in which Stewart sought to recover the unpaid balance on the contract for the work which he undertook to do at the almshouse, one of the issues therein being whether or not the plumbing had been performed according to the contract, judgment has been entered in favor of the city. This question we answer in the negative.

While it is true that this action is brought in the name of the city of Philadelphia, and while it has been said by the Supreme Court that "having an interest to enforce the condition, the city recovers on its legal title," the real party in interest here is a person different from the city, whose interest is not derived from the city, and whose claim is made in the city's name only because the city happened to be the trustee named in the bond given to secure the payment of such indebtedness as Stewart might incur to his sub-contractors and materialmen. The position of the use-plaintiffs in this case is quite different from that of the assignee of a bond or other non-negotiable chose in action, who stands merely in the shoes of his assignor, and who, taking subject to all counter-claims and equities which might be enforced against his assignor, is, for the purposes of litigation, identified with him. The right of Faith & Co. to recover for a breach of the condition of this obligation is distinct from and independent of that of the city of Philadelphia. What might bar the city, if the action was in its own right, will not necessarily bar them. They were not parties to the action brought by Stewart against the city. As to Faith & Co., the judgment therein is *res inter alios acta*, and therefore not binding upon them.

The question of the effect of the judgment entered in the case of Stewart v. The City of Philadelphia does not, of course, arise if, as matter of fact, Faith & Co. did not undertake to do the setting of the glass partitions and wainscotings for Stewart.

So far as they have been questioned, the rulings of the trial judge seem to be correct, and as the evidence was sufficient on either of the questions of fact above discussed to warrant a verdict for the plaintiffs, a new trial is refused.

Elmslie's Estate.

Will—Construction—Legacy given to parent for care of invalid son.

A legacy given in the following words, "To L. G. P. I give and bequeath his heirs and assigns \$5000 especially for the care of his invalid son," is intended for the son and not for the parent. The words may be regarded as equivalent to a gift in trust for the son. Hence, the gift does not lapse by reason of the death of the parent during the lifetime of the testatrix.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 225.

N. Dubois Miller, for exceptant; *J. Claude Bedford*, contra.

PENROSE, J., June 29, 1901.—It is manifest on the face of the will that the legacy of \$5000 was intended for the invalid son of the person there named and not for the parent individually. The will appears to have been written by the testatrix, herself, and the gift to the parent "especially for the care of his

Elmslie's Estate.

invalid son" may well be regarded as the equivalent of a gift to him in trust for such care. The intention is to govern, and technical words are not essential to the creation of a trust. If the legacy had been to the parent, in his own right, with simply an expression of the purpose for which it was intended, it would, under the authorities (Beck's Appeal, 10 Wright, 527), not prevent its application to any other purpose, and the intention of the testatrix might never have become effective; and as he died in her lifetime it would have been defeated altogether, though the contemplated beneficiary is still living. But the principle of Beck's Appeal only applies where the indicated purpose is for the benefit of the legatee, and not where the rights of third persons are affected: Williams on Executors, 1397; Dillin v. Wright, 23 P. F. Smith, 177; Lejee's Estate, 181 Pa. 416.

As we agree with the auditing judge in thinking that the legacy did not lapse, the exceptions are dismissed and the adjudication confirmed absolutely.

Baizley's Estate.

Decedent's estate—Claims against—Debt for third party.

The evidence to establish the liability of a decedent for articles delivered not to him, but to a third person carrying on business in another place, should be clear and convincing. Proof of an entry in claimant's books, made in pursuance of a direction by telephone, not shown to have been transmitted by the decedent, is insufficient.

Decedent's estate—Claims against—Set-off—Presumptions.

There can be no defence to a claim by way of set-off growing out of the loss by fire, while in the possession of the claimant, of certain patterns belonging to the decedent, sent to the claimant for the purpose of making castings for the decedent, when the claimant was simply a bailee and there is no evidence on the part of the executors to overcome the presumption against negligence by the claimant.

Exceptions to adjudication. O. C. Phila. Co., April T., 1900, No. 267.

Read & Pettit, for exceptants; *J. M. Yeakle* and *E. C. Shapley*, contra.

PENROSE, J., June 1, 1901.—Where claim is made against the estate of a dead man for articles delivered not to him but to a third person, carrying on business in another place, the evidence to establish his liability should be clear and convincing. Here all that is offered in support of the bill presented by Peter Spaeter is an entry in his books made in pursuance of a direction by telephone not shown to have been transmitted by the decedent. It is admitted that the articles were sent to The Spring Mills Brewing Company and charged to the decedent because of doubts as to the solvency of the consignee; and it further appears that the decedent utterly denied any responsibility and repudiated the claim altogether. That the books of a plaintiff are not competent evidence to charge a defendant with goods sent to a third person, unless an order for such delivery be otherwise proved, has been expressly decided: Wheeler's Estate, 8 W. N. C. 534, and cases there cited.

The exceptions to the claim of The Columbia Foundry Company are overruled. The defence was a set-off to an amount in excess of the debt, growing out of the loss by fire, while in the possession of the company, of certain patterns belonging to the decedent, sent to it for the purpose of making castings for him. But, under these circumstances, the company was simply bailee of the patterns, and as such not liable for loss unless caused by its negligence. The presumption is against negligence, and there was no evidence to overcome it.

The exceptions to the allowance of the claim of Peter Spaeter are sustained: the other exceptions are dismissed.

10 DIST. R.

Fahy's Estate.

Decedent's estate—Executor de son tort—Following goods purchased by same.

If the proceeds of goods purchased by one who, without authority, undertakes the settlement of a decedent's estate, or the goods themselves find their way into the inventory filed by a subsequently appointed administrator, the creditor, who has parted with his title, cannot follow them into the Orphans' Court. His remedy is exclusively in the courts of common law and against the person with whom he dealt.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 619.

G. W. Carr, for exceptant; Thomas A. Fahy, contra.

PENROSE, J., June 29, 1901.—That the estate of a decedent cannot be made liable for the act or contract of one who, without authority as executor or administrator, undertakes its settlement, is proved by the mere statement; and if the proceeds of goods purchased by such person, or the goods themselves, find their way into the inventory filed by a subsequently appointed administrator, it is no less clear that the creditor, who has parted with his title, cannot follow them into the Orphans' Court.

His remedy is, exclusively, in the courts of common law, and against the person with whom he has dealt.

Exceptions dismissed and adjudication confirmed absolutely, interest on claim of J. and L. Mantner being allowed from Dec. 1, 1898, to time of payment, and distribution modified accordingly.

Sinkler's Estate.

Decedent's estate—Trusts—Unexplained reduction in amount awarded to trustee—Subsequent adjudication—Duplicate reduction—Necessary conclusion—Filing separate account.

Where the amount awarded to a trustee in trust by the adjudication is \$11,000 less than the amount given by the will and there is no explanation of the reduction, and none of the other bequests are reduced, and, three years later, another account is filed, which appears to be simply an income account, to which is attached a schedule entitled "Mem. of securities belonging to estate," in which mortgages, judgments and a piece of real estate are directed to be set aside as an investment of \$10,000, the only conclusion to be reached is that the sum of \$10,000 had already been awarded by the earlier adjudication and the fact that such award had been made had been overlooked, as it certainly could not have been intended to deduct the legacy twice from the principal of the estate.

Trustees—Surcharge—Assets.

Where a trustee fails to explain a discrepancy between the amount awarded to him and the amount he has on hand, he will be surcharged therewith.

Trusts—Loans—Co-trustees.

A trustee is liable for the amount of a loan made by his deceased co-executor without security, when he failed to claim exemption from personal liability at the settlement of the executors' account, and subsequently did not endeavor to collect it.

Loans by trustee to himself.

A trustee will be surcharged with loans made to himself out of the trust funds even on good security.

Trustees—Interest on surcharge.

A trustee is chargeable with interest upon the deficiency in a trust estate unaccounted for by him, and also upon the balance of income due the *cestui que trust* and withheld by him. He will not be relieved from payment of interest on the latter because of the failure of the *cestui que trust* to demand payment.

Sinkler's Estate.

Trustees—Commissions—No intentional fraud shown.

Commissions upon the income will be allowed to the trustee when no intentional fraud or misappropriation of the income is shown.

Trustees—Counsel fees—Principal and income—Services rendered to trustee in individual capacity.

When a trust is undetermined, counsel fees should be charged to income and not principal. Where a great deal of the time, labor and advice of counsel is consumed and rendered for the individual benefit of the trustee, only so much of the fee claimed will be charged against the estate as will represent a just and proper allowance for the services rendered thereto.

Practice, O. C.—Error in account—Correcting same.

An alleged error in a prior account must be corrected by a review of such account and not in a subsequent account.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1891, No. 557.

Oliver E. Shannon and A. H. Wintersteen, for accountant.

Charles Wetherill, for cestui que trust.

HANNA, P. J., June 15, 1901.—The settlement of the account of the trustee is unsatisfactory both to him and his *cestui que trust*. In the will the testator, after certain devises, gave to his executors the sum of \$52,000, in addition to the real estate, in trust, to collect the income therefrom, and, after deducting taxes, water rents, necessary expenses and cost of keeping the real estate in repair, to pay over one-half of the same semi-annually or oftener to his son, one of the executors, and now the surviving executor and trustee, during his natural life, and the other equal half-part unto his daughter during her natural life. She is still living. The executors filed their account, and by the schedule of distribution attached to the adjudication thereof, approved Feb. 3, 1892, after the award of a legacy to the son of testator absolutely, and other legacies to him in trust, but which have no connection with the present trust, the sum of \$40,933.76 was awarded to the accountant in trust for himself and his sister, as directed by the will of their father. Why the other bequests were awarded in full and the bequest of \$52,000 reduced to \$40,933.76 we are unable to ascertain. However, this sum was awarded to the surviving trustee as if in cash. It is conceded, however, this was not cash, but represented by securities and investments. No specific investments appear to have been awarded to the trustee. We further find from the record that on March 22, 1895, the accountant filed an account which appears to be simply an income account, to which is attached a schedule entitled "Mem. of securities belonging to estate." This comprises mortgages and judgments, including one for \$700 against the accountant, and two certain properties, we presume dwelling-houses. And to show the carelessness with which this was prepared, there is no addition of the amount of the securities, nor statement of the amount represented by the two dwelling-houses. The result is the principal of the trust-estate cannot from this account be ascertained. And although the schedule referred to does not purport to be an account of the principal of the estate, nor seem to be audited as such, yet mortgages, judgments and a piece of real estate were directed to be set aside as an investment of the sum of \$10,000, bequeathed in trust for the benefit of two of testator's grandsons. No distribution was made of the balance of the principal of the estate to the trustee; the only distribution being of the balance shown by his income account. The only conclusion we can reach from the unskilful manner in which this trust has been managed, with no setting apart of investments to represent the legacies in trust, in 1892, although so awarded, nor until 1895, when \$10,000 was directed to be set apart in investments. so considered, and a piece of real estate at a supposed value, it was overlooked that by the adjudica-

Sinkler's Estate.

tion of the account of the executors and schedule of February, 1892, the sum of \$10,000 was then deducted and awarded to the trustee. And thus the balance in that account was found to be \$40,933.76. It certainly could not be intended to twice deduct this legacy from the principal of the estate.

We now come to the account under consideration. This is both a principal and income account, and the first account of the principal of the estate since the adjudication of the executors' account in 1892. And although no specific securities or investments were then awarded to the accountant as surviving trustee, nor by the adjudication of the income account in 1895, he charges himself with the mortgages and judgments (including the judgment for \$700 against himself), comprising the memorandum attached to the account filed in 1895, amounting, by the addition we have made, to the sum of \$40,200, whereas, he should charge himself with the sum of \$40,933.76 awarded to him, after deducting legacies amounting to \$19,000, and directed to be paid and set aside upon the adjudication of the executors' account in 1892. This is the proper form of accounting. And it was incumbent upon the trustee to explain the discrepancy and loss of \$733.76. This is not made apparent. And, furthermore, he includes among the securities representing the trust-estate, mortgages and judgments set apart in the adjudication of the income account of 1895 to the amount of \$7000, to be held by him as a trust for the grandchildren of the testator. And, after charging himself with other items, the total principal of the trust-estate is increased to \$42,267.10. From this balance of principal was deducted the mortgages and judgments amounting to \$7000, and a piece of real estate appraised at \$3000, thus making the sum of \$10,000 bequeathed by the testator in trust for his grandchildren. But, as already shown, the sum of \$10,000 was previously deducted from the principal of the estate upon the adjudication of the executors' account in 1892. And it was incorrect to deduct the piece of real estate at a valuation of \$3000 when it nowhere appears in the account, or in the prior account, as having been an item of charge against the executors at this or any other valuation. This duplication of the deduction of \$10,000 from the principal of the estate is clearly an error and cannot be allowed. The principal of the trust-estate is consequently the amount stated in the account as \$42,267.10. But, as far as can be ascertained, even this is incorrectly stated, for the reason that the cost of repairs or alterations to one of the properties belonging to the estate should not be treated as an "investment," but as an expenditure forming a subject of credit. And, in like manner, the item designated as an investment in the premises set apart for the \$10,000 trust referred to, if for alterations or repairs, should not be termed an "investment," but an expenditure of principal to be allowed as a credit, or, if it represented a mortgage on the property foreclosed by the executors, it should also be allowed as a credit. If this be the fact, then the principal of the estate will be correspondingly reduced.

The first two exceptions by the *cestui que trust* are to the refusal of the auditing judge to surcharge the accountant with the sum of \$4341.66, the difference between the amount awarded to the accountant as trustee upon the settlement of the executors' account, viz., \$52,933.76, but which, after deducting the legacies in trust, namely, \$12,000, left \$40,933.76 for the present trust, and the amount now accounted for by the accountant as belonging to the trust. The trustee admits a fund in his hands amounting to \$42,267.10, being \$1333.34 in excess of the amount awarded by the adjudication of the executors' account in 1892. This appears to be composed of items omitted from the schedule attached to the trustee's account of income filed in 1895, corrections of items contained therein, and of items claimed as investments by the trustee. But the accountant deducts from the principal of the trust-estate the sum of \$10,000, thus reducing the prin-

DISTRICT REPORTS.

Sinkler's Estate.

cial to \$32,287.10, which is erroneous. As already shown, said sum of \$10,000 was previously deducted from the principal of the estate by the adjudication of the executors' account in February, 1892, which left the balance of \$40,933.76 awarded to him as trustee. The investments to secure said sum of \$10,000 were never set apart until 1895, and included a house valued at \$3000. This may be satisfactory to the *cestui que trust*, but it is incorrect to deduct from the residue, as now asked, the sum of \$10,000, as if the trustee included in his account securities for that amount. He does not do so, but with investments amounting to \$7000 only. The house set aside at a value of \$3000 represented, as far as we can ascertain, a mortgage for \$1975, which does not appear in the account, nor in the memorandum attached to the account filed in 1895, as a charge against the trustee, excepting in pencil at the foot of the memorandum, stating as follows: "Premises 1731 Fittler street (mtg. G. Ryan 1975 foreclosed)." If this be the case, the trustee should be credited with \$1975 and not with \$3000, thus depleting the estate to the extent of \$1025.

From our analysis of the account, it therefore appears the trustee was, on Feb. 3, 1892, awarded the sum of.....	\$52,933.76	
From which deduct securities set apart for the \$10,000 in trust.....	\$7,000.00	
And house, 1731 Fittler street, at amount of mortgage.....	1,975.00	8,975.00
Balance,.....		\$43,958.76
From which deduct credits allowed.....		3,008.43
Balance.....		\$40,950.33
due the present trust.		
And to represent this, the trustee has on hand securities and real estate valued at.....		36,608.67
Showing a deficiency of.....		\$4,341.66
and with which it is claimed he is to be surcharged.		

After the most laborious examination, we think the trustee is clearly chargeable with this amount. He fails to explain this discrepancy, and the contention of the *cestui que trust* must be sustained. The trustee admits holding and representing a part of the trust-estate, the amount of \$800, loaned, as he alleges, by his co-trustee, who is now deceased. These loans were included in the executors' account, and formed part of the balance awarded to accountant as surviving trustee, but they do not appear in the memorandum attached to the income account filed in 1895, and which now appear for the first time and are included as "judgments." The fact is, they are not judgments, nor represented by any security, negotiable or otherwise. This is another mistake in the preparation of the account. The question is, should the trustee be allowed credit for these so-called investments by his co-executor. Under the circumstances, we think he is liable for his laches and negligence. At the settlement of the executors' account it was his duty then to claim exemption from personal liability, and, subsequently, endeavor to collect the amount of the loans from the estate of his deceased co-executor. But this he neglected to do, and from the lapse of time and inattention to duty he cannot now burden the *cestui que trust* with a loss caused by his own dereliction. From the facts developed the trustee must make good this loss to the estate. The third exception is sustained.

The facts shown relative to the borrowing by the trustee, from the trust funds in his possession, the sum of \$2500, to pay off the mortgage held by the trust company against his farm, taking an assignment of the mortgage to himself as
10 Dist. R.

Sinkler's Estate.

trustee, and, subsequently, a further loan to himself, individually, out of the trust moneys, of the sum of \$5000, and executing to himself, as trustee, a second mortgage therefor upon his farm, cannot be recognized as proper investments by the trustee. He is now paying interest to himself, and occupies the anomalous position of creditor and debtor. These investments, so-called, were without application to the court, and it is safe to say such a request would never have been granted. Nor is it material that the trustee believed his farm worth much more than the amount of the mortgages; and, as well argued by counsel for the *cestui que trust*, "If the property should diminish in value it would become the duty of the trustee to pay the debt or take legal proceedings against himself to secure the trust-estate from loss, and the temptation to neglect to do this is one that should be removed." We think the trustee should replace in the trust fund the amount he thus loaned to himself, and these mortgages cannot be recognized as proper investments to be held by him. The fourth exception is sustained,

That the trustee should be charged with interest upon the deficiency of the trust-estate unaccounted for by him we think does not admit of dispute. The *cestui que trust* is clearly entitled to her share of the income which ought to have been realized by the trustee. This exception must also be sustained.

The *cestui que trust* is also entitled to interest on the balance of the income due her and withheld by the trustee. The testator directed that his daughter should be paid her one-half of the net income "semi-annually or oftener." Nor was she bound to make demand upon the trustee for its payment. His duty was to pay it to her. The adjudication shows that during the last five years, 1896 to 1900, inclusive, the trustee withheld from his sister \$1975.09, and no excuse was given for its withholding. In view of these facts, the trustee is certainly liable to be charged with interest. Nor will he be relieved therefrom by averring his readiness to pay his sister her income whenever requested by her, and that, as far back as 1894, he overpaid her her share of the income for that year. This exception is also sustained.

The allowance to the trustee of commissions or compensation from the income is also objected to by the *cestui que trust*. Under all the circumstances, as no intentional fraud or misappropriation of the income has been shown, and in view of the facts found by the auditing judge, the trustee is entitled to the reasonable compensation allowed. The seventh exception is dismissed.

The eighth exception is to the allowance to the trustee of the amount requested by his counsel for professional services. Although the notes of testimony show the allowance was requested, no objection appears to have been made to its allowance, nor was the subject considered by the auditing judge. The allowance, however, was made and deducted from the principal of the trust-estate. This is an oversight. The trust being undetermined, the costs of filing and the settlement of the account, as ruled in *Butterbaugh's Appeal*, 98 Pa. 351, and subsequent cases, should be charged against income and not principal. This correction will be made. And as to the allowance out of the income of the amount asked by the trustee for the compensation of his counsel, we can only say, that while counsel are justly entitled to the compensation requested, yet it is very clear a large proportion of the time, labor and advice of counsel were consumed and rendered for the individual benefit of the trustee. In such a case the whole amount of compensation of counsel should not be charged to the estate, but only such proportion as will represent a just and proper allowance to the trustee had he carefully prepared his account, made full disclosure of the condition of the trust-estate, and not evoked, by his negligence and carelessness, a contest in which he is found at fault and indebted to the estate. For the services rendered for his personal benefit and in contesting the well-founded claims of the *cestui que trust*, he must personally pay. In this case we think the sum

Sinkler's Estate.

of \$150 a proper and reasonable sum to expend out of the income of the estate for the employment of counsel. To this extent the eighth exception is sustained.

The ninth exception must be dismissed, for the reason that an alleged error in a prior account must be corrected by a review of such account and not in a subsequent account.

We have also carefully considered the exceptions of the trustee. The first and second exceptions, referring to an error in a prior account, which, as we have already said, can be corrected only in the manner pointed out by the Act of Assembly, or an appeal to the equity power of the court to correct its former decree. These exceptions must be dismissed.

The third exception was withdrawn.

The fourth exception, however, must be sustained. The auditing judge surcharged the trustee with the amount of a loan to Mary Comegys of \$100. This is evidently a mistake, for, upon examination, it is ascertained that a judgment against M. Comegys or William Comegys (both names appear) for \$100 was, with other securities, set apart as investments of the sum of \$10,000, to be held in trust for testator's grandson. A surcharge of \$100 is therefore erroneous and must be corrected.

The fifth exception relates to the disapproval by the auditing judge of an investment by the trustee in a loan of \$500 to a borrower without security other than his personal responsibility. This was certainly proper on the part of the auditing judge. And if the trustee seeks the approval of the court of the investment, which, as counsel states, has since been made, the proper petition should be presented to the court for its approval. This exception is dismissed.

Another irregularity is apparent, which should be noticed so that it may not be repeated. To this account, though prepared separately, is attached an account of the trustee with respect to the \$10,000 before referred to. This was improper and tends to promote confusion. The account of this trust should have been filed separately and distinctly from the account of the other trust and wholly independent from it.

A final decree in accordance herewith will be prepared by counsel.

Notes of Treasury Department Decisions.

From June 18 to July 23, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes: "[The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Beer Stamps.

Extending time when the regulations requiring cancellation of beer stamps by perforations shall take effect. No. 381, July 16, 1901. 4 Treasury Decisions, No. 29, page 15.

Bonds.

Stamp tax. Ruling as to what bonds require a stamp under paragraph 7, Schedule A, Act of June 13, 1898, as amended by Act of March 2, 1901. No. 371, June 25, 1901. 4 Treasury Decisions, No. 26, page 27.

Stamp tax. Bonds of executors and administrators require a 50-cent stamp when delivered on and after July 1, 1901. No. 377, July 9, 1901. 4 Treasury Decisions, No. 29, page 13.

10 DIST. R.

Notes of Treasury Department Decisions.

Stamp tax. What bonds required in legal proceedings are taxable under paragraph 7, Schedule A, of the war revenue Act as amended by the Act of March 2, 1901. No. 378, July 10, 1901. 4 Treasury Decisions, No. 29, page 18.

Stamp tax. Distillers' transportation and warehousing bonds, and certain other bonds given under internal revenue laws, not required to be stamped on and after July 1, 1901. No. 384, July 22, 1901. 4 Treasury Decisions, No. 30, page 27.

Changes in Records.

No. 360, June 18, 1901. 4 Treasury Decisions, No. 26, page 17.

Collector's Record—Revised.

No. 366, June 22, 1901. 4 Treasury Decisions, No. 26, page 22.

Conveyances.

Stamp tax. Stamp tax on conveyances of realty offered for record on and after July 1, 1901. No. 364, June 21, 1901. 4 Treasury Decisions, No. 26, page 20.

Stamp tax. Rate of stamp tax on conveyances of realty under the amendatory Act, taking effect on and after July 1, 1901. No. 382, July 19, 1901. 4 Treasury Decisions, No. 30, page 25.

Conveyances of Realty.

Stamp tax. Construction of paragraph 10, Schedule A, Act of June 13, 1898, as amended by the Act of March 2, 1901, relating to conveyances of real property, and rulings thereunder. No. 365, June 21, 1901. 4 Treasury Decisions, No. 26, page 21.

Drafts.

Stamp tax. Certain drafts taxable because drawn otherwise than at sight or on demand. No. 379, July 13, 1901. 4 Treasury Decisions, No. 29, page 14.

Foreign Bills of Exchange.

Stamp tax. The amendment to paragraph 5, Schedule A, exempting from tax certain foreign bills of exchange drawn against the value of products actually exported, construed. No. 385, July 23, 1901. 4 Treasury Decisions, No. 30, page 27.

Freight Receipts.

Stamp tax. No. 380, July 18, 1901. 4 Treasury Decisions, No. 29, page 15.

Legacy Tax.

A legacy to an adopted daughter subject to tax as a stranger in blood to testator. Former rulings inconsistent herewith revoked. No. 367, June 22, 1901. 4 Treasury Decisions, No. 26, page 23.

1. Reversionary interests which are vested are taxable at once. 2. Tax may be paid on reversionary interests which are not vested at the option of the executor or other person having in charge the estate. The basis for determining the tax in such cases, where the remainder will pass to issue, will be the number of such issue living. Where there is no issue, the reversionary interest will be considered a part of the life-estate for the purpose of determining the legacy tax. No. 383, July 20, 1901. 4 Treasury Decisions, No. 30, page 25.

Mixed Flour.

No. 375, June 28, 1901. 4 Treasury Decisions, No. 27, page 12.

Modifying Circular No. 602 as to the date when same takes effect and as to form of perforations permissible.

No. 368, June 24, 1901. 4 Treasury Decisions, No. 26, page 24.

Mortgages.

Stamp tax. Stamp tax on mortgages offered for record on and after July 1, 1901. No. 362, June 19, 1901. 4 Treasury Decisions, No. 26, page 19.

New Packages for Plug and Twist Tobacco.

No. 376, July 6, 1901. 4 Treasury Decisions, No. 28, page 23.

Packing Plug Tobacco.

No. 370, June 24, 1901. 4 Treasury Decisions, No. 26, page 26.

Rebate Claim.

No. 369, June 24, 1901. 4 Treasury Decisions, No. 26, page 25.

Rebate on Tobacco.

No. 368, June 21, 1901. 4 Treasury Decisions, No. 26, page 19.

Rebate on Tobacco Products.

No. 372, June 25, 1901. 4 Treasury Decisions, No. 26, page 27.

Redemption of Documentary Stamps.

Banks or stationers cannot make claims for the redemption of documentary stamps belonging to customers or others, but may purchase such stamps and make claims in their own names. No. 359, June 18, 1901. 4 Treasury Decisions No. 25, page 33.

Redemption of Stamps by Banks or Stationers.

No. 361, June 18, 1901. 4 Treasury Decisions, No. 26, page 18.

Sale of Leaf Tobacco.

No. 373, June 27, 1901. 4 Treasury Decisions, No. 27, page 11.

Storing Leaf Tobacco.

No. 374, June 28, 1901. 4 Treasury Decisions, No. 27, page 12.

Rieker et al. v. The Harrisburg Consumers' Brewing Co.*Equity—Jurisdiction—Continuing trespass—Injunction—Damages.*

Where a brewery company has for some time permitted both rain water from its premises and wash water from its wash-house, in considerable quantities, to discharge itself upon adjoining premises, to the injury of the owners of the latter, a court of equity will restrain such continuing trespass and award damages for the injury sustained.

City lots—Duty of owner to remove natural water—Rights of adjoining lot-owners.

Whatever the law may be as to the flow and discharge of waters naturally issuing out of and flowing from farming land upon that of another owner lying contiguous; in towns and cities it is of the utmost importance that water upon each lot arising from rain or other causes should be conducted by the owner or occupier thereof directly into a sewer or other place appropriate for its receipt and discharge, and not be turned or led on to an adjoining lot without the consent of the adjoining owner, and a lot-owner who improves his property is bound to dispose of his surface water in this way without regard to the original formation of the surface of the lot.

Injunction. C. P. Dauphin Co., Equity Docket, No. 265.

Casper Dull, for plaintiffs.

John A. Herman and William M. Hain, for defendant.

WEISS, J., April 30, 1901.—Lyons & Treon are engaged in the wholesale liquor and bottling business in the city of Harrisburg, and occupy two lots of ground, 10 DIST. R.

Rieker et al. v. The Harrisburg Consumers' Brewing Co.

upon which buildings and stables are erected and used in the conduct of their business.

The defendant company erected a brewery upon land adjoining, on the north-east side, the property occupied by the complainants. It is complained that the company used the rear building of the brewery, which was erected on the party or division line, as a place for washing kegs; that the water was constantly leaking and seeping through the dividing wall in large quantities over and upon the yard and grounds and under the buildings belonging to the complainants; that a private sewer, built by the defendant under the rear building for the purpose of carrying off the water used in washing, was constructed in a careless and faulty manner, whereby the waters flowing from its lands caused great injury and damage to the complainants' property. They filed a bill praying for an injunction, preliminary until hearing and then final, to restrain the defendant company from using the sewer for the purpose of carrying off the waste water in manner stated, and to decree reasonable compensation for waste done or committed upon their lands and premises and damages occasioned by its neglect, including depreciation in value of their horses by reason of sickness resulting from the leakage mentioned, and for general relief.

To this bill the defendant demurred, which was overruled on the day of the hearing of the motion to continue the injunction, May 12, 1900, and an answer was filed on the same day.

The cause was so proceeded in that the court, on the same day, ordered that "the injunction heretofore granted, after hearing of the motion to continue the same, is modified so that the defendants, their agents and servants, are enjoined from causing or permitting the water used by them in their business from passing through their premises upon the premises of the plaintiffs, and, thus modified, the injunction is continued until further order of the court."

From this decree an appeal was taken to the Superior Court, which was subsequently, by consent of the parties, withdrawn, in order that all the matters in controversy may be finally disposed of.

The land occupied by the complainants was low, but, prior to the acts complained of, no trouble was experienced other than from showers which caused little mud holes, but which soon dried up.

Since the brewery building was erected, some time in or prior to 1896, the water came over on their lands from the room where kegs were washed through the retaining wall, at two or three different places, in streams as thick as a wrist, and filled and banked up on high and dry ground to the depth of two or three inches, so as to deprive them of access to the pump from which they drew clear water for the needs of their business, and injured their property otherwise.

They gave the defendant company notice to abate, from time to time, when the flow of water would stop for a short time, but they would soon cause it to flow over again all through the week, and through summer it was always the worst. In the spring of 1896 their horses became sick, and from that time, or the spring of 1897, they had sick and crippled horses, caused by dampness in the stable, which heretofore was dry, but which was wet after the defendant started washing kegs.

The president of the company says that water seeped through, but denies that it did any damage, because it soaks in the ground. He adds a purpose or intention to cement or grout the floor during the summer.

The washing was done by machinery, and one witness says that there was no leak as long as the floor was kept caulked. Both the main sewer and the smaller six-inch pipe sewer which led into it from the wash-house were in good

Rieker et al. v. The Harrisburg Consumers' Brewing Co.

condition, especially the former. The horses were depreciated in value, it is claimed, by sickness, which was manifested by rheumatic conditions, influenza, lameness in the limbs, etc.; the sickness was caused by the dampness of the stable, and the dampness came from the water which seeped, in considerable and continuing quantities, from the brewery, and mainly from the wash-house, where large quantities of water were used for washing beer-kegs, through the wall of the brewery.

The company says that very little water percolates through the wall, and that most of it which flows over the lots of ground occupied by the complainants comes from rain; that there is no spouting in some of the buildings; that connection with a sewer is some distance away from the bottling-house; that the water from the sheds descends on their ground; that it is only the splash water which seeps through the wall, and the bulk is carried off through troughs into the sewer; that the ground was low and swampy; that oats in the stable were mouldy, as was the harness, the stable damp, and water from rains remain for some time, and the soil was damp the greater part of the year, as rain water flowed from the brewery lot upon that of the complainants; that since the brewery is there the lot is in pretty good condition, and freer from pools of water and dampness than before.

There can be no doubt that water in considerable quantities flowed from the brewery premises and wash-house, through the carelessness of the company, upon the premises occupied by the complainants, which were so permitted to discharge and distribute themselves—both rain water and wash water—as to cause dampness to the soil and saturate it, and suffered and caused the atmosphere to become charged with noxious and fermented vapors, whereby illness was caused to the horses owned by the complainants, which were depreciated thereby in value, and that damage and loss were occasioned to the property owned by them. This state of affairs continued for some time, and while the lots occupied by them were low and the soil more or less naturally damp, and some dampness arose from the natural deposit of water and from the sheds and buildings, yet the injury done and the damage caused was mainly by the continuous negligent acts of the company. The surface water which gathers and collects from rainfall and snow deposited upon the complainants' premises is necessarily so limited in quantity, and distributed at intervals so diminutively, as not to invite serious consideration of its injurious effects.

The objection to the jurisdiction of the court respecting the subject-matter is met by the rule laid down in *Stewart's Appeal*, 56 Pa. 422: "A single trespass, or several, not coupled with circumstances indicating that they were to be repeated continuously, are generally redressed by the common law action of damage. But when they are constantly recurring, and threaten to continue, it is well settled that they may be redressed in equity by injunction:" citing *Story's Equity*, §§ 925-6-7; *Com. v. Pittsburgh and Connellsville R. R. Co.*, 12 Harris, 159; and *Com. v. Erie and Northeast R. R. Co.*, 3 Casey, 339.

The objection that damage sustained must be ascertained, not in a court of equity, but in a court of common law jurisdiction, is answered by the principle laid down in *Allison and Evans's Appeal*, 77 Pa. 227: "It is well settled as a general principle that where a court of equity has obtained jurisdiction for one purpose, it may retain it generally for relief. This seems to be the rule, not only when the jurisdiction attaches for discovery in case of fraud, accident, mistake and account, but when it attaches for injunction in cases of continuing trespass and waste. In such cases, the course is to sustain a bill for the purpose of injunction, connecting it with the account, and not compel the plaintiff to go into a court of law for damages: *Thomas v. Oakley*, 18 Vesey, 184. To prevent multiplicity of suits, the court will decree an account of the damages or waste

Rieker et al. v. The Harrisburg Consumers' Brewing Co.

done at the same time with the injunction, and proceed to make a complete decree, so as to settle the entire controversy between the parties."

The defendant erected a valuable building upon its property, costing well nigh onto \$100,000, and filled up the ground, whereby the surface water from the rain flowed over upon the complainants' land, and with the water it caused or permitted to flow from the wash-house through the division wall, and upon their land, produced, in the main, the loss and damage shown to have existed prior to the decree heretofore made.

Whatever the law may be as to the flow and discharge of waters naturally rising and flowing from farming land upon that of another owner lying contiguous, it has been held that in towns and cities "it is of the utmost importance that the water upon each lot, arising from rain or other cause, should be conducted by the owner or occupier thereof, if he wishes to have it removed, directly from it into a sewer or other place appropriate for the receipt and discharge of the same, and not to be turned or led onto an adjoining lot without the consent of the adjoining owner; and it appears to me to be the duty of the owner of each lot, if he improves it, to do it in the way just mentioned, without regard to the original formation of the surface of his lot:" *Bentz v. Armstrong*, 8 W. & S. 40; *Rennyson's Appeal*, 94 Pa. 154; *Davidson v. Sanders*, 1 Pa. Superior Ct. 432.

That the defendant is engaged in a lawful business, matters not. He must so use his own as not to entail loss and damage to another: *Robb v. Carnegie*, 145 Pa. 324.

There is left only the duty of ascertaining the subject-matters for which damage may be had and the amount of loss sustained. An element of damage is depreciation in value of the horses owned by the complainants, caused by the acts of the defendants in permitting water from the wash-house and the surface water to percolate through the division wall and run upon and over their premises.

The testimony varies in amount and does not generally conform to the rule which ought to obtain—the difference between their market value at the time the illness was caused and after it was caused. Forming as nearly as may be a just estimate, the loss sustained from this source is ascertained to be \$325. The amount paid for veterinary attendance and medicines is \$65, and this sum is deemed reasonable in amount and a proper item for allowance.

The filling up was necessitated by the flowage of the water upon the plaintiff's premises, caused by the company, and the amount paid by the complainants must be assumed to include only what was necessary as a consequence of the defendant's acts, and is \$200.

The claim for the cost of a new stable and the loss to the business from and during the illness of the horses, and all other matters looking to a recovery of damages not already considered and allowed, are not deemed elements from which damage inflicted by the company results.

The aggregate of the damage sustained by the complainants, as a consequence of the injury caused by the defendant company, is ascertained and determined at the sum of \$590.

A decree may be drawn in accordance with the foregoing opinion, which the prothonotary will enter *nisi*, to which exceptions may be filed within ten days.

From William M. Hargest, Harrisburg, Pa.

Commonwealth v. Roland.

Criminal law—Indictment—When quashed—Defective complaint—Record.

An indictment will, on motion, be quashed when the complaint on which it is based is made "from information received" and not on the personal knowledge of the complainant, and does not set forth the name of the informant or the facts communicated to the complainant or his belief in the information received.

The general rule, that in such case the court should look at nothing outside of the face of the indictment, is not of universal application, for if the record discloses upon its face an insurmountable defect, the court has a right to consider it, and the complaint being part of the record, and all the facts appearing on the face of the record, the accused is entitled to be heard on the regularity and sufficiency of the proceedings before the magistrate, if he moves in time.

Indictment for attempted abortion. Motion to quash indictment. Q. S. Lancaster Co.

B. F. Davis, for motion ; *William T. Brown*, district-attorney, contra.

LANDIS, J., Nov. 17, 1900.—As an appropriate introduction to the discussion of this case, we may, not improperly, use the words of Williams, J., in *Reno v. Moss*, 120 Pa. 49, that "the trouble in this class of cases is, not in ascertaining the rules of law that are applicable, but in making an application of them to particular cases." Here we find, upon an inspection of the complaint made, that, on Jan. 8, 1900, Joseph Schlegelmilch appeared before a justice of the peace, and, "upon his solemn oath, from information received, according to law, saith that on Tuesday, being the 7th of November, 1899, at Columbia, Pa., a certain Peter P. Roland did procure certain drugs and furnish same to deponent's daughter, Lillie Schlegelmilch, with intent to procure an abortion."

The indictment based upon this complaint, on which a true bill was subsequently found by the grand jury, sets forth that "Peter P. Roland, late of the county, yeoman, on or about the 7th day of November, in the year of our Lord 1899, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and willfully did feloniously administer to one Lillie Schlegelmilch, she, the said Lillie Schlegelmilch, being then and there a woman pregnant with child, a certain drug and substance, the name of the component parts of said drug and substance being to this grand inquest as yet unknown, and with intent thereby then and there to procure her miscarriage." On Aug. 6, 1900, a motion to quash and a demurrer to the indictment were filed. It is unnecessary for us to consider the demurrer, as the motion to quash raises all questions as to the legality of the proceeding, and we will therefore direct our whole attention to ascertaining whether that motion should be sustained by us.

We think the second reason assigned on behalf of the motion to quash is the only one which it is important to consider. That reason is, that "the information or complaint upon which the indictment is based being 'from information received,' and not setting forth the name of the informant, nor the facts as communicated to the complainant, is defective, and the indictment based thereon is illegal." The fourth amendment to the constitution of the United States provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The declaration of rights (section 8, art. 1, of the constitution of Pennsylvania) declares that "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and that no warrant to search any place, or to seize any person or

10 Dist. R.

thing, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation." In passing upon these provisions, Tilghman, C. J., in *Conner v. Com.*, 3 Binney, 38, says: "If the constitution did not mean that a man charged with, or suspected of, a particular offence should not be arrested until some person swore either that he believed him to be guilty, or to some facts from which it might be reasonably inferred that he was guilty, then, I confess, I can see no meaning in it." In that case, it appeared on the face of the warrant that it had been issued from common rumor and report, and it was held that this was not sufficient to sustain the proceedings, and the judgment, even after conviction, was reversed. See also *Com. v. Smith*, 185 Pa. 570.

In *Com. v. Clement*, 8 District Reps. 705, the complaint upon which the warrant of arrest issued purported to have been made on information derived from others, without the sanction of the affiant's belief in its truthfulness. Reed, P. J., said that the indictment should have been quashed, and added: "It is to be observed that, in making this charge, the deponent refrains from expressing his belief in the existence of probable cause for arresting the defendant, and that no facts are stated whereby the magistrate might judge for himself. In the absence of probable cause, supported by oath or affirmation, no warrant can legally issue. We have no doubt an officer, under the constitutional provision quoted, can make the complaint upon information furnished him by a third person, but the facts disclosed to him should be of such character and from such a credible source that he can conscientiously swear he believes them to be true."

In *Com. v. Schall*, 5 York, 137, the indictment was quashed because the information on which it was founded was not signed by any prosecutor, this defect being held by the court to be fatal. Judge Clark, in referring to this latter case, says: "If an unsigned information disclosing probable cause is fatal to the prosecution, so is a signed information void of probable cause. Both these things must concur in fulfilling the constitutional provision that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation."

In *Com. v. Phillips*, 16 Pickering, 211, the complaint set forth "that the complainant has probable cause to suspect," etc. It was held that it was not made with such reasonable and sufficient certainty as to be the ground of a judicial determination, conviction and sentence, and that, while it is important to the administration of public justice that indulgence should not be too readily yielded to mere technicalities and subtleties, it is also important that every man accused of crime should have a reasonable opportunity to know what the charge is, that he may not be called to meet evidence at the trial that he could not have anticipated from the charge. See also *People v. Heffron*, 53 Mich. 527.

The "information received" by the complainant, in the case we are now considering, may, for aught we know, have been but the idle gossip of irresponsible persons, and it would be dangerous to hold that, upon such a fragile foundation, a citizen can be compelled to answer at the bar of justice for a most serious crime against the law. If the charge were substantial, he should, at least, have stated it in plain terms and in accordance with the rule as laid down in the above authorities.

But it is strenuously contended that, in deciding cases of this character, the court should look at nothing outside of or beyond the face of the indictment. We must concede that this is the general rule, but it is not of universal application: *Com. v. Williams*, 149 Pa. 54; for, if the record discloses upon its face an insurmountable defect, the court has a right to consider it. It must be remembered that, in this case, the complaint is part of the record, and all the

facts appear upon the face of the record.—The accused is entitled to be heard on the regularity and sufficiency of the proceedings before the magistrate, if he moves in time. In this case he has done so. The Criminal Procedure Act provides that every objection to an indictment for defect apparent on its face must be taken by demurrer or motion to quash before the jury is sworn, and not afterwards; and as, in this case, the defendant has made the objection before the swearing of the jury, he is entitled to the benefit of whatever advantages result from the defective proceedings.

Being, therefore, of opinion that the complaint should have set forth upon its face the belief of the affiant in the information received, and the character and source of such information, or that sufficient facts should be stated of his own knowledge to warrant the binding over of the defendant to answer for the crime charged, we think the motion to quash should be sustained and the indictment, based upon this void complaint, should be set aside. The district-attorney may have a proper complaint made and returned to the next Quarter Sessions.

Indictment quashed.

From George Ross Eshleman, Lancaster, Pa.

Levison et al. v. Blumenthal.

Judgment—Competency of tribunal to render same—Jurisdiction.

To make a tribunal competent to render a judgment in a cause, it must have jurisdiction both of the parties and of the subject-matter in litigation. If the matter had no existence it could not be the subject of litigation, and any assumed adjudication of it would be void for want of jurisdiction.

Constitutional law—Art. iv, sec. 1, of the Federal constitution—Concurrent actions in different States—Effect of judgment in one State—Jurisdiction after judgment.

While the mere fact of the pendency of an action in the courts of one State will not bar a suit for the same demand between the same parties in the courts of another State, nevertheless, the rendering of a judgment extinguishes the cause of action, merging it in itself, and thereby rendering any subsequent judgment in another State void for want of jurisdiction, under art. iv, § 1, of the Constitution of the United States, requiring full faith and credit to be given in each State to the judicial proceedings of every other State.

Constitutional law—Action on foreign judgment—Defence—Want of jurisdiction—Conflict of laws.

Want of jurisdiction, either of the parties or of the subject-matter, can always be shown as a defence to an action brought on a foreign judgment.

The plaintiffs during the pendency of their action in Pennsylvania brought suit against the defendant on the same cause of action in New York. The Pennsylvania court rendered a judgment in favor of the defendant, and, subsequently, the New York court rendered a judgment in favor of the plaintiffs. The plaintiffs then sued in Pennsylvania on the New York judgment. *Held*, that the New York judgment was void, because the New York court had not given full faith and credit to the prior-rendered judgment of the Pennsylvania court, and the New York court did not, at the time of rendering judgment, have jurisdiction over the subject-matter in litigation.

Rule for judgment for want of sufficiency of affidavit of defence. C. P. Luzerne Co., Dec. T., 1898, No. 389.

A. A. Chané and A. Ricketts, for plaintiffs; J. T. Lenahan, for defendant.

FERRIS, J., March 7, 1901.—The plaintiffs' action, as appears from their amended statement, is founded upon a judgment obtained by them against the defendant in the city court of the city of New York, March 9, 1898.

The original statement is not before us. To that statement, however, an affidavit of defence was filed, and thereupon a rule was granted to show cause
10 DIST. R.

why judgment should not be entered notwithstanding the affidavit. This rule was discharged in an opinion by Judge Woodward; first, because the New York judgment sued upon was entered in a suit for a demand which had been previously adjudicated in this court, in an action between the same parties, thus being in apparent violation of art. iv, § 1, of the Constitution of the United States, and of the Act of Congress of May 26, 1790, which provides that "the said records and judicial proceedings so authenticated (of courts of other States) shall have such faith and credit given to them by every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken;" and, secondly, because it was claimed that a full copy of the record sued upon was not given. See *Levison v. Blumenthal*, 9 Kulp, 392.

The plaintiffs thereupon filed an amended statement, purporting to give such full copy. No new affidavit of defence being filed, the plaintiffs' counsel obtained the present rule, which, upon the oral argument, they claimed should be treated as a rule to reinstate the one previously discharged. The question, therefore, arises as to the sufficiency of the affidavit already filed to prevent judgment on the amended statement.

Assuming that the new statement sufficiently covers the second ground upon which Judge Woodward based his refusal of judgment, it by no means meets his first objection. The present action still remains an attempt to set at naught and practically reverse a judgment of this court duly rendered in a cause wherein it had obtained complete jurisdiction, both of the parties and of the subject-matter, by giving effect to a subsequent judgment upon the same cause of action, between the same parties, in a New York court, in a suit begun during the pendency of the action in this court, and rendered after the cause had been finally adjudicated here, and the New York court fully advised of that fact, as appears on the face of its own record, assuming the copy filed to be correct.

We are asked to ignore and nullify a valid and lawful judgment of this court by breathing the breath of life into a proceeding, claimed to be invalid, unlawful and utterly void; first, because violative of the Constitution of the United States, as pointed out by Judge Woodward; and, secondly, for want of jurisdiction. It is argued that we are required by the Federal constitution to give "full faith and credit" to a judgment of the court of a sister State, which apparently rests upon a denial of like faith and credit to a judgment of this court. To enter the judgment now asked for would be to make the records of this court exhibit two subsisting judgments upon the same cause of action between the same parties—one for the defendant and the other for the plaintiffs. It would be to establish a new rule of law, contrary to public policy and subversive of all judicial precedent, viz., that a plaintiff could concurrently bring action for the same demand against the same defendant in every State in which the latter could be found and served with process, and then, notwithstanding judgment in one of the actions, could take judgment in each of them, and then cumulate them all upon the unhappy defendant by suits upon them in the court of his domicile, on the ground that such court would be bound to give "full faith and credit" to the records and judicial proceedings of sister States. The bare statement of such a remarkable proposition should be its own refutation. It is not to be thought for a moment that the framers of our national constitution ever contemplated such a construction of the provision referred to. Nor is there anything in the adjudicated cases to sustain such a pernicious doctrine.

A judgment is a decision or sentence of the law given by a court of justice or other competent tribunal as a result of proceedings instituted therein: 17 Am. & Eng. Ency. of Law (2nd ed.), 762.

The tribunal must be competent, otherwise its utterance is not a judgment. To make it competent it must have jurisdiction of the parties and of the subject-matter of the inquiry. It is not enough that the court have jurisdiction of the parties and of causes *ejusdem generis* with that in question. It must have jurisdiction of the particular matter in litigation. If that matter have no existence it obviously cannot be the subject of litigation, and any assumed adjudication of it is void for want of jurisdiction: *Wall v. Wall*, 123 Pa. 545; *Scott v. McNeal*, 154 U. S. 34; *Devlin v. Com.*, 101 Pa. 273; *Peebles's Appeal*, 15 S. & R. 39; *McPherson v. Cunliff*, 11 S. & R. 422.

When judgment was rendered in this court in the suit of *Levison & Hirsch v. C. A. Blumenthal*, on Dec. 9, 1895, the original cause of action ceased to exist. It became merged in the judgment, and was no longer the subject of litigation. The judgment here absolutely extinguished any right of recovery on the same cause of action elsewhere: *Brenner, Trucks & Co. v. Moyer*, 98 Pa. 274. While the mere fact of the pendency of the action in this court would not bar a suit for the same demand in the New York court (*Smith v. Lathrop*, 44 Pa. 326), nevertheless, the rendition of judgment here extinguished the cause of action there, and the subsequent judgment in New York was void for want of jurisdiction: *Baxley v. Linah*, 16 Pa. 241; *Duffy et al. v. Lytle*, 5 Watts, 120; *Brenner, Trucks & Co. v. Moyer*, *supra*.

In *Duffy v. Lytle*, Justice Kennedy said: "The first judgment, when given, whether it be in the action commenced first or last, extinguishes the original cause of action."

The cause of action no longer existing, the New York court no longer had jurisdiction of it, and its judgment thereon was a nullity. Being void, it was no judgment at all, and not entitled to "faith and credit" in other courts, under the Federal constitution.

The affidavit sets up this defence. It is virtually a collateral attack on the validity of the New York judgment. It is needless to cite authority to the proposition that any judgment of any court is open to collateral attack on the ground that the tribunal had no jurisdiction to render it. On this point we refer to the leading case of *Thompson v. Whitman*, 18 Wallace, 457, where it was held by the highest court in the land, speaking by Mr. Justice Bradley, that (as summarized in the syllabus) "neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, or the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown, either as to the subject-matter or the person." This case is followed by our own Supreme Court, in *Price v. Schaeffer*, 161 Pa. 530.

The affidavit of defence does not aver want of service of process of the New York court, and the copy of its record filed shows an appearance by counsel for defendant. We must, therefore, presume that the court had properly acquired jurisdiction of the person. The affidavit does, however, sufficiently set forth facts showing want of jurisdiction of the subject-matter at the date of rendition of judgment. The copy of the record, moreover, shows that those facts were pleaded.

The affidavit is, therefore, in our view of the case, sufficient to prevent judgment on the amended statement; and the rule for judgment is accordingly discharged.

From Sidney R. Miner, Wilkes-Barre, Pa.

**The Philadelphia Trust, Safe Deposit and Insur. Co., Trustee,
et al. v. Loder.**

**Bornot and The Philadelphia Trust, Safe Deposit and Insur.
Co., Trustees, etc., v. Bonschur.**

Constitutional law—Statutes in pari materia—Implied repeal—Rules of construction—Construction of ordinance of the city of Philadelphia of March 31, 1884.

Statutes in *pari materia* are to be considered together, and all are to be maintained, if that result can be secured, without doing violence to the language.

There is a presumption against an implied repeal, and an interpretation that leads to such a result is not to be adopted, unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.

Hence, the ordinance of the city of Philadelphia of March 31, 1884 (Ordinances, 54), providing for the widening of Chestnut street so as to make it of the width of 60 feet, "widening equally from both sides of the old centre line," and containing no vacation of any street or part thereof, or the surrender of any right of way over the lands of individuals at that time vested in the city, or any repeal of the ordinance of March 31, 1881 (Ordinances, 51), which provides that the north line of Chestnut street, between 15th and 16th streets, shall be 31 feet north of the centre line thereof, does not work an implied repeal of the earlier ordinance, and, construed together, their effect is to widen Chestnut street in places where it had a less width than 60 feet, and not to narrow it to that width where before it was of a greater width.

WILT BANK, J., dissents.

Exceptions to findings of equity trial judge. C. P. No. 2, Phila. Co., June T., 1896, No. 992, and March T., 1899, No. 738.

Rowland Evans, R. L. Ashhurst and W. H. Hepburn, for plaintiffs.

Henry J. Scott, C. C. Lister and John G. Johnson, for defendants.

PENNYPACKER, P. J., July 25, 1901.—It is due to the learned judge who has filed a dissenting opinion in this case, no less than to the importance of a just ascertainment of the rights of the parties, that careful consideration should be given to that opinion. Up to a certain point we walk upon common and safe ground.

Under the Act of June 6, 1871, P. L. 1353, the board of surveyors are invested with authority to confirm or reject all plans or revisions of plans of the city of Philadelphia, "when the same have been made by direction of the select and common councils of the said city." The legislative body of the municipality is to give direction, and the board of surveyors are then to prepare the plans in accordance with the direction so given.

It was held in the cases of *Wetherill v. Penna. R. R. Co.* and *Carpenter v. Penna. R. R. Co.*, 195 Pa. 156, 160, that when, in obedience to an ordinance of councils, whether the direction be specific, as in the first case, or general, as in the second, a street is stricken from the city plan, the effect is to vacate the street. The authority for the vacation is the direction of the councils. As Mr. Justice Mitchell says, page 158, late legislation has tended "to vest the control of legislative matters where it rightfully belongs—in the hands of the legislative branch of the city government."

Having advanced thus far without divergence, the next inquiry is as to what has been the direction given by councils with respect to Chestnut street, and this becomes a question of construction. When the learned judge, at the outset of his opinion, says that "the question presented rests wholly upon the ordinance of councils of March 31, 1884," we think his outlook is too narrow and restricted, and we cannot assent to his proposition that this is the effect of the judgment entered. The findings of fact and law show otherwise. It is a well settled principle, in the ascertainment of legislative intent, that all statutes in

The Philadelphia Trust, &c., Co. et al. v. Loder et al.

pari materia are to be considered together, and that all are to be maintained if that result can be secured without doing violence to the language: Keeling's Road, 59 Pa. 360.

The principle is stated by Judge Endlich, in his work upon the Interpretation of Statutes, § 43, as follows: "Where there are earlier Acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs."

If, then, there be any uncertainty as to the meaning of the ordinance of 1884, it becomes important to examine the prior ordinance of March 21, 1881, relating to the same subject, and adding this disputed foot of ground to the street. Especially is this the case where it is contended that the effect of the later ordinance is to repeal the former by implication. There is a presumption against implied repeal. As was said by Judge Sharswood, in *Erie v. Bootz*, 72 Pa. 199, "implied repeals are not favored." Such an interpretation is not to be adopted unless inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. The implication of an intention to repeal must necessarily flow from the language used disclosing a repugnancy between its provisions and the earlier law, so positive as to be irreconcilable by any fair, strict or liberal construction of it: Endlich, § 40.

The learned judge says we need not consider the later ordinance of June 16, 1885. It is not before us, because not offered in evidence; but if it were before us, it ought to be considered. It has an important bearing in showing the legislative intention not to limit the width of Chestnut street to 60 feet at all points, since it made the width of that street westward from 22nd street to the river 70 feet. Bearing in mind, then, the principle that we are to be aided in reaching a conclusion by a consideration of the other ordinances upon the same subject, we approach the question of the interpretation of the ordinance of March 31, 1884. In its entirety that ordinance is as follows:

"An ordinance to provide for the widening of Chestnut street on the city plan.

"Section 1. The select and common councils of the city of Philadelphia do ordain that the department of surveys be and is hereby authorized to revise the city plan so as to make Chestnut street, from the Delaware river to the Schuylkill river, of the width of 60 feet, widening equally on both sides from the centre line.

"Section 2. After the confirmation and establishment of said lines, it shall not be lawful for any owner or builder to erect any new building or to rebuild or alter the front of any building now erected without making it recede so as to conform to the lines established for a width of 60 feet."

It will be observed that there is not a word in it anywhere about the repeal of the ordinance of 1881, the vacation of any street or part of a street, or the surrender of any right of way over the lands of individuals at that time vested in the city. An intention to make such a surrender is not to be presumed. Chestnut street is the chief street of the city running east and west, crowded with cars, carriages and foot passengers, with every foot of space necessary for the purpose and of great value. Councils must have known that they could not surrender even a foot without yielding what was of great use to the municipality and conferring a large pecuniary benefit upon the individual owner. But we are not left to inference. The purpose of the ordinance is expressed in the preamble. That purpose is not stated to be to make "a straight highway of even, regular and uniform width," but "to provide for the widening of Chestnut street."

10 DIST. R.

The Philadelphia Trust, &c., Co. et al. v. Loder et al.

It may be conceded that were we to take the words "to revise the city plan so as to make Chestnut street . . . of the width of 60 feet," and the words "lines established for a width of 60 feet," and look at them alone, we should be driven to the conclusion contended for, but we think this is also too narrow and restricted a view. It is necessary to look at the whole ordinance and all of its language in order to reach its meaning.

The words cited are in each instance qualified in such a way as to indicate the thought. To the first phrase is added "*widening* equally on both sides from the old centre line." And, in using the second phrase, councils direct that no house shall be erected or altered "without making it *recede* so as to make it conform to the lines established."

The opinion of the learned judge is that the object of councils was to provide for a regular, even street between perfectly straight lines, and that this regularity was sought even at the expense of lessening street facilities. The opinion of the court is that the object of councils was to widen so as to provide additional facilities in an overburdened street, which was too narrow for the demands upon it. Is mere regularity of such importance that the sacrifice of substantial interests is to be presumed in order that it may be secured? The growths of nature and the works of man alike show to the contrary. In many streets of many cities spaces are left and the streets are lengthened around them, with only the aesthetic purpose of breaking lines which would otherwise have been straight. Means are taken in the ordinance to provide for the widening of the street, since each house built thereafter is required to recede; but, assuming that there was also a purpose to narrow the street, what plan has been arranged for its accomplishment?

The only effect produced by this construction, apparently, would be to bring about the irregularity which is so abhorrent, since one man like the complainant would build back on the north line, and another man like the defendant would build on the line a foot to the south, and there is no means to compel them to conform.

This construction leads also to grave and unknown dangers. In the findings of law on file, the State House was referred to, not at all to determine what are the existing facts at that locality, but to illustrate this danger. We are considering an ordinance which states that its object is to "widen" the street, and we are likewise dealing with, perhaps, the most frequented and important street in a populous and wealthy city. There may be numerous places in it where, for special reasons, a greater width than 60 feet has long existed and is essential, as, for example, at the State House and at the post-office. One such place appears to have been found by the ordinance of June 16, 1885. Why should we hold that these unusual widths have all been surrendered and vacated unless it is essential to so hold? Is it too much to ask that if councils intend to surrender what may be, perhaps, of the utmost importance to the community, they should indicate that intention by direct language, or at least in ways that are less uncertain?

The ordinance of 1881 made Chestnut street, at 16th street, 56 feet wide. The ordinance of 1884, if this construction be correct, made the street 60 feet wide, no more, no less, from the Delaware to the Schuylkill. The ordinance of 1885, if we may look at it, made the street 70 feet wide from 22nd street to the Schuylkill river. Are we to hold that the purpose of councils in a period of four years worked in this wavering manner, when it is so easy to reconcile all the words of all the ordinances by deciding that the ordinance of 1884 only meant to do what it says, to widen, and did not mean to do what it does not say, to narrow? At most, it would require only the insertion of the words, "where less than 60 feet in width" after the words "Chestnut street." Having regard, then, to

The Philadelphia Trust, &c., Co. et al. v. Loder et al.

the provisions of the ordinance of 1881, which widened Chestnut street on the north side 6 feet, to the fact that the ordinance of 1884 expresses no intention to repeal the former ordinance, and implied repeals only occur when inevitable, and to the fact that the language of the latter ordinance, while not entirely clear, may be readily interpreted in a reasonable manner so as to comport with the former, we hold that the effect of the ordinance of 1884 was to widen Chestnut street in places where it had a less width than 60 feet, and not to narrow it where it was before of a greater width.

In *Morris v. Philadelphia*, 199 Pa. 357, there was no question raised, as here, with respect to the intention of the city to vacate the street. In that case the contentions in this court and in the Supreme Court were over the power of the city to vacate after the acceptance of a dedication, and whether complainant's remedy was in equity or in law.

The facts stated in the opinion of the learned judge with respect to the official plan of the city and the confirmation of the lines by the board of surveyors on March 2, 1885, are no doubt correct. There is no evidence in the case as to either. We have preferred, however, to rest the decision upon the grounds before stated. The exceptions are dismissed.

SULZBERGER, J., concurs in the foregoing opinion.

WILTBANK, J., dissenting, July 11, 1901.—It was conceded at the argument of this cause, and has in effect been determined by the judgment entered, that the question presented rests wholly upon the ordinance of councils of March 31, 1884. Pursuant to the authority given thereby, the department of surveys, as appears by an inspection of the official plan, laid out Chestnut street between lines equi-distant from the central line. This action was confirmed by the board of surveyors March 2, 1885. We need not consider the ordinance of June 16, 1885, whereby Chestnut street as it extended westward to the river from 22nd street was widened to 70 feet for the purposes of the building of the Chestnut street bridge. The construction of the ordinance of March 31, 1884, made by the majority of the court is, that its primary object was to widen Chestnut street, and that so far as it did not operate in that way it was inoperative; that so far as, at the time of its passage, Chestnut street was narrower than 60 feet, that street was by its passage and the consequent act of the department of surveys duly widened, but that so far as Chestnut street was already wider than 60 feet the ordinance was inapplicable, and the replotting made in consequence thereof by the department of surveys did not narrow it to 60 feet at those places. I am obliged to take another view of the ordinance. It is to me clear that the primary intent of the city councils, acting under the authority of the Act of Assembly of June 6, 1871, P. L. 1353—an authority which has not been questioned by any of the parties to the cause—was to revise the city plan so as to make Chestnut street a straight highway of even, regular and uniform width from the Delaware river to the Schuylkill, extending on either side equi-distant from what the ordinance describes as the old centre line, and that the question whether or not the street as it stood before the passage of the ordinance was thus widened or narrowed was a subsidiary, incidental and unimportant question, the fact being that the operation of the ordinance along the greater extent of the highway indicated would result in a widening, whilst at other points or places it would result in a narrowing. The municipal legislative body must, in my opinion, be regarded as acting with a complete knowledge of the circumstances of the locality, fully aware that Chestnut street between the termini indicated was of varying width to the extent of many feet, so that in certain stretches of the highway it was less than sixty and in others more, as contemplating what it regarded as an improvement therein by the
10 DIST. R.

The Philadelphia Trust, &c., Co. et al. v. Loder et al.

establishment of a regular boundary line on either side of the old central line in its unbroken stretch from one river to the other, and as referring to the prevailing circumstance of the lesser width in making its provisions as to the erection of new buildings or the alteration of old ones, because, under those circumstances, such provisions were necessary, whilst it is quite clear that they could have no reference to properties already erected outside of the 60-foot boundaries. If such is the correct construction of the ordinance, the legal effect of the proper action of the department of surveys was, under the authorities cited in the opinion of my colleagues, a vacation of the strip of ground a foot wide extending in front of the premises of the several defendants.

"In *Wetherill v. Penna. R. R. Co.*," said Mr. Justice Mitchell, in *Carpenter v. Penna. R. R. Co.*, 195 Pa. 160, "it is held that where a street is struck off the city plan by the department of public works, in obedience to an ordinance of councils, and a new plan is confirmed, omitting the street, the legal vacation is complete and does not require any confirmation or other action by proceedings in the courts." Against this view there appears to be no controlling force in the words "widening equally on both sides." The direction is not that the city plan be revised so far as it indicates Chestnut street of a width less than 60 feet, but that it be revised so far as it comprises Chestnut street between the two rivers. Care was taken to direct that in running the border lines they should be equi-distant from the centre line, and this was to obviate a difficulty which otherwise might have arisen, to wit, that the department of surveys might otherwise have left the plan unrevised at places where Chestnut street was already wider than 60 feet, containing more land on one side of that line than on the other, from which a variation in the extension of the road-bed on one side or the other of the central line might have followed. Take, for instance, the locality which we are now considering. As Chestnut street there was more than 60 feet wide at the time of the passage of the ordinance, if the latter was not designed to secure an uniform width on either side of a central line throughout the extent of the highway, the revision of the plan as it reached that point would have involved the diversion on the north side of the street of the road-bed from the central line in order to escape the consequences of a narrowing of it, and thus the highway would not have been straight, but would have been irregular, as it extended from one river to the other. And this might well have been said to be a disregard of the scheme of the Act of April 28, 1870, P. L. 1291, prescribing an increased width according to a given straight line for the south side. The established datum and also the actual circumstances of Chestnut street were before the councils when they legislated; they must be presumed, as I have already stated, to have legislated with direct reference to these, and with the deliberately formed intention to project, not only a highway of 60 feet, but a highway of 60 feet and no more, of which 30 feet lay on one side and 30 feet on the other of a straight line already established and duly laid down upon the plan. Their caution was exercised to prevent a divergence from this line on one side or the other at any locality.

In brief, the object of the ordinance was to make a great and permanent municipal improvement in the most important business highway of the city, and the improvement involved two expressed features, a widening where necessary and an uniformity of lines; the vacation at certain points must be regarded as implied. In recognizing this implication we do not go beyond the principles of the authorities to take a step for the first time. Councils may vacate a street directly or by implication: *Wetherill v. Penna. R. R. Co.*, 195 Pa. 156; *Carpenter v. Penna. R. R. Co.*, 195 Pa. 160. The widening, the uniformity, the vacation, were the incidents of the improvement. The paramount consideration was a straight highway of equal width throughout, and of equal width on either side

The Philadelphia Trust, &c., Co. et al. v. Loder et al.

of an already established line. Whether or not a zig-zag course for a municipal way is ornamental or to be adopted for other reasons, we need not ask, because, no matter what the motive of the civic interest in the subject, the councils had for their object the correction of lines already zig-zag. They provided, also, evidently for a long period of time in the accomplishment of a work which the Supreme Court, by Mr. Justice Paxson, said might take a century. "The city is proceeding cautiously and in the only practical way by which such a street can be widened. The process will probably occupy nearly a hundred years. It is done gradually, and in a way to produce no great strain upon the city treasury. Few of those now living will derive much benefit from it; the advantages will be reaped principally by another generation:" In re Chestnut Street, 118 Pa. 593.

The title of the ordinance sufficiently expresses its subject, as required by the Act of May 23, 1874, § 3, P. L. 231. We would not be justified, were there a doubt on this head, in declaring the legislation invalid on account of defect in the title, in view of the repeated sanction of the ordinance by the tribunal of the last resort in controversies involving its legality and effect: In re Chestnut Street, 118 Pa. 593; *Brower v. Philadelphia*, 142 Pa. 350.

It has been earnestly argued that my construction of the ordinance is incorrect for an additional reason, to be found in a practical consequence that cannot be thought to have been in the contemplation of the councils. If it operated to vacate portions of Chestnut street lying without the established 60-foot width, we must consider the plot of ground from 5th street to 6th street, fronting the State House and the adjacent buildings, from the earliest times used by the public. Has that plot been vacated by the municipality? Or, as the point has been more forcibly put, can it for one moment be supposed that the councils intended to vacate it? The questions, however, are put without regard to the provisions of the Act of April 28, 1870, P. L. 1291, whereby the State and not the councils established the south line of Chestnut street: "Be it enacted . . . that the south line of Chestnut street between the rivers Delaware and Schuylkill shall be at the distance of 539 feet southward of the south side of Market street. Provided, that this Act shall not interfere with any buildings now erected on the south side of Chestnut street."

In *Morris v. Philadelphia*, 199 Pa. 357, a bill in equity was filed in this court to restrain the city from proceeding under the ordinance of councils of Dec. 16, 1890 (Ordinances, 410), to revise the lines and grades of plan No. 246, in the 27th ward, which directed that the department of public works revise the lines and grades between 42nd and 47th streets, Woodland avenue and the Schuylkill river, in that ward, by virtue of which Linmore street in front of the plaintiff's land was in effect narrowed. The board of surveyors, in March, 1899, confirmed a revision of this plan, whereby Linmore street was laid down as 30 feet wide instead of as physically opened before then of a width varying from 30, 42 to 46 feet. The plaintiff was the owner of property fronting on the street, which he had purchased in August, 1889, without notice that his grantor had dedicated the street to public use by deed dated July, 1888, and accepted by the city in May, 1890. The deed of dedication described the street as of a uniform width of 40 feet, and purported to convey the street as physically opened. A width of 40 feet included part of a lot purchased by the plaintiff in front of which the street was opened as of but 30 feet, and there were other but less material variations between the lines of the street as they existed when the plaintiff bought and the lines as fixed by the deed of dedication. In 1899, as already stated, the board of surveyors confirmed the plotting of the street for some distance as of a uniform width of 30 feet, and thereafter the city proceeded to improve the street in conformity with this plan. A contention of the plaintiff was that the deed

The Philadelphia Trust, &c., Co. et al. v. Loder et al.

of dedication was inoperative and raised a cloud on his title so far as it conflicted with his rights as a purchaser without notice, of which nothing need be said at present, as the cause turned upon another point, to wit, that the street as laid out had been dedicated by implication by the opening thereof and its use for ten years, in consequence of which there arose an obligation in the city to maintain the same as a public highway, and that the vacation of a part of it by implication, that is to say, by revision of the plan, was illegal and void. This court sustained a demurrer to the bill and entered a decree of dismissal. The Supreme Court held that the deed of dedication "gave to the city the same power over the street that it has over a street opened by adverse legal proceedings, and the right of the city to narrow or vacate a street so opened under proceedings such as were instituted in this case is beyond doubt, and the liquidation or payment of damages is not a prerequisite to a legal vacation: *Wetherill v. Penna. R. R. Co.*, 195 Pa. 156. As the street plotted on the city plan is wholly within the lines of the street as originally opened, no right of the plaintiff growing out of his purchase without notice of the deed to the city is interfered with. For any injury he may sustain by reason of the narrowing or vacation he has an adequate remedy at law."

The decree of this court sustaining the demurrer and dismissing the bill was thereupon affirmed.

I would sustain the exceptions of the defendant and dismiss the bill.

Hart's Estate.

Decedent's estate—Accounts—Account filed fifteen years after testator's death—Practice, O. C.

In accounting in the Orphans' Court under Rule 1, § 2, administration must not be blended with distribution nor principal with income, but a separate account must be given of each.

The proper form in which to file an executor's account is for the executor to charge himself with the principal of the personal estate of the testator at the date of his death which came into his possession, and then to add a separate account of the income realized and collected therefrom since the testator's death.

When this is not done, but, instead, the executor files first a principal account and includes therein as credits items of distribution, and then transfers the balance of principal to himself as trustee, to which he annexes an account of the principal already transferred to himself as trustee, together with subsequent receipts of money, as belonging to the principal of the trust-estate, and, after deducting credits for assessments on securities held, loans paid and the value of securities apparently worthless or of doubtful value, he deducts commissions upon the moneys borrowed by him, in addition to full commissions upon the debit side of the executor's account, as if the same had been converted into cash, and the costs of copying and filing his account, items which properly belong to the executor's account, and, finally, to this account of the so-called principal of the trust-estate, he attaches an account of the income received therefrom, and a credit side, including not only items which would properly form expenses of the trust, but an annual distribution of the income to the *cestuis que trust*, the account is radically wrong.

Where the inventory of the personal estate of the testator is almost wholly composed of investments improper for trust funds, and which would never have been awarded to the executor to hold for the continuing trusts under the will, such an account will be treated as an executor's account alone: the balance due by the executor, and of what it is composed, whether cash or securities, will then be ascertained: and, finally, distribution of the balance in cash and securities in kind, as may be agreed upon, will be made to the legatees. When this is accomplished, the balance of principal can be ascertained and awarded the trustee.

Decedent's estate—Commissions—Uncollected securities—Personal attention given by accountant to the business of the estate—Counsel fees.

Commissions will be allowed only upon the actual cash received or the investments and securities which the parties interested elect to take in kind. They cannot be allowed upon securities and evidences of debt not collected; the proper time to claim commissions thereon is when they have been converted into cash and form the subject of a further account.

When the executor personally attends to the business of the estate without professional assistance—the services being mainly in the line of the usual administration of an estate—

Hart's Estate.

and makes no claim for counsel fee, the presumption is that he will be satisfied with the compensation to be allowed to him upon the settlement of his account.*

Decedent's estate—Clerical error of auditing judge—Correction.

An exception to a plain clerical error of the auditing judge is needless. The error may readily be corrected.

Decedent's estate—Principal and income—Agreement to appropriate income to repay loan made to principal.

Where it became necessary for the executors to obtain \$20,000 to protect the interest of the estate, and one-half of this sum was secured by a loan, to repay which all the parties interested agreed that \$7750 should be appropriated out of the income of the estate, and the balance of \$2250 should be taken from the principal, and the agreement of the parties read, "we hereby authorize and agree that one-half of the dividend upon said 800 shares . . . into which the said first-named stock is to be converted, which we hereby authorize to be done, shall be applied to the reduction of the said loan of \$10,000," held to be a loan from income and not an absolute gift to the principal.

Wills—Construction—Life-estate—Remainder.

Testator devised six of the eight parts of his residuary estate "in trust to pay over the net income to my daughters, S. and R., so long as they remain unmarried, in equal shares, semi-annually, and upon the marriage of either, then to pay to my said daughter so marrying, from and after such marriage, the net income of two of the said eight parts of my estate, and the net income of the remaining four parts of said six parts to my unmarried daughter for and during her life. In case of the marriage of both of my daughters, then upon the further trust to pay the income of one of the six parts of my estate . . . to my daughter, C., and the principal of said part to her children upon her death. . . . And upon the marriage of both of my daughters, S. and R., to pay over the other one of the said six shares to my son, C., in fee simple. . . . Upon the death of my daughters, or either of them, without issue, then I give the principal of the shares of which they have had the income for life, as follows, viz.: One-half thereof to my son in fee simple, and the other half to my surviving executor in trust . . . for my daughter, C., . . . to pay to her the income for life, and on her death the principal to her children. . . . In case of the death of either of my daughters, leaving issue, then I give the principal of the two shares of my estate of which such daughter has had the income for life to such issue in fee simple."

The daughter, R., died unmarried and without issue, leaving surviving her her sister, S., unmarried. Held, that, upon the death of R., one-half of her share of three-eighths went to his son absolutely, and the other half of the three-eighths parts to him as surviving executor in trust for his sister, C., for life, with remainder to her children.

Practice, O. C.—Exception taken before award made—Dismissing same.

Where no award on account of distribution has been made because no schedule of distribution has been completed, no exception can be taken, and if one is taken, it will be dismissed without prejudice.

Decedent's estate—Distribution by accountant to himself of the securities of the estate.

An executor who makes a partial or entire distribution to himself of his share of the residuary estate without authority from or award by the court, does so at his own risk.

If he pays himself his share in advance and selects investments of the testator, he cannot retain them except at their market value at the time he took them and interest thereon, even though he took them at the appraised value.

Decedent's estate—Commissions—Reduction of—Unbusinesslike management of the trust—Account improperly stated.

Where the management of the trust has been unbusinesslike and no account is filed by the executor for fifteen years, and then only under compulsion, and, when filed, is improperly stated and imposes great labor and exhaustive examination upon the parties interested and the court, the commissions which would otherwise have been awarded to the accountant will be reduced.

Decedent's estate—Executor's interest in personal estate—Assignment thereof—Re-assignment—Effect.

An executor who was already trustee under his father's will for his sisters, and, upon their death, accountable to their children, if any, executed an assignment of all his interest in the

*NOTE.—As to allowance of counsel fee for professional services rendered by accountant personally, see Perkins's Appeal, 108 Pa. 314.—Ed.

Hart's Estate.

estate. On the same day he made the assignment, the assignee re-assigned the same to him as executor and trustee, "in trust to manage, sell, dispose and convey the same or any part thereof, and apply the proceeds to the payment to S. J. H., R. C. H. and the children of C. S. C., of whatever amount, income or principal, they may be entitled to respectively from the estate of S. H., deceased; and upon final settlement and division of the residuary real and personal estate of said S. H., deceased, to pay the full amount which may be due to them or any of them, and which there shall not be other assets in the hands of the executor of said estate or his successors to pay and satisfy in full." *Held*, (1) the re-assignment was in the nature of a collateral security for the payment of the shares of testator's daughters, and, upon payment to them in full out of the estate, the share of the executor was to remain his individual property; (2) the transaction did not create an assignment for the benefit of creditors under the Act of April 17, 1848, P. L. 273; (3) an attaching creditor took no interest in the fund as against those claiming under prior assignments from the executor.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1898, No. 552.

John G. Johnson, for accountant; *R. L. Ashhurst*, for attaching creditor.

Frank P. Prichard, for assignees; *J. A. Develin*, for distributees, exceptants.

HANNA, P. J., July 1, 1901.—We ascertain from the facts proved and admitted that testator died June 2, 1885, leaving a will, duly proved, and an unexecuted codicil, which, on June 22, 1885, was agreed by all the parties interested should be considered as executed by testator and made a part of his will. Testator's wife and his son were appointed executrix and executor. Both survived him, but the former died in May, 1886, thus leaving his son the surviving executor. Instead of filing an account at the expiration of one year after testator's death, or within a reasonable time thereafter, the surviving executor neglected to file an account until Nov. 1, 1900, more than fifteen years after the death of his father, and then was compelled so to do by one of the assignees of his interest in the estate. Upon an examination of the account, instead of being simply an account charging the executor with the principal of the personal estate of testator at the date of his death, which came into his possession, and then a separate account of the income, realized and collected since testator's death therefrom, the proper form to be adopted, the surviving executor files first a principal account and includes therein as credits items of distribution, contrary to the well-settled authorities upon the subject of accounting, and Rule I of the Rules of this Court, and then transfers the balance of principal to himself as trustee. To this he also annexes an account of the principal already transferred to himself as trustee, together with subsequent receipts of money as belonging to the principal of the trust-estate, and, after deducting credits for assessments on securities held, loans paid, and the value of securities apparently worthless or of doubtful value, he deducts commissions upon the moneys borrowed by him, in addition to full commissions upon the debit side of the executor's account as if the same had been converted into cash, and the costs of copying and filing his account, which items properly belong to the executor's account. And, finally, to this account of the so-called principal of the trust-estate is attached an account of the income received therefrom, and a credit side, including not only items which would properly form expenses of the trust, but an annual distribution of the income to the *census que trust*. The account is therefore radically wrong. As before stated, it should be an executor's account simply, and for the reason the executor never filed an account as such, and the balance of principal he took to himself as the *corpus* of the trust-estate was never awarded by the court to him as trustee. What he did was wholly unauthorized. And as the inventory of the personal estate of the testator was almost wholly composed of investments made by him of bonds, stocks, promissory notes and due bills, which, being improper investments of trust funds, would never be awarded to the executor to hold for the continuing trusts under the will of testator, we must treat the account as an executor's account alone. Then ascertain the balance due

Hart's Estate.

by the executor, and of what it is composed, whether cash or securities, and finally make distribution of the balance in cash and securities in kind, as may be agreed upon, to the legatees. When this is accomplished, the balance of principal can be ascertained and awarded to the trustee for the purposes of the will. This would have been done had the executor filed an account at the expiration of the year after the death of the testator, as he was required to do by the obligation he assumed, and is the only course to be now adopted. And his trustee account, so-called, should only be recognized as such with respect to the income collected since the death of the testator.

Thus treating the account filed, we will consider the exceptions to the adjudication.

First, those filed by the accountant relate to the reduction of the commissions claimed. He claimed to be allowed commissions at the rate of five per cent. upon the debit side of the principal account of the principal estate, viz., \$187,082.85. But this includes not only cash but securities and investments unconverted, promissory notes and due bills uncollected. It is very clear the accountant cannot be allowed commissions upon securities and evidences of debt not yet collected. The proper time to claim commissions thereon is when they have been converted into cash and form the subject of a further account. The commissions or compensation should be allowed only upon and deducted from the actual cash received or investments and securities which the parties interested elect to take in kind. In view of all the facts and circumstances, and although accountant has devoted his own time and professional knowledge and services to the settlement of the estate without any expenditure for the employment of counsel, which, had he done, to a reasonable amount, could not fairly be objected to, yet as he elected to personally attend to the business of the estate without professional assistance, the presumption must be, the services and duties performed being mainly in the line of the usual administration of an estate, the accountant was satisfied with the compensation which would be allowed to him upon the settlement of his account. As we do not find that the executor made any claim for an allowance for strictly professional services rendered the estate, the subject need not be further referred to; and these exceptions are dismissed.

The fourth exception is to that which is plainly a clerical error of the auditing judge, and may readily be corrected. As an exception thereto is needless, it is dismissed.

Exceptions were also filed by the accountant as administrator of his deceased sister. As far as we can learn from the account and testimony, the testator in his lifetime was the owner of \$17,100 bonds of the New York Card Company, valued at \$17,100, and 1366 shares of New York Card Company stock, valued at \$37,575. The executor subsequently sold 160 shares of the stock of said company at a profit of \$5600, and now holds 1874 shares received in exchange for 1206 shares of said company, and \$17,100 in bonds of the same corporation above mentioned. This transaction was the result of a consolidation of the company named with another corporation in the same business. To protect the interest of the estate it became necessary for the executor to obtain \$20,000. One-half of this sum was realized from the sale of 160 shares of stock, and the remaining \$10,000 were secured upon a loan. To repay this loan, all the parties interested agreed that the sum of \$7750 should be appropriated out of the income of the estate, and the balance of \$2250 be taken from the principal. In other words, income loaned principal \$7750. The natural inference is the *cestuis que trust*, or those entitled to the income, should be reimbursed their loan out of principal. This return was made to the income and deducted from the principal. (See testimony of the executor, page 19). The auditing judge, however, concludes it was improper, and the parties, when they relinquished their share of the

income, made an absolute gift to the estate, and they are, therefore, not entitled to be reimbursed. The agreement of the parties is merely this: "We hereby authorize and agree that one-half of the dividend upon said 800 shares . . . into which the said first-named stock is to be converted, which we hereby authorize to be done, shall be applied to the reduction of said loan of \$10,000." This is merely an authority to the executor to use such proportion of their income for the purpose indicated, and is silent as to whether it was an absolute gift to the principal of the estate, or a loan, to save a greater loss. The presumption, even in view of this fact, we think, is that the advance of income was merely a temporary loan. If more was intended by the parties, they and the executor would have been more explicit, and their subsequent conduct confirms this view. In this respect we must differ from the finding of the auditing judge, and sustain the first and fifth exceptions.

The statement by the auditing judge forming the subject of the second exception is supported by the testimony of the accountant, and is dismissed; but if it is erroneous, the correction can be made in the decree of distribution.

The third and fourth exceptions will be considered together. By the tenth clause of the will of testator it is evident he created a trust for the benefit of his two daughters, Sarah and Rebecca, for life. In case of their marriage their income to be reduced, and upon the death of both or either of them without issue, the principal of her or their share he gave to his son, and to him in trust, as fully set forth in the will. Although the question is not discussed by the auditing judge, yet, upon consideration of this clause of the will, we think it shows testator intended to give to his daughters a life-estate, with remainder to their children, if they had any, and if not, then to his son and to him in trust for his married sister and her children. The tenth clause in the will also directed the residue of the estate, after the death of testator's wife, to be divided into eight equal parts, one of which he gave to his son absolutely, one other eighth part in trust for his daughter, Clarissa, for life, and six eighth parts in trust for his daughters, Sarah and Rebecca, so long as they remain unmarried. One of the daughters, namely, Rebecca, has since died, unmarried and without issue, leaving surviving her sister, Sarah, who is still living and unmarried. The result is, the further provisions of the will now take effect. Upon the death of either of his daughters without issue, testator then gave the principal of the share, of which she had the income for life, as follows: One-half, that is one-half of three-eighths, to his son absolutely, and the other three eighth parts to him in trust for his sister, Clarissa, for life, with remainder to her children. As we agree with the conclusion of the auditing judge, the exception thereto is dismissed. And also the remaining exceptions on behalf of Sarah J. Hart, they having already been considered.

Exceptions have also been filed by the children of a deceased daughter of testator. We infer they are all of lawful age, and by the ninth clause of testator's will they are entitled to the one-eighth part of the residuary estate held in trust for their mother, now deceased. And by the tenth clause, owing to the death of testator's unmarried daughter, Rebecca, they are also entitled to one-half of six eighth parts or three eighth parts held by accountant in trust for her life. This is to be provided for in the schedule of distribution, which is not yet complete, and therefore is not a subject for exception.

The first exception is dismissed without prejudice.

The second exception should be sustained, for the reason that the exceptants were entitled, upon the death of Rebecca Hart, not only to the income of one-eighth of the principal, but also to the income of one-half of three-eighths additional. Upon a restatement of the income account, the proportion of income due exceptants, as above indicated, is awarded to them. If the accountant

Hart's Estate.

desired to make a partial or entire distribution to himself of his share of the residuary estate, after the death of his mother, the proper account from which to make such deduction and distribution is his executor's account; but he does not adopt this course. It is found in the so-called trustee account of the principal of the estate, never awarded to him as trustee. And to make up the total of the principal he had taken to himself as trustee, and cash subsequently received, he charges himself with \$155,895.44. By cash expended, this is reduced to a balance of \$154,109.28, and from this is deducted securities taken by the executor at a valuation of \$31,136.37. As the entire personal estate of testator amounted to \$187,062.85, and legacies, debts, losses, expenses, etc., are yet to be deducted, it is difficult to understand how the executor estimated his one-eighth share of the residue at \$31,136.39, and took from the estate that sum and appropriated it to his own use. This method of division and subtraction is incomprehensible, and was without any authority from or award by the court. Such distribution, like all other payments by an executor or administrator without a protecting order of the court, is always at his own risk. In *Lewis's Appeal*, 18 Pa 318, it is held that an administrator cannot transfer to himself stocks belonging to the estate before the settlement of his account, and such transfer does not pass the title. The stocks may be recovered by the administrator *d. b. n.* from the representative of his predecessor; and the fact that the latter was entitled as distributee makes no difference. And an administrator who takes possession of the inventory as his own, and, ten years afterwards, accounts for it at the inventory price, is not entitled to commissions, but will be charged with interest from the date of the inventory: 6 Kulp, 73.

If the executor thus claims the right to pay himself his legacy or distributive share in advance of any distribution to him and selects investments of the testator, he is not at liberty to take them at the appraised value, unless it be less than the market value. The executor in this instance selected shares of stock at \$40 per share, which, at the date of his appropriation, Aug. 7, 1866, had a market value of \$52 per share, thus causing a diminution of the estate to the extent of \$1200. He also elected to take 150 shares of stock of the Peerless Brick Company, appraised at \$15,000, and which, on Nov. 21, 1890, apparently the date on which the executor took the stock, had a market value of \$158.33 per share, thus causing a loss to the estate of \$8749.50. It is conceded, however, there was no difference between the market value of the other investments taken by the executor and their appraised value. The result, we think, is too plain for argument. The executor can pay himself no more than the court would award to him upon a proper settlement of his account. And if he has taken securities instead of cash, while he may be allowed to retain them, he must do so at their market value at the time he took them, either in full or part payment of his legacy or share. Not only did the executor pay himself far more than his share of the personal estate, but, at the very time he thus depleted the estate, he held in his custody due bills given by him to his father in the amount of \$4000, which have never been paid and with which he should now be charged. It further appears the executor, notwithstanding he had distributed to himself the securities of the estate as his share under the will, embraced in the account of income collected by him dividends and interest thereon as if belonging to the trust-estate. Why this was done, it is difficult to comprehend, as the dividends and interest were his property as much as the securities he had taken to himself; and why he should include the same as part of the income of the estate, and then distribute the same to himself and the distributees, we do not understand. It was evidently improper from the standpoint of the executor, and his own declaration of the ownership of the stocks, etc., he retained for his own use. However, as he must be charged with their full market value, with interest, he

Hart's Estate.

will be entitled to credit for the dividends and interest with which he has charged himself.

The second, third, fourth, fifth, sixth and seventh exceptions are sustained.

We do not discover from the adjudication that any request was made to the auditing judge to decree distribution in kind of the investments in the possession of the executor. As already stated, no awards have been made, a schedule of distribution not yet prepared, and if parties who are entitled to present distribution elect to take investments at their present market value in lieu of cash as part payment of their awards, we know of no reason why they should not be permitted so to do. As it has not yet been refused to them, this exception is dismissed without prejudice.

The remaining exception relates to the commissions or compensation claimed by the executor.

In Holman's Appeal, 24 Pa. 174, we find: "It is scarcely necessary to say that where there is no evidence of a proper attention to the duties of the trust, where no account has been settled for thirty years, and then only when the settlement was compelled by law, and where a very unfair exhibit was made when the account was presented, no compensation ought to be allowed to the executor."

The authorities upon the subject of the faithfulness, diligence and care required to be exercised by an executor or other trustee are legion. It is also well settled that an executor is not entitled to commissions upon his own debt to the estate unless he actually pays it into the estate. Then he will be allowed only half commissions for its disbursement. Nor should he be allowed commissions upon the loss of an investment made by him. An executor who speculates with trust funds resulting in a loss will not be allowed commissions even where services have heretofore been faithfully performed: Richardson's Estate, 12 W. N. C. 386. And an executor who secretly appropriates the trust fund is a borrower, at least so far as the question of loss, interest and compensation go. He is entitled to no favor, and should not be allowed compensation for his services: Drake's Estate, 2 Kulp, 256.

What are the facts in the present case? No account was filed by the executor for fifteen years, and then under compulsion, and, when filed, is improperly stated, and imposes great labor and exhaustive examination upon parties interested and the court, and includes both principal and income and distribution in one co-called account, claims commissions wrongfully and even upon a debt of his own which has never been paid by him, although less than the amount of commissions he has paid himself. And although he sold many of the investments made by the testator at a profit, but at what date does not appear in the account, he has retained others until the present time, when they are practically worthless, and paid assessments out of the principal of the estate upon shares of stock and bonds not recognized as investments proper to be held by an executor, and which should have been sold by him; made investments of moneys of the estate in railroad, iron company and brick company, country club and card company bonds and stock, all illegal investments; paid himself in excess of the share of the estate, without award by the court, and unknown to legatees and *cestuis que trust*, and retained shares of stock at less than their market value; and, in addition, in the income account, charged himself with interest and dividends received on the investments he had appropriated to himself as his share of the personal estate as belonging to the estate, and the distribution to him had not been made, deducted commissions upon the whole amount as if it had actually been paid to him, and then made distribution to the *cestuis que trust* and himself as if an actual cash balance for distribution. And, still more inexplicable, the income account, from July, 1897, to May, 1900, both inclusive,

Hart's Estate.

instead of claiming credit for the distribution of his share to himself, has this remarkable entry, viz. : "Credited to C. H. Hart."

In view of these facts, the reduction of the commission by the auditing judge is not only proper, but he should also have disallowed the claim upon promissory notes, accrued interest thereon and open accounts, due bills of the accountant, all still unpaid, due bills of a brother of testator barred by the statute, and the amount of credits claimed by executor as losses from sales of certain assets of the estate.

It is also difficult to discover any reason for the recognition of an investment by the executor of moneys of the estate in the bonds of an iron company. This is clearly an improper investment, and was made at the risk of the executor. Not only were these bonds purchased at the par value in 1887, but other moneys of the estate were subsequently expended in payment of assessments by the iron company upon the bonds. These bonds were afterwards exchanged for shares of stock in another coal and iron company and bonds of this company, to represent the assessments paid upon the bonds of the former company, and are still held by the executor as part of the balance of the estate. This investment was wholly unauthorized, and we think the parties interested should not be compelled to accept these so-called securities, which are now practically worthless. This is another illustration of the mismanagement and want of good care exhibited in the control and management of the estate, and, taken in connection with his irregular and almost incomprehensible account, we regret to reach the conclusion that the executor does not merit the full reward granted to a prudent, careful and meritorious trustee. Enough has been shown to warrant the disallowance of all compensation, but we are disposed to be more lenient. The rate allowed by the auditing judge is adopted, but the amount to be awarded to the executor as compensation cannot be ascertained except upon a restatement of the account, showing disallowance of commissions upon the several items before referred to, together with the income, so-called, upon the securities appropriated by the executor as his distributive share.

The eleventh exception is sustained, and those remaining are in part dismissed.

Another remarkable and unique feature is presented in the settlement of this estate. It is without precedent, as far as we can discover, and arises as follows : On Nov. 5, 1897, the executor executed an assignment of all his interest in the estate, and on the same date the assignee re-assigned the same to him as executor and trustee, "in trust to manage, sell, dispose and convey the same or any part thereof and apply the proceeds to the payment to Sarah J. Hart, Rebecca C. Hart and the children of Clarissa S. Chase, of whatever amount, income or principal, they may be entitled to respectively from the estate of Samuel Hart, deceased ; and upon final settlement and division of the residuary real and personal estate of said Samuel Hart, deceased, to pay the full amount which may be due to them or any of them, and which there shall not be other assets in the hands of the executor of said estate or his successors to pay and satisfy in full."

The purpose of this assignment is not easy to comprehend. The executor was already trustee, under the will of his father, for his sisters, and, upon their death, accountable to their children, if any, and why he should assign his interest in the personal estate, which is all we have before us, and the amount of which has not yet been determined, to be re-assigned to him as trustee for his sisters, is not apparent, except to prevent its attachment by creditors. It is also to be noticed the assignment contemplates the estate will prove sufficient to pay the shares to be held in trust for his sisters, as it provides, first, that the share of the executor may be applied to pay whatever may be due them, and,

Hart's Estate.

second, if, upon the final settlement of the real and personal estate, there be not sufficient to pay them in full their distributive shares, then any deficiency shall be deducted from the ascertained share of the executor. The assignment, while, in the first instance, an absolute assignment, is in the nature of a collateral security for the payment of the shares of testator's daughters, and, upon payment of them in full out of the estate, the share of the executor to remain his individual property. Nor is it for the benefit of creditors. It is precisely as if the executor had assigned directly to his sisters his interest in the estate as collateral security for whatever amount would be found due them upon the final settlement of the estate. This he certainly had the right to do, and the intervention of an assignee to hold in trust, whether a stranger or the executor, will not make it prejudicial to the rights of others claiming as creditors of the executor. The assignment may also be treated as a mortgage or pledge of the interest of the executor, and, if so, is not within the Act of 1843: *Gilmore v. Adams*, 1 W. N. C. 76; *Johnson's Appeal*, 103 Pa. 373.

The exceptions of the attaching creditor are therefore dismissed.

As the account must be corrected in accordance herewith, and a scheme of distribution prepared, the same will be prepared by counsel and submitted to the court for final decree.

Longenecker v. Barron.

Mandamus—Jurisdiction of Common Pleas over chairman of Republican county committee—Acts of June 14, 1836, and June 8, 1893.

A chairman of the Republican county committee of Somerset county is an officer within the meaning of Act of June 8, 1893, P. L. 345, and the Court of Common Pleas has jurisdiction to issue a peremptory mandamus directing him to perform the duties of his office.

Hence, where a resident of Bedford county tendered his name as a candidate for nomination for the office of president judge of the 18th judicial district, which consists of Somerset and Bedford counties, after complying with all the requirements of the rules of the party in Somerset county, to the chairman of the county committee of that county, who refused to announce his candidacy as required by the party rules in that county. *Held*, that a peremptory mandamus would issue, directing him to make the announcement.

Party rules—Construction.

The voters of a party should be allowed wide liberty in the choice of candidates and in their right to offer themselves as such, and party rules and Acts of Assembly restricting such rights should be strictly construed.

Petition for mandamus. C. P. Somerset Co., May T., 1901, No. 330.

J. R. Scott and John M. Reynolds, for petitioner.

W. H. Koontz and J. A. Berkey, for respondent.

REPPERT, P. J., 14th judicial district, specially presiding, May 16, 1901.—This case comes before us on petition, return and demurrer. By demurring to the return the plaintiff admits everything well pleaded therein, and, so far as the facts affect the case, the demurrer must stand or fall on such facts set forth in the petition as are admitted in the return, and such additional facts set forth in the return as are relevant and material. The pleadings raise substantially but two questions: First, the jurisdiction of the court to issue the writ prayed for; and, second, the right of the plaintiff thereto.

The authority of the court to issue writs of mandamus is contained in the Act of June 8, 1893, which provides that the several Courts of Common Pleas shall

Longenecker v. Barron.

have power to issue such writs "to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district or place within such county," etc.

The language quoted is also contained in the Act of June 14, 1836, which, with other Acts, seems to be superseded by the Act of 1893. Is the defendant an officer within the meaning of this Act?

An officer is one who is lawfully invested with an office. An office is a public charge or employment; and one who performs the duties of an office is an officer: *Bouvier's Law Dictionary*.

The word officer is very elastic. As applied to the military establishments of the army and navy, it would be more definite, perhaps, and somewhat so as applied to the civil establishments, where there are *indicia* of authority to point them out; but, as used in statutes, the term often cannot be so confined. There are various kinds of officers; thus, a public officer is a person who has some duty to perform concerning the public. An executive officer is a person in whom resides power to execute the laws: *Anderson's Law Dictionary*.

It may be of assistance to consider the official duties devolving upon this defendant. He holds his office by virtue of the rules and regulations governing Republican primary elections of Somerset county. These rules have the force and effect of law within the sphere of their application. By these rules he is one of the principal officers of the Republican party in Somerset county. He is the chief executive officer of the party organization. He controls, under the rules, to a large extent, the operation of the party machinery. Through the operation of this machinery are accomplished such civic duties as the announcement of candidates for nomination for public office; their nomination by carefully-conducted elections, around which both these rules and the laws of this State throw safeguards, and at which every qualified member of the party can express his choice by ballot, and at which also those so desiring, and in the manner prescribed, are enabled to submit to the voters their candidacy for nomination; the choice of delegates to State conventions, through whom nominations for State offices are made and State delegates chosen—all these and similar matters are regulated by these rules. These duties are of the greatest public importance and of far-reaching effect under our system of government—even from the most trifling county office to the highest in the gift of this nation. By these same rules this defendant presides at meetings or conventions of return judges as president. As such presiding officer it is his duty under the law of this State to sign, with others, certificates of nomination made at such meetings or conventions, which shall be sworn to by him and others, and a certificate of the oath shall be annexed to the certificate of nomination. Without such certificate no nominee can have his name printed upon the official ballot. The effect of his refusal to act, or of his arbitrary action, may also be of assistance. If he can so act, he has it in his power to restrict the voters in their choice of candidates; he can even deprive them of their opportunity to choose; after the nomination is made he can deprive the nominee of a place upon the official ballot, and the voter of the opportunity thus afforded. All this, this defendant can do, if his contention that the court has no jurisdiction to direct a writ of mandamus to him is correct. We cannot so decide, and we are constrained to hold, as other Common Pleas judges have held, that the defendant is an officer within the meaning of the Act of June 8, 1893, and that this court has authority to issue the writ prayed for.

Second. Has the plaintiff clearly established his right to the writ?

Rule 20, which relates to the announcement of candidates for nomination, provides as follows: "Each candidate for nomination shall furnish to the chairman of the county committee, not less than twenty days before the day of 10 DIST. R.

Longenecker v. Barron.

primary election, his name, the office for which he is a candidate, the township or borough in which he resides, with his post-office address, and pay a fee of: For president judge, \$100 (here follows schedule of fees for other offices), to be used exclusively as a fund to defray the expenses of announcing candidates in such Republican newspapers of the county as shall be designated by the chairman, printing tickets and election blanks and such other necessary expenses for holding and conducting the primary elections."

"The chairman of the county committee shall be custodian of the funds arising from such fees, and shall give a bond approved by a majority of the executive committee."

"The chairman of the county committee shall cause to be printed separate lists of all the candidates for each office, with the office designated at the head of each list, and furnish the committeemen of each district with at least two copies thereof for each voter who voted at the preceding November election. These lists may be used by the voters as tickets by striking out or erasing any name they do not wish nominated."

On May 2, 1901, the plaintiff, through John R. Scott and J. C. Lowry, tendered the defendant the sum of \$100, and furnished in writing, as he alleges, or offered to furnish, as the defendant alleges, to the said defendant, his name, the office for which he is a candidate, the borough in which he resides, with his post-office address, and demanded of the defendant chairman the announcement of the plaintiff's candidacy for president judge, to be voted for at the Republican primary election of Somerset county on June 22 next, in accordance with the rules governing the same. To this, the defendant made reply by handing them a paper reading as follows, omitting the headings:

"To whom it may concern:

"The rules and regulations governing Republican primary elections of Somerset county, Pa., provide that the primary election shall be held on the fourth Saturday of June next (June 22, 1901).

"The county committee is entirely without money. For the purpose of providing funds for holding the said Republican primary election and transacting such other business as may come before them, the chairman of the Republican county committee and the executive committee of the same will sit at the Farmers' National Bank on Thursday, May 30, 1901, from 6 P. M. to 9 o'clock P. M., at which time all persons desiring to be candidates for any offices at said primary election are requested to attend. No announcements will be received before that time. Very respectfully submitted, Henry F. Barron, chairman Republican county committee. Dated at Somerset, May 2, 1901."

On May 8, 1901, the plaintiff, through J. C. Lowry and Edward Hoover, again tendered the defendant the sum of \$100 and the following writing, demanding his announcement as a candidate, omitting the heading:

"Bedford, Pa., May 7, 1901. To Henry F. Barron, Esq., chairman Republican county committee of Somerset county, Penna. Dear Sir: I hereby notify you as chairman of the Republican county committee of Somerset county that I will be a candidate at the Republican primary election to be held in said county on June 22, 1901, for nomination to the office of president judge under the rules of the Republican party of said county; that I reside in the borough of Bedford, Bedford county, Penna., in the 16th judicial district, of which said county of Somerset is a part. I also herewith tender you, as I have heretofore done, the sum of \$100, the fee fixed by rule 20 of said rules for announcing a candidate for president judge and other purposes prescribed by the rules. And as you have declined to receive said fee when formerly tendered, with the following reply as your reason for said action, viz. (here quoting the reply above

given). Now the said tender is renewed, with the agreement on my part, in view of your above statement as to a deficiency of funds, that I will at any time on demand pay such additional assessment as may be my just proportionate share of any fund necessary to defray the proper expenses of said primary election. I demand this right to be announced as a candidate to be voted for at the said primary election on the ground that I have tendered full compliance with the rules of the Republican party of said county of Somerset governing the nomination of candidates for said office. Respectfully, etc., J. H. Longenecker."

As his answer to this tender and demand, the defendant referred the said Lowry and Hoover to the paper dated May 2, 1901, signed by him and delivered to them by him the same date. The tender was not accepted.

In justification of his action, the defendant in his return alleges that it remains to be determined if the plaintiff, a non-resident, is entitled to be voted for as a candidate for president judge at the primary of June 22 in Somerset county; that a meeting of the chairman and executive committee has been called for Thursday, May 30, of which the plaintiff has had notice by the defendant's letter of May 2, already quoted, at which meeting the question of the plaintiff's eligibility and sundry other matters referred to in the letter will be determined; that in determining the plaintiff's right it will be necessary to consider the rules, customs and precedents of the Republican party of Somerset county, and the mutual and reciprocal relations of the organizations and rules of the Republican party of Somerset and Bedford counties, among others, the following:

(a) The "rules and regulations governing Republican primary elections of Somerset county, Pa.," under which the plaintiff asserts his rights.

(b) Rule 20 of said rules, providing as heretofore quoted.

(c) Rule 24, authorizing candidates selected for district nominations to select their own conferrees, and providing that "when no candidates are selected at the primary elections, then the county committee chairman shall appoint said conferrees."

(d) That for many years, when no resident of Somerset county asked a district nomination, non-resident candidates were not announced in Somerset county, but conferrees were appointed under rule 24.

(e) That in the year 1892 the then chairman of the county committee of Somerset county refused to announce Josiah D. Hicks, a resident of Blair county, as a candidate for Congress in Somerset county, on the ground that he had no power to officially announce any non-resident of the county as a candidate, and that such an announcement would be irregular and in violation of the party rules.

(f) That the Bedford county rules adopted April 10, 1900, provide, by rule 23 thereof, that all candidates for nomination shall be actual residents of Bedford county, and that the chairman shall not announce the name of any person residing outside the county.

And while admitting the truth of various allegations contained in plaintiff's petition, the defendant denies that his written statement, dated May 2, 1901, was or is a refusal to accept plaintiff's announcement as a candidate, but that, for the reasons therein stated, the matter of receiving announcements of candidates for all offices, district and county, was deferred until the executive committee should meet with the chairman on May 30, at which meeting this question and other questions would be determined. The defendant further denies that on May 2 or May 8, 1901, or at any other time before or since, he refused or still refuses to accept the plaintiff's announcement or fee, but that he merely deferred the consideration of the question until the meeting above referred to. That the acceptance of announcements in Somerset county has heretofore repeatedly

Longenecker v. Barron.

been deferred, and that the defendant's action in this instance is in accord with the customs and usages of the party.

That owing to a judicial apportionment bill then and yet pending in the Pennsylvania legislature, it was and yet is uncertain what judicial officers would be nominated at said primary election, and May 30 is a date that would give every one entitled to be a candidate a chance to offer and be announced as a candidate, and fuller opportunity to the chairman and the executive committee to learn what officers are to be nominated, what expenses would be incurred and what assessments should be laid upon candidates.

This somewhat lengthy reference to the facts and pleadings assists to a clearer understanding of the controversy.

Rule 20 governs the announcement of candidates. The plaintiff has tendered compliance with all the conditions of that rule laid upon candidates. He has done or offered to do all that he can do. In addition, he pledged himself to pay his share of the expenses of holding the primary in excess of the amount of the announcement fees. In reply, he is told that his case will be considered at a meeting of the chairman and the executive committee called for May 30, from 6 to 9 P. M., but a short time before the time for receiving announcements expires, at which meeting all persons desiring to be candidates are requested to attend, and that no announcements will be received prior to that time. His tenders are not accepted. No rule authorizes any such meeting for the purpose of passing upon the eligibility of persons desiring to announce as candidates. That question, under these rules, is not left for decision to the chairman or the executive committee, or to both combined. Beyond the requirements plainly set forth in the rules, it is left with the voters, where it belongs, to be passed upon by them. Nor can a chairman make any such unreasonable restriction as to the time of receiving announcements, as has been done in this case. No rule authorizes it; it might work gross injustice and inconvenience, and any such restriction or any such custom is inconsistent with a fair interpretation of the rules.

Is the plaintiff by reason of being a non-resident barred? We think not. The office for which announcement is sought to be made is a district office, the district being composed of Somerset and Bedford counties. Nominees for the office will be voted for in both counties without regard to the fact whether they reside in one or the other. The incumbent of the office is only required to reside in the district. The rules do not require residence in Somerset county. Nor do they invest either the chairman or the executive committee, or both, with authority to require such a qualification in a candidate. The voters of a party should be allowed wide liberty in the choice of candidates, and in their right to offer themselves as candidates. The laws and the courts in interpreting the laws are growing more and more liberal in this respect. Party rules and legislative Acts restricting these rights should be strictly construed. Where party rules regulating announcements contain no such restriction as is here sought to be made effective, such restriction should not be allowed, either by custom or precedent or otherwise, because it is hostile to and inconsistent with the rights of the voter and the candidate under the rules. And where such provisions are injected into the text of party rules and regulations the courts, as opportunity offers, will probably take such steps in considering them as will conserve alike the rights of the voter and the rights of the candidate. Party organizations exist for the purpose of making the party principles effective in the conduct of public affairs. Party rules and regulations for the government of the organization are devised to this end, and are useful only in so far as they serve the purposes for which they are made, one of which purposes is to enable the members of a party to nominate and elect candidates in sympathy with the

Longenecker v. Barron.

party principles. Rules should be construed to facilitate, not to hamper or restrict, the exercise of the rights and privileges of the members of the party. This is not a case of forcing a candidate on an unwilling constituency. It is giving a member of a party the right to offer himself to his fellow-members as a candidate for an office to which he is eligible. In them is vested the right to say whether this plaintiff shall be their candidate, and not in the head of the organization to say that he shall not. To the people can be safely left the right and duty of passing upon his candidacy. To them it belongs. There let it rest.

The defendant denies that he refused or still refuses the plaintiff's announcement. He did not accept it when properly tendered, and when it was his duty so to do. He said that no announcement would be received before May 30, 1901, between the hours of 6 and 9 P. M., a requirement involving unreasonable delay, and which he had no authority to make under the circumstances. He has in no way indicated that he will even then, or at any other time, accept it. He denies the jurisdiction of the court, and his return is a statement of the case against the right of the plaintiff to be announced. We cannot but hold his words and conduct at the time the plaintiff's announcement was tendered and since as a distinct refusal to accept plaintiff's announcement. We are of opinion that the plaintiff is entitled to the relief sought.

The defendant's return refers to the possibility of an apportionment bill being passed by the legislature, whereby a change in this district would be made. It may be proper to observe that this opinion is written with reference to the district as at present formed. Were it otherwise constituted the case might present a different aspect. We might then have the case of a candidate seeking announcement for an office to which, at the time, he is not eligible.

Order.—May 30, 1901, after consideration, plaintiff's demurrer is sustained, and judgment is rendered thereon that a peremptory mandamus issue forthwith, directed to the defendant, Henry F. Barron, chairman of the Republican county committee of the county of Somerset, Pa., as prayed for in the plaintiff's petition, and that the defendant pay the costs; returnable to next term.

From James L. Pugh, Somerset, Pa.

Vollmer and Register v. The Avondale Marble Company.

Practice—"Quarto die post"—Judgment for want of appearance.

The allowance of the *dies gratia* or the *quarto die post*, which was the practice of the English courts, was, upon the adoption of the common law in this State, introduced as the proper and approved practice thereunder, and the law still remains unchanged in this respect.

Assumpsit. Rule to strike of judgment. C. P. Chester Co., Aug. T., 1898, No. 63.

A. P. Reid, for rule; J. F. E. Hause, contra.

HEMPHILL, P. J., Oct. 17, 1898.—The summons in this case was served on June 23, 1898, and judgment by default for want of an appearance entered July 5, 1898, twelve days thereafter. Was this judgment prematurely entered, or, in other words, was the defendant entitled to its days of grace—the *quarto die post*?

Lord Coke, in Coke on Littleton, 135, says: "The day that is *quarto die post* is called *dies gratia*; for the very day of return is the day in law, and to that day the judgment hath relation; but no default shall be recorded till the fourth day be past, unless it be a writ of right, where the law alloweth no day, but only the day of return."

The reason for allowing defendants the four days' grace, as given by Blackstone, is that "our sturdy ancestors held it beneath the condition of a freeman

Vollmer and Register v. The Avondale Marble Company.

to appear or to do any other act at the precise time appointed. The feudal law, therefore, always allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing:" 3 Black. Comm., 278.

But a more reasonable and satisfactory explanation of the origin of the practice is given in Tidd's Practice, page 9, where it is said: "If an essoin be not cast, where it is allowable, on the very return-day of the original writ, the plaintiff may enter his exception the next day and obtain an order that it be not received, and from this exception so taken and entered, the second day after the return of the writ is called the day of exception. The third day the sheriff should regularly return his writs into court, which are delivered to the *custos brevium*, and from thence this day is called the day of *retorno brevium*; and then it is that the court is seized of the cause by possession of the writ. The fourth day is called the appearance day or *dies amoris*, which is the day given *ex gratia curiæ* for the defendant's appearance."

The allowance of the *dies gratiæ* or the *quarto die post* was the practice in the English courts, and was presumably, upon the adoption of the common law in this State, introduced as the proper and approved practice thereunder, for we find it recognized in a number of our reports and in the Pennsylvania works on practice. See *Black v. Johns*, 68 Pa. 83; *Vanormer v. Ford*, 98 Pa. 177; *Fisher v. Potter*, 2 Miles, 147; *Still v. Howard*, 2 Miles, 274; *Association v. Gardiner*, 2 W. N. C. 95; *Haven v. Campbell*, 4 W. N. C. 216, and 1 Troubat & Haly's Practice, 158.

The 33rd section of the Act of June 13, 1836, P. L. 568, made it "lawful for the plaintiff, having filed his declaration, to take judgment thereon for default of appearance, according to the rules established by the courts to regulate the practice in this respect," and the Act of April 5, 1862, P. L. 270, relating to the commencement of action in Chester county, made all writs for the commencement of actions "returnable in ten days after the service thereof."

The latter Act contains no provision for the entry of judgment in default of an appearance, and no rules having been established by this court, under the Act of 1836, "to regulate the practice in this respect," we are necessarily remitted to and must be guided by the practice existing at the time of the passage of the Act of June 13, 1836, which, as we have seen, allowed the defendant the *quarto die post*.

Under this practice, the judgment was prematurely entered, and must therefore be stricken off and the rule made absolute.

NOTE.—This case, although decided several years ago, is published here by request.

From Gibbons Gray Cornwell, West Chester, Pa.

Davis v. Sidle.

Practice—Joint actions—Alderman's court—Act of April 6, 1830.

The Act of April 6, 1830, P. L. 277, entitled "An Act for the furtherance of justice between obligors and obligees and other creditors and debtors," should be liberally construed, and embraces proceedings before aldermen.

Hence, where service is had and judgment obtained before an alderman against one defendant in a joint action against two defendants, another action can be subsequently brought and judgment obtained against the other defendant.

Certiorari to alderman's court. C. P. Dauphin Co., Sept. T., 1900, No. 458.

B. F. Etter, for plaintiff; *Hargest & Hargest*, for defendant.

WEISS, J., April 6, 1901.—An action in *assumpsit* was brought by the plaintiff against the defendant and one William H. Moody before Alderman Maurer, of the city of Harrisburg, on June 2, 1900. Service of summons was had upon

Davis v. Sidle.

Moody, and a return made by the constable as to Sidle, the other defendant in the joint action, that he could not be found.

On June 9, 1900, judgment was rendered in favor of the plaintiff and against the defendant, Moody, for \$50 and costs, for "balance due on rent for race-track on Park Farm," from which judgment he took an appeal June 27, 1900.

On July 24 following, the same plaintiff caused a summons to be issued by the same alderman to the defendant, Sidle, upon whom service was had, and it was so proceeded, notwithstanding a plea in abatement of the action, that judgment was rendered on Sept. 8, 1900, for the plaintiff and against the defendant, Sidle, in the same amount and for the same cause as in the joint action. The defendant, Sidle, complained that his plea in abatement and his motion to quash the writ were overruled by the alderman, and removed the cause, by writ of *certiorari*, into this court.

The exceptions filed set forth that the alderman erred in overruling the pleas filed; in not quashing the writ of summons directed to and served upon the defendant, Sidle; in assuming jurisdiction of the separate suit against Sidle, and, "having acquired jurisdiction of the subject-matter of the suit in the joint action against William H. Moody and the defendant below, and having given judgment therein against one of the parties, erred in rendering judgment against the other party, the defendant below, for the same cause of action in a separate suit."

There is no doubt that, prior to the Act of April 6, 1830, P. L. 277, the plaintiff, by obtaining judgment against Moody in the joint action, lost all remedy against Sidle, and it is a lament by Chief Justice Tilghman, in *Downey v. Bank*, 13 S. & R. 288, that such was the case; and the Supreme Court, in commenting upon the same subject in *Griffith v. Chew's Executor*, 8 S. & R. 32, quotes Chief Justice DeGrey as saying, "he never liked equity as well as when it was like law," and Lord Mansfield as saying the day before, that "he never liked law so well as when it was like equity," and against equity the law certainly was. It worked a hardship greater than the common law, for, by it, the plaintiff could "proceed to outlawry against the defendant who cannot be taken, and if he has any effects, the king, to whom the forfeiture accrues, always permits the plaintiff to obtain satisfaction out of the effects:" *Downey v. Bank*, *supra*.

But it was declared by that enactment that: "In all cases now pending or hereafter brought, in any court of record in this Commonwealth, against joint and several obligors, co-partners, promissors or the endorsees of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process or judgment shall not be a bar to a recovery in another suit against the defendant or defendants not served with process."

This Act disposes of the question at hand, unless it does not embrace the case of proceedings before an alderman whose tribunal is not a court of record.

In *Campbell v. Steele*, 11 Pa. 397, the court says "this just and salutary Act is entitled to a liberal construction;" and Justice Huston, in *Vaneman v. Herdman*, 3 Watts, 202, gives expression to the just and salutary feature of the Act, which ends all controversy respecting the proper disposition of the exceptions: "It is certain that more than half, perhaps more than three-fourths, of the money collected by suit in this State is collected before justices, and we should greatly abridge the utility of the Act if, by a narrow construction, it was not extended to them. Their tribunal, though not strictly a court of record, has many of the attributes of one."

The exceptions filed are overruled and dismissed, and the proceedings and judgment had before the alderman are affirmed, at the costs of the defendant.

10 Dist. R.

Commonwealth v. Stirling.

Criminal law—Murder—When new trial granted—Evidence—Photograph—Circumstances under which it was taken—Subsequent custody and history—Proof of—Extraneous matter written on back—Hearsay.

A photograph, proved to have been taken from life and to resemble the person intended, may be used in evidence for the purpose of identification; but where its offer in evidence may affect so serious a question as one of life or death, the offer ought to be accompanied with proof of the circumstances under which the photograph was taken, and of its subsequent custody and history; nor should extraneous matter be written upon its back, containing unproved statements likely to create in the minds of the jury impressions unfavorable to the defendant.

In a murder trial, the Commonwealth, in order to contradict defendant's statement that blood on his coat when arrested May 22, 1900, came from blows inflicted in June, 1899, and to prove that he did not wear the same coat on both dates, offered in evidence a photograph. The only evidence concerning it was that of the keeper of the county prison, who testified that it was a photograph of the defendant, and was taken on Sept. 9, 1899. The photograph represented a colored man having hanging upon his breast a large placard, on which was the number "223." On the back of the photograph there was written in unidentified manuscript the following:

"Philadelphia County Prison. No. 2040. Name, William Fields. *Alias*—. Residence, 16 Little Pine street, Philada. Crime, larceny. Age, 23; height, 5 ft. 9 in. Weight, 139; build, medium. Hair, —; eyes, —. Complexion, —. Born, Virginia. Occupation, laborer. Convicted, 9, 8, '99; 3 mos. Remarks: Small scar right eyebrow, scar right cheek, small ears set back, heavy cheeks, scar back of right hand & index finger, first joint second finger stiff, small scars left arm, first time C. P., also Norfolk & Baltimore."

The trial judge admitted the photograph in evidence. *Held*, to be error.

Quere, as to the right of persons in charge of a prisoner to inflict indignities or impose penalties other than those provided for by the law as a punishment for the crime of which he may have been convicted.

Rule for a new trial. O. and T. Phila. Co., July Sess., 1900, No. 30.

John C. Hinckley, with him *G. Von Phul Jones*, for rule.

P. F. Rothermel, Jr., district-attorney, with him *Samuel M. Clement, Jr.*, assistant district-attorney, contra.

PENNYPACKER, P. J., July 29, 1901.—The defendant was convicted of the crime of murder in the first degree. Nine specifications of error are assigned by his counsel as reasons for the granting of a new trial. With the exception of one of them, they need not be specially considered. It is enough to say that the case was conducted with entire fairness, with due regard to the interests of the defendant as well as of the Commonwealth; that the many technical and difficult questions raised in the course of the trial were, save in a single instance, accurately decided, and that the question of the guilt or innocence of the accused was left to the jury in a clear, comprehensive and adequate charge.

One item of evidence offered by the Commonwealth and admitted under objection we think ought to have been excluded. When the prisoner was arrested on May 22, 1900, he had some stains upon his coat which were apparently produced by blood, and he was asked by the officer in charge of him to account for them. He said, in explanation, that he had been arrested about eleven months before upon a charge of larceny, and that the officer who made the arrest beat him with a club. In order to show that the defendant did not wear, in June of 1899, the same coat that he wore at the time of the later arrest of May 22, 1900, and therefore the incorrectness of his statement, a photograph was offered in evidence by the Commonwealth and admitted. The only evidence concerning this photograph was that of the keeper of the county prison, Frank M. Williams, who testified that he had charge of the defendant under the name of William Fields, and who continued:

DISTRICT REPORTS.

Commonwealth v. Stirling.

"Q. Do you know anything about this photograph? A. Yes, sir. Q. Is that a photograph of him, taken in the county prison (showing photograph to witness)? A. Yes, sir. Q. You know that is a fact, do you? A. Yes, sir. Q. When was it taken? A. It was taken on the 9th day of September. Q. 9th day of September, 1899, wasn't it? A. Yes, sir, 1899."

The photograph represented a colored man having hanging upon his breast a large placard, on which was the number "2223." On the back of the photograph there was written in unidentified manuscript the following:

"Philadelphia County Prison. No. 2040. Name, William Fields. *Alias*—. Residence, 16 Little Pine street, Philada. Crime, larceny. Age, 23; height, 5 ft. 9 in. Weight, 189; build, medium. Hair, —; eyes, —. Complexion, —. Born, Virginia. Occupation, laborer. Convicted, 9, 8, '99; 3 mos. Remarks: Small scar right eyebrow, scar right cheek, small ears set back, heavy cheeks, scar back of right hand & index finger, first joint second finger stiff, small scars left arm, first time C. P., also Norfolk & Baltimore."

By what authority and under whose direction a placard was hung upon his breast and in this ignominious guise he was so photographed does not appear. It does not seem probable that it was at his own request, nor does it seem probable that those having him in charge would presume to inflict indignities or impose penalties other than those provided for by the law as punishment for the crime of which he may have been convicted. That a photograph, proved to have been taken from life and to resemble the person intended, may be used in evidence for the purpose of identification was decided in the case of *Udderzook v. Com.*, 76 Pa. 352. It is matter of common knowledge, however, that a photograph may easily be made to tell an untruthful story. For example, a man is shown examining or doing other acts to himself, and the head of one man is placed upon the body of another. Where the offer of a photograph in evidence may affect so serious a question as one of life or death, the offer ought to be accompanied with proof of the circumstances under which the photograph was taken, and of its subsequent custody and history. Proof of this character is of unusual importance in the present case, for the reason that the number upon the placard, "2223," and the number written on the back of the photograph, "2040," do not agree. If the latter number was the one given when the defendant was arrested in June, 1899, the query arises whether, after all, there has not been some mistake, and whether the photograph was not taken on some other occasion when another number was given.

The defendant was arrested in June, 1899. The photograph was taken, according to the testimony, upon Sept. 9, 1899. There was ample time between these two dates for the defendant to have changed his coat. In the absence, then, of testimony to show that the defendant wore the same coat on Sept. 9 as when arrested in June, the offer did not tend to contradict his statement that the blood on the coat he wore in May of 1900 came from blows in June of 1899.

In addition to these considerations, there was extraneous matter written upon the back of the photograph, containing unproved statements likely to create in the minds of the jury impressions unfavorable to the defendant. The most important of them are: "Crime, larceny;" "Convicted, 9, 8, '99, 3 mos.;" "First time C. P., also Norfolk & Baltimore." These memoranda would seem to suggest that the defendant had been convicted of the crime of larceny, and had been sentenced to the county prison for a period of three months, and that he had also been confined in Norfolk and Baltimore. They are both irrelevant and hearsay. It is impossible to ascertain to what extent they may have influenced the verdict which was rendered

It is to be regretted that in a serious case, conducted upon the whole with conspicuous care and skill, the result should prove to be abortive because of inadvertence in pressing an improper item of evidence; but where the question is of so much importance as the preservation or destruction of life, the error cannot be overlooked.

The rule for a new trial is made absolute.

Seymour, Assignee, &c., v. Philadelphia.

County commissioners—Assessors—Payment for services—Warrants as evidence of contract with commissioners.

The duly elected assessors for election and jury purposes for their several election divisions in the various wards of the city of Philadelphia, who performed their duty of making assessments for voting and jury purposes, and also for the enrollment of school children as required by the Act of May 16, 1895, P. L. 72, are bound by the terms of the bills, on presentation of which they procured warrants in full for their services, when the validity of such bills is not impeached.

If the commissioners of the county of Philadelphia had power for twenty-seven years to agree with the assessors that they should be paid for eight days' work in making voting and jury assessments, regardless of the actual time expended, they have also power to require the assessors to include in the eight days the enrollment of the school children required by the Act of 1895. If the assessors agree thereto, the bargain is complete. If, however, the commissioners do not possess such power, the assessors can only be paid on the basis of a *quantum meruit* for the actual work done.

Trial by court without a jury. C. P. No. 2, Phila. Co., Dec. T., 1900, No. 55.

Thomas R. Elcock, for plaintiff.

Thomas E. Merchant and *John L. Kinsey*, city solicitor, for defendant.

SULZBERGER, J., Aug. 1, 1901.—This case was tried on Jan. 16, 1901, before the court without a jury, under the provisions of the Act of April 22, 1874, P. L. 109. The court finds the facts as follows:

1. The plaintiff is the assignee of the claims of ninety-five persons, who were respectively the duly elected assessors for election and jury purposes for the year 1897, for their several election divisions in various wards of the city of Philadelphia.
2. The right of the plaintiff to sue in the form used is conceded by the defendant.
3. The several assessors, plaintiff's assignors, performed the duty of making assessments for voting and jury purposes, and also for the enrollment of all school children between the ages of eight and thirteen years, for school purposes for the year 1897.
4. The number of days during which each assessor rendered services was not ascertained by the commissioners by an examination of each individual's case. The method adopted by the commissioners for many years, at least twenty-seven, according to the evidence, was to make an average estimate without regard to the size of the several divisions or the number of names to be noted. Prior to the year 1897, eight days had been fixed as the time for which the assessors were paid in respect of their services for voting and jury purposes.
5. The school enrollment was made by these assessors under the provisions of the Act of 1895. It was made for the first time in 1896, and the estimate of the average period of service in that behalf was two days.

Seymour, Assignee, &c., v. Philadelphia.

6. It is admitted by the defendant that the assessors were severally engaged for two days in making the school enrollment for 1897.

7. After the services for the year 1897 had been rendered, each of the assessors, plaintiff's assignors, procured a warrant of \$44 from the city of Philadelphia, on the presentation of a paper which, as to its essential and relevant parts, was in the following form :

City of Philadelphia, Dr.

To _____, Assessor.

(In the blank each assessor wrote his name.)

For assessment of _____ ward, _____ division, September, 1897, as per Act of Assembly, for assessment of voting and jury purposes, also for the enrollment of all school children between the ages of eight and thirteen, for school purposes, \$44.

8. There is no adequate evidence to prove that, at the time of the delivery of this paper by the several assessors, they or any of them were led to sign or deliver the same by coercion, fraud or mistake.

The plaintiff's claim is based on the following facts: 1. That the assessors were engaged for two days each in making the school enrollment for 1897. 2. That they made the usual assessment for voting and jury purposes in 1897, and that for twenty-seven years before the length of this service had been estimated at eight days; wherefore, it should be so estimated for the year 1897. 3. That they have only been paid for eight days in all.

This reasoning, if valid, leads to the conclusion that each of the assessors is entitled to be paid for two days' services at the rate of \$5.50 per day, and that therefore the plaintiff should have judgment for the full amount of his claim.

According to this view, however, the bills rendered by the assessors themselves are disregarded. These distinctly state that the claim of \$44 is for services as well in respect to school enrollment as to the assessment for voting and jury purposes.

If the actual fact of ten days' total service in each case were ascertained by evidence the question would present less difficulty. But it is conceded that the commissioners have always, in effect, made lump bargains with the assessors that the voting and jury assessments should be paid for as eight days' work, regardless of the actual facts. It would seem in accord with this long established precedent that the commissioners, when they had become convinced that the voting and jury assessments could be made in six days and the school enrollment in two days, would revise their estimate and fix eight days as the proper average time for both services. If they had the power to make the former lump bargain, it follows necessarily that they had the power to make the latter, and the assessors having assented thereto and joined therein must be held to have affirmed the correctness of the revised estimate.

If, on the other hand, the power of the commissioners to make such a bargain be denied, the plaintiff's case falls for want of proof. In order to recover on that theory he would have to present the evidence in each case and secure a verdict or finding on the basis of actual work done. This he has not done or offered to do, and perhaps it would be impracticable to follow such a course.

With the hardship of a case, however, it is not our province to deal. It may well be that in point of fact the plaintiff's assignors have been inadequately compensated for their honorable and useful service to the community, but they are in the position of having, by writing, accepted the reward paid as a full equivalent. The validity of that writing has not been legally impeached. By it they are bound, and we have no right to declare otherwise.

Judgment should be entered for the defendant.

10 DIST. R.

Appleton's Estate.

Decedent's estate—Res adjudicata—Surcharge.

A surviving trustee obtained a rule to open a judgment against the trust property, entered on a bond accompanying a mortgage executed by the trustees, alleging in his petition that the judgment had been paid. An issue was then framed to determine whether the obligors had obtained the money fraudulently, and whether the mortgage was affected with notice of the fraud at the time of its loan upon the mortgage. This issue was found in favor of the mortgagee. Thereafter, the Orphans' Court was petitioned to enjoin the mortgagee from proceeding upon the judgment, and to decree that it was either null or had been paid. The auditor to whom the matter was referred reported that the trustees had made no misapplication of the proceeds, and that the sum of \$2000 which remained due upon the mortgage had been used for the benefit of the estate of the *cestui que trust*. This report was, on appeal, sustained by the Supreme Court. One of the trustees died, and the surviving trustee filed two accounts, one in the name of the joint trustees, and a final account in his own name as surviving trustee. *Held*, that, notwithstanding the determination of the above questions, they were reviewable on the audit of the accounts filed by the surviving trustee, and, it not appearing in the account what became of the \$2000, the trustees should be surcharged with the amount paid in settlement of the judgment upon the bond which accompanied the mortgage, and with the amount of the credits claimed in the account for sums expended in the litigation over it and the costs of the audit.

An executor will be surcharged with the rents of properties in Philadelphia which he included in his account filed in New Jersey.

Exceptions to auditor's report. O. C. Phila. Co., April T., 1887, No. 431.

E. Spencer Miller and J. Howard Gendell, for exceptants.

William A. Manderson, contra.

ASHMAN, J., June 29, 1901.—John Lawrence, who died in 1847, left a will, by which he gave his estate in trust to pay the income to his daughter, Ann Appleton, for life, and the principal at her death to her appointees by will. Ann Appleton died in 1883, after executing a will exercising the power, and constituting her son, George W. Appleton, trustee for the beneficiaries named therein. The trustees under the former will were dismissed for malfeasance, and George W. Appleton and Henry Pomerone were, in 1860, substituted in their place. Henry Pomerone survived his co-trustee and filed two accounts, one in the name of the joint trustees, and a final account in his own name as surviving trustee. These accounts, together with a supplement to the final account, were before the auditor, and his rulings thereon are the subject of exception.

The main exception was to the refusal of the auditor to surcharge the co-trustees with \$5000, representing a mortgage which had been executed by them, and the proceeds of which, it was alleged, had been applied by them to their own use. They had obtained the sanction of court to the loan through a petition setting out that moneys were needed for repairs to real estate and for reimbursement to the widow of \$1500 expended by her in the satisfaction of a mortgage against a house owned by the decedent. The money was loaned by the Odd Fellows' Building and Loan Association, of Camden, upon the bond and mortgage of the trustees, Feb. 24, 1872. On Jan. 25, 1884, the bond and mortgage were purchased by the Mutual Loan, Savings and Building Association, of Haddonfield, for \$2000, that sum having been admitted by George W. Appleton, one of the trustees, to be at that time still due and unpaid.

On June 10, 1887, the judgment which had theretofore been obtained by the Odd Fellows' Building and Loan Association upon the bond accompanying the mortgage was marked to the use of the Mutual Loan, Savings and Building Association, and a writ of *alias vend. ex.* was issued against the mortgaged premises.

Henry Pomerone, the surviving trustee, obtained a rule to open the judgment, alleging in his petition that the judgment had been paid. An issue was then

framed, in which the Odd Fellows' Building and Loan Association was plaintiff, to determine whether the obligors had obtained the money fraudulently, and whether the Odd Fellows' Building and Loan Association was affected with notice of the intended fraud at the time of its loan upon the mortgage. This issue was found in favor of the plaintiff. Subsequently (in June, 1892), the present trustee petitioned the Orphans' Court to enjoin the Odd Fellows' Building and Loan Association from proceeding upon said judgment, and to decree that the said judgment was either null or had been paid. The auditor to whom the matter was referred reported that the trustees had made no misapplication of the proceeds, and that the sum of \$2000 remaining due upon the mortgage had been used for the benefit of the estate of Ann Appleton, the *cestui que trust*. His report was, on appeal, sustained by the Supreme Court (169 Pa. 185).

These matters are reviewable, for the reason that a new party and a new fund are before the court. It is contended that the verdict in the feigned issue was not conclusive as to the fact of misappropriation by the trustees, because the issue actually involved was only as to the want of knowledge on the part of the lender of any possible fraud. The trial judge seems to have been of a different opinion, his charge to the jury containing the following language: "Whether George W. Appleton and Henry Pomerone, the trustees, fraudulently misappropriated the money obtained thereon, and whether the Odd Fellows' Building and Loan Association, of Camden, knew at the time it loaned this money on the said bond that the said money was to be so disposed of—now, that, gentlemen, is the only issue to be determined here. You have heard the testimony, and while there is testimony which would lead to the belief that there was a fraudulent misappropriation of this money by the trustees, it is not sufficient to say that the parties who loaned it knew that it was to be so misappropriated." We are willing to concede that the only fact found by the jury was the good faith of the loan association in loaning upon the mortgage. We also admit the justice of that part of the charge in which the judge intimated a suspicion of fraud. The testimony submitted at the trial would certainly have warranted a verdict that the funds were applied by the trustees, or by one of them, to a personal use. Samuel Appleton swore that a loan of \$2000 was made to him, and another of \$3000 to George W. Appleton, as individuals, by the Odd Fellows' Building and Loan Association, in which they both were stockholders, and that the mortgage upon the trust property was given as collateral security for those loans. He also testified that the moneys were used by himself and his brother as partners in a real estate transaction, totally disconnected with the affairs of the trust. He swore, further, that he and his brother paid these loans in full. His statement as to their payment can be reconciled with the statement of George W. Appleton, that \$2000 still remained due at the time of the transfer of the bond and mortgage to the Mutual Loan, Savings and Building Association, only upon the theory that a new loan of \$2000 had been granted, and that the bond and mortgage had been kept open to secure its repayment. What became of that money is left to conjecture. If it was brought into the estate it ought certainly to appear in the account; if it was used by the trustees as they used the balance, for their own ends, it should be surcharged against them in order to save the estate from the loss occasioned by reason of its liability on the mortgages. We think that the auditor erred in refusing to charge the trustees with the sum of \$3701.03 paid by the present trustee in settlement of the judgment upon the bond which accompanied the mortgage.

We are also of opinion that the trustees should be surcharged with the amount of the credits claimed in the account for sums expended in the litigation over the mortgage; a contest which was not only justified on the part of the con-

Appleton's Estate.

testants, but necessitated by the risk to which the accountants had subjected the estate. These credits, as they appear in the account of the surviving trustee, foot up \$351.50, and in his supplemental account, \$915.75.

For the rents of properties in Philadelphia, which George W. Appleton improperly included in the account, as executor, filed by him in New Jersey, the accountants are surcharged in the sum of \$1194.80. The courts of another State have no jurisdiction over real estate in Pennsylvania.

The accountants are also surcharged with the costs of the audit. Counsel will draft a decree in conformity with this opinion.

The exceptions, so far as they relate to these surcharges, are sustained.

Grubbs's Estate.

Decedent's estate—Husband prevented from sharing in wife's estate—Willful and malicious desertion—What constitutes—Act of May 4, 1855.

A case of willful and malicious desertion, such as will prevent a husband from sharing in his wife's estate under the Act of May 4, 1855, P. L. 430, is not made out when the evidence shows that the husband and wife supported themselves by keeping a small cigar store and renting rooms in their house to lodgers, that they were apparently on good terms with each other, that he had on another occasion gone west to establish himself in business, with the intention of sending for his wife if he succeeded, but had returned in two months, disappointed, that, when he finally left, about four years before her death, he made no concealment of his purpose, and, being seventy years of age and a United States pensioner, he went directly to a soldiers' home, where he was still staying when his wife died, that he permitted her to draw his pension money regularly, that he wrote to her, and in one letter asked her for money, which she sent, and when, although it was alleged that there were two sales of the business, at both of which the wife became the purchaser, the evidence failed to show why the sales were made, or how the wife, who, according to the evidence, had no money of her own, was able to pay the purchase-money.

PENROSE, J., dissents.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 177.

A. M. Cooper, for exceptions; L. F. Shuck, contra.

ASHMAN, J., July 13, 1901.—It seems to have been held in *Hahn v. Bealor*, 132 Pa. 242, that the unexplained absence of a husband for more than a year will raise a presumption of the willful and malicious desertion contemplated by the Act of May 4, 1855, P. L. 430, and will cast upon the husband the *onus* of its disproof. This burden was promptly assumed by the claimant at the outset, and long before he put in his demand at the audit. The brother of the decedent had obtained letters of administration to her estate, upon the strength of his oath that the husband had deserted her—a fact of which, by his own admission, he had no personal knowledge—and the husband had succeeded in revoking those letters and in securing a new issue to himself. The decision of the register was allowed to go unchallenged; but whether this broke the force of the presumption we shall not stop to inquire. The husband and wife supported themselves by keeping a small cigar store and renting rooms in their house to lodgers. Several witnesses, among them a tenant who had lived there for some ten years, testified that the couple were apparently on good terms with each other, and no one, not even the relatives who contest the claim, could assign a quarrel as the cause of separation. The husband had left on another occasion, and had gone west to establish himself, as he said, in business, and with the intention of sending for his wife if he succeeded, but had returned in two months, disappointed. He made no concealment of his purpose when he finally left about four years before the decedent's death; he spoke of it to tenants and friends, and, so far as the evidence goes, he departed without opposition or protest on the part of his wife. He was at the time seventy years of age and a United States

Grubbs's Estate.

pensioner, which, in itself, was some proof of physical disability, and he went directly from this city to a soldiers' home in Ohio, where he was still staying when his wife died. He permitted her to draw his pension money regularly, and he wrote to her from the home; one witness, who was unfriendly to the claimant, declaring that she had seen several letters from him, and that in one he had asked his wife for money, which the latter accordingly sent him. That he wrote to his wife was shown by the evidence of another witness. It is not easy to make out of these details a case of willful and malicious desertion. In the near prospect of becoming, if he was not already, a hopeless dependent, the claimant might very naturally and justly seek to rid his wife of the burden of supporting him by going to a home which was established for the care of those who, like himself, had earned the recognition of the government. In doing this, he did not leave his wife to penury. She continued his business, and left at her death the money which has tempted to this contest. Respecting the transfer of the business, the testimony is more or less obscure. The uncle and lately the administrator said that the decedent had written to him and "wanted him to come down and sell her things out," and then that the husband had wanted to sell out to a stranger, and that she had herself bought out the business through her nephew. He declared further, that, in 1868, the decedent had received some \$700 or \$800 from the estate of a relative, but that at the time of the sale she had no means of her own. A. W. Frank swore to the fact of a similar sale which was made ten or twelve years earlier, at the time of the husband's two months' trip to the west, at which the witness bought the business for \$700, at Mrs. Grubbs's request, and turned it over to her immediately, and that, on the claimant's return, the couple continued to live together as before. Exactly why these sales were made, or how the wife, if she had no money of her own, was able to pay the purchase-money, was not indicated; the fact remains, that during her husband's stay with her and after he left her, the decedent, either jointly or separately, appears to have drawn a comfortable livelihood from the business which the husband established.

Exceptions dismissed.

PENROSE, J., dissenting, July 13, 1901.—Under the Act of May 4, 1855, § 5, P. L. 430, a husband forfeits his right to any share of his wife's estate, if, for a period of one year or more before her death, he has "willfully neglected or refused to provide for her," "or," during the same period, "shall have willfully and maliciously deserted" her. Of course, if his failure to provide for her has been occasioned by his sickness, age, or other inability, it cannot be called "willful neglect," and the Act does not interfere with his rights; but if, without her assent or approval, or without cause which would justify a divorce, he should leave her during the time designated, he is guilty, under the authorities, of "willful desertion," the consequences of which necessarily follow.

The evidence here shows that the husband, in 1896, sold out his business and went to Indiana, taking with him, it would seem, all that he thus received, and leaving his wife, to whom he did not afterwards return. She died in 1900, having, in the meantime, supported herself by the business sold by the husband, which, with moneys of her own, she bought back from the purchaser.

The burden of proving that this leaving was with the consent of the wife, or for justifiable cause, was upon the husband (*Hahn v. Bealor*, 17 Crumr. 242), and there was not only no sufficient evidence on his behalf, but he failed to submit himself for cross-examination.

The suggestion that he is relieved of the consequences of his act because the wife "had independent means of support" is without weight. Even if the only ground of forfeiture had been his neglect to furnish support, there is no

Grubbe's Estate.

case which decides that a husband is relieved of his duty in this respect because the wife may have means of her own; and in this case, as the account shows, the entire estate amounted to but \$599.10. But the desertion is the real ground of forfeiture, and with this the question of the wife's ability to support herself has nothing to do.

In my judgment, the exceptions should be sustained, and the balance shown by the account, less collateral inheritance tax, awarded to the brothers and sisters of the decedent, or their descendants, to the exclusion of the husband.

Meyer's Estate.

Decedents' estates—Allowance to creditor in excess of his claim.

A creditor of a decedent's estate should never be allowed a dividend on a sum greater than his claim.

Practice, O. C.—Jurisdiction over settlement of a partnership of which decedent was a member—Practice where decedent's books show a certain debt due to such a partnership.

The Orphans' Court has no jurisdiction over the settlement of the accounts of a partnership of which the decedent was a member. Until such a settlement is made, it will not be presumed, when firm moneys were deposited with decedent, that he was a debtor to the partnership for the balance shown by his books. The court, however, in such case, will direct the accountant to retain the dividend on such balance to await the settlement of the partnership accounts in the proper forum.

Exceptions to adjudication. O. C. Phila. Co., July T., 1900, No. 167.

Gustavus Remak, Jr., and R. D. Maxwell, for exceptants.

John Weaver, contra.

PENROSE, J., June 1, 1901.—It is not often that complaint is made by creditors of a decedent that the sums upon which dividends have been awarded to them exceed the amounts to which they are entitled. The nearest approach to such a case is *Yearsley's Appeal*, 12 Wright, 534, where it was said that "It can never be right to allow a creditor of a decedent more than he claims. All experience proves that the accounts which the living state against the dead are large enough." In that case, however, the overpaid creditor was willing to retain what the court below had thrust upon him, and the objection came from another, seeking to increase his own dividend.

The exceptants allege that the moneys collected for them by the decedent were deposited separately from his general funds, and that the amount due them from the latter is only the balance remaining after deducting what is left of such deposit, viz., \$14,572.16, less \$6000. Of course, in asking this reduction, they take upon themselves the risk of failure to establish their right to the alleged trust balance—a question not now before us, which is not in any way affected by our present action.

The exceptions, so far as they relate to the allowance of a dividend in excess of the amount claimed in this proceeding by the exceptants, are sustained.

We sustain also the exception to the allowance of the claim of the assignee in bankruptcy of the firm of which the decedent was a member. It by no means follows that because moneys of the firm were deposited with the decedent, he was debtor for the whole balance shown by his books: *non constat*, that on settlement of the partnership accounts he will not be found to be the creditor partner, and the settlement of such an account, where the surviving partner is not the executor or administrator of the dead one, cannot be had in the Orphans' Court; *Miller's Estate*, 22 W. N. C. 11; *Weigley's Appeal*, 21 Crumr. 349.

Meyer's Estate.

Following, however, what was done in Hulse's Estate, 12 Phila. 180, we direct that the amount of dividend upon this claim be retained by the accountant to await the settlement of the partnership accounts in the proper jurisdiction, or until the further order of this court.

The adjudication is modified in accordance with this opinion.

Counsel will prepare the necessary decree, with amended dividend list.

Stief's Estate.

Decedent's estate—Surviving partner—Custody of books—Evidence of partnership.

A surviving partner is entitled to the custody of the books of the firm as against the executor of a deceased partner.

Hence, where a jury might fairly find from the evidence that a partnership existed between the testator and two of his sons, the executor's petition for the custody of the books of the firm will be dismissed, although the business, including stock, fixtures and book accounts, was bequeathed to him by the testator.

Petition for citation. O. C. Phila. Co., Jan. T., 1900, No. 637.

Joseph Savidge, for petitioner; *J. Joseph Murphy*, for respondent.

ASHMAN, J., June 22, 1901.—The testator bequeathed his business, including its stock, fixtures and book accounts, to his son, Haizinga, whom he constituted executor of his will. The latter, in his petition, alleges that the said business is in the possession and control of John L. Stief, another son, and asks that the respondent shall surrender the books to the legatee in order that an inventory may be filed. The answer sets up that respondent was a partner with the decedent for many years, and that the latter, two years before his death, transferred the entire business to the respondent and his brother, Charles A. Stief, and thereafter had no interest therein.

The evidence as to the existence of a partnership was obscure, partly because of discrepancies between the statements of the respondent and the brother, whom he alleged to be a partner, and partly because the dealings of the decedent with his sons had been altogether in parol. The business was that of paper-hanging; it was of small volume, and its books and accounts seem to have been kept in a primitive way. The respondent and his brother Charles agreed on the point that both received, in addition to wages, ten per cent. of the profits of the business, and that this percentage amounted to about \$100 per year. They also agreed that the business cards were in the name of Andrew Stief & Company. According to the testimony of the respondent, the father, two years before his death, finding his health declining, turned over the business to the respondent and his brother Charles, and, according to the brother, he simply declared, in the latter part of 1899, that the two sons should take possession in the spring of 1900, and that when he died he was still in control of the business. It was admitted that the decedent had lived in the respondent's house as one of the son's family for many years and had paid no board. It was also admitted that the signs in front of the store were changed before the decedent died; an act which the respondent alleged was done at the request of the father. With this testimony before them, a jury, we think, might fairly find that a partnership existed between the parties prior to and at the date of the decedent's death. In that event, the respondent, as surviving partner, is entitled to the custody of the books of the firm as against the executor of the deceased partner.

The petition is dismissed.

10 DIST. R.

Brooke's Estate.

Decedent's estate—Petition for review—Onus of proof—Practice, O. C.

The onus of showing an error in an adjudication is upon the petitioner for a review, and, if no proofs are submitted in support of the allegations of the petitioner, the answer thereto will be taken as true. Hence, when, assuming the averments of the answer to be true, no error of law appears, the petition will be dismissed.

Petition for review. O. C. Phila. Co., Oct. T., 1900, No. 603.

Joseph T. Foulke and Robert H. Hinckley, for petition.

George Henderson, contra.

HANNA, P. J., July 13, 1901.—This comes before us upon a petition for review of the adjudication of the account of the trustee, with the answer of the *cestui que trust*.

No testimony was taken. It need hardly be said, therefore, that the *onus* of showing an error in the adjudication by the auditing judge is upon the petitioner. No proofs have been submitted in support of the allegations of the petitioner, and we must therefore consider the answer as true. Nor, treating the question suggested as one entirely of law, has any error been made to appear in the conclusion reached by the auditing judge. We must therefore dismiss the petition. Petition dismissed.

In re Hallman Wholesale Liquor License.

Wholesale liquor license—Judicial discretion.

Where it sufficiently appears that there is a distributing business (entirely exclusive of the regularly licensed hotel trade) being carried on by agents of outside wholesale houses in a town sufficiently large to maintain a legitimate wholesale liquor business, and it further appears that the granting of a wholesale license would tend to the maintenance of good order by materially decreasing, if not destroying, the irregular traffic carried on by such agents, the court will, in the exercise of its judicial discretion, grant such license.

Hallman's application for a wholesale liquor license in Phoenixville. Q. S. Chester Co.

J. Frank E. Hause and Cornwell, Gheen & Cornwell, for applicant.

William M. & J. Carroll Hayes, for remonstrants.

HEMPHILL, P. J., March 22, 1901.—The evidence in this case unquestionably establishes these facts, viz., that the applicant is a man remarkably well qualified to conduct the business for which he seeks a license; that liquors, exclusive of those sold by the hotels, are now sent by wholesale houses to their distributing agents in Phoenixville in quantities sufficient to maintain the legitimate business of a wholesale house in that borough, and that the furnishing of liquors in this manner, through irresponsible soliciting and distributing agents, is very undesirable and demoralizing.

It thus appears that the applicant is a person fit to be licensed; that there is an existing demand, exclusive of the patronage of the hotels (and their proprietors all unite in the application, thus inferentially indicating their need for such a license), sufficient to sustain a wholesale house; and that such a house would not only be a substantial convenience to those in the community who have occasion to secure what it dispenses, but would also tend to take the present trade out of the hands of irresponsible agents, and place it where it can be regulated and supervised.

All of these considerations, and possibly others, have resulted in securing for this application an earnest and most extraordinary support from the active business men of Phoenixville, including school directors, physicians, heads of

In re Hallman Wholesale Liquor License.

departments of the Phoenix Iron Company, &c., as well as from all holding official positions and charged with the maintenance of law and order in the borough, viz., the burgess and all of the councilmen, justices of the peace and constables.

Having, therefore, duly considered these well-established facts, together with all the evidence offered by both those supporting and those opposing this application, we feel that an exercise of the sound discretion enjoined upon us by the law and decisions of the Supreme Court requires us to grant the license prayed for.

This determination is, furthermore, based somewhat upon the belief of its advocates, that the licensee will conduct his business in a lawful and reputable manner, and that it will result in a material decrease, if not entire destruction, of the liquor traffic now conducted by irresponsible agents, over whom we have no supervision or control. Should these expectations not be realized, the license may be revoked or not renewed. From Gibbons Gray Cornwell, West Chester, Pa.

Scanlan's Appeal.

Borough auditors—Powers of—Finality of report.

Borough auditors have the power to audit the accounts of a tax receiver for former years, which have not been audited, but they cannot re-audit accounts which have been previously audited.

The report of the borough auditors can be reviewed only by appeal within the statutory period, and is final, if no appeal is taken within that time.

Rule for issue. Appeal from auditor's report on settlement of tax collector's account. C. P. Schuylkill Co., July T., 1899, No. 416.

Hollopeter, Schalek & Reilly, for rule; Whalen and Burke, contra.

SHAY, J., May 6, 1901.—Michael J. Scanlan was tax receiver of the borough of Shenandoah during the years 1895 and 1896, and, for some reason, which does not appear from the papers we have before us, his accounts for those years were not audited by the borough auditors until March 3, 1898. This audit showed balances due by Scanlan for those years as follows:

Balance on 1895 duplicate.....	\$15,413.98
Balance on 1896 duplicate.....	16,037.95

No appeal was made by Scanlan from this report.

In 1899 the auditors of the borough of Shenandoah attempted to re-audit the accounts of Scanlan for those years, previously audited by the board of auditors in 1898, to wit, the years 1895 and 1896, and again restated his accounts, giving him credit for additional payments made by him subsequent to the audit of 1898, and also credit for commissions, amounting to the sum of \$2453.05 on the 1895 duplicate, and the 1896 duplicate was restated as it had been found by the auditors in 1898. From this report Scanlan appealed, and presented to court his petition, setting forth that he was entitled to various credits, which had not been allowed by the auditors, and praying court to grant an issue to try the disputed matters of fact set forth in his petition.

There are two questions which arise for our consideration in this case: 1. Had the auditors of 1898 the power to audit the settlements on the 1895 and 1896 duplicates? and, if so, 2. Was their action final, if unappealed from by the tax receiver?

We are clearly of the opinion that both these questions must be answered in the affirmative.

In *Richter v. Penn Township*, 9 Barr, 79, it is held, that "where the accounts of a previous year have not been audited, the auditors are not confined to his 10 DIST. R.

Scanlan's Appeal.

accounts for the year previous to the settlement." This case is re-affirmed in *Blackmore v. Allegheny County*, 51 Pa. 164; *Luzerne County v. Rhoads*, 1 Kulp, 437, and other cases, and admits of no doubt of the power of the auditors of 1898 to audit the accounts of Scanlan for the years 1895 and 1896, as they had not previously been audited; and, secondly, this report of the auditors of 1896, unappealed from, was final and conclusive, and the auditors of 1899 had no power or authority to re-audit and re-open the accounts of Scanlan for the years 1895 and 1896.

The first case we find on this subject is reported in *Leasure v. Township*, 8 Watts, 551, in which Kennedy, J., said: "The plaintiff's claims had been examined and adjusted by the auditors duly appointed for that purpose in the years in which they accrued; and no board of auditors appointed for any subsequent year could take cognizance of them for any purpose, either for renewing or avoiding them."

In *Richter v. Penn Township*, 9 Barr, 79, the court says: "If the auditors of prior years had audited and adjusted the accounts properly, an appeal from them could not have been open." See, also, *Blackmore v. Allegheny County*, 51 Pa. 164; *Township v. Miles*, 61 Pa. 290; *Siggins v. Com.*, 85 Pa. 282; *Schartzer v. School District*, 90 Pa. 195.

In *Northampton County v. Herman*, 119 Pa. 378, Justice Sterrett said: "And if that (the appeal) is not taken in the time limited by law, the decision of the auditors becomes final and conclusive, and cannot afterwards be inquired into either by the auditors themselves or by a court of law. If the officer was dissatisfied with the decision of the auditors he might have appealed from their report within the time limited by the Act of Assembly, but not having done so, their decision became final and conclusive against him, and thenceforth the door of the Common Pleas and every other judicial tribunal were effectually barred against him as to any claim or claims within the jurisdiction of the auditors at the time his respective accounts were audited, adjusted and settled by them."

In *Luzerne County v. Rhoads*, 1 Kulp, 437, it is held by Judge Rice: "An auditor's report unappealed from is conclusive, and a subsequent board of auditors cannot re-examine the account."

In *Godshalk v. Northampton County*, 71 Pa. 328, it was held: "The report of the auditors in 1856, if not appealed from, was conclusive and binding on the county and commissioners, whose accounts were audited, settled and adjusted by the auditors, and the auditors in 1866 had no power to re-examine and resettle them, even if there were errors in them."

We must inevitably conclude, from the foregoing authorities, that the audit of 1898 (there being no appeal from the same) was conclusive and final on all matters therein contained in reference to the audits of 1895 and 1896 of M. J. Scanlan, tax collector of the borough of Shenandoah for those years, and issue as to matters in dispute prior to March 3, 1898, must be refused.

It appears from the auditor's report of 1899 that there was credited by them on the 1895 duplicate, items accruing subsequent to the audit of March 3, 1898, and amounting in the aggregate to the sum of \$2453.05. From the petition of Scanlan for an issue and the other papers submitted to us, we are unable to say whether any of the alleged matters in dispute arise after March 3, 1898, or that Scanlan did not receive all the credits to which he was entitled subsequent to said date, or that the above sum of \$2453.05 is not the full amount of credit to which Scanlan is entitled subsequent to the audit of 1898. These matters cannot be determined from the papers, as no dates are attached to the items claimed by Scanlan in his petition. If it is not correct and counsel will furnish us with a statement, containing a detailed account of the additional credits they

Scanlan's Appeal.

claim on the 1895 duplicate, accruing subsequent to the date of the 1898 audit, to wit, March 3, 1898, we will cheerfully consider the same and determine what shall be done, viz., whether the court can adjust the account, or whether an issue shall be framed and the case sent to a jury for matters in dispute covering that period of time. As to all matters in dispute prior to March 3, 1898, on the duplicates of 1895 and 1898, the rule for an issue is discharged.

Now, May 8, 1901, the rule for an issue as to all matters in dispute prior to the 1898 audit, to wit, March 3, 1898, and covering the 1895 and 1898 duplicates, is discharged.

From J. O. Ulrich, Tamaqua, Pa.

Reiff's Estate.

Practice, C. P.—Trust-estate—Compromise with absconding trustee.

It is important that fiduciaries be held strictly to the faithful performance of their duties, and it is seldom that a court is warranted in considering a deliberate breach of trust in its merely civil aspect.

Hence, where the family of a committee in lunacy, who had absconded and against whom an attachment had issued, offered his successor to compromise an embezzlement of \$3139.59 for \$500, on condition that the court authorize its acceptance in full payment of the indebtedness, that the attachment be stayed, and that no further proceedings be had against him, *held*, that such a decree would be refused.

Petition by committee in lunacy for a decree authorizing him to settle for \$500 a claim for \$3139.59 embezzled by his predecessor, against whom an attachment was outstanding. C. P. Cumberland Co., Nov. T., 1897, No. 80.

S. S. Rupp, for petition.

EDW. W. BIDDLE, P. J., April 5, 1901.—It appears that on Feb. 16, 1899, an attachment was issued against J. N. Young, former committee in lunacy of Henry Reiff, by reason of his failure to pay over the amount shown to be due by his account filed on Nov. 10, 1897, to wit, the sum of \$3139.59. The attachment has not been served, inasmuch as the accountant has absconded and the sheriff has not been able to apprehend him. His wife and children propose to pay \$150 in cash, and \$350 additional in partial payments within three years, on condition that the attachment be stayed and no further proceedings be had except in case of failure to meet an instalment, and on the further condition that the court authorize the acceptance of \$500 as aforesaid in full payment and compromise of the indebtedness owing to the estate.

Of the above-mentioned balance of \$3139.59 and interest, aggregating at this time over \$3500, not one dollar has been paid, nor has any mitigating circumstance been alleged in palliation of the default. The embezzlement of trust funds is a serious offence in any event, but is particularly so where the victim is a man of feeble intellect and utterly unable to protect himself. A decree recalling the attachment and allowing Mr. Young to return to his family and friends, exempted from any punishment, provided the meagre sum of \$500 be paid, would not be calculated to discourage either himself or others from the future commission of a similar crime. It would not only exonerate him from any personal liability for his crime, but would also lift from his shoulders an obligation for more than \$3000, the balance remaining after \$500 was paid.

It is important that fiduciaries shall be strictly held to the faithful performance of their duties, and it is seldom that a court is warranted in considering a deliberate breach of trust in its merely civil aspect. In the present instance, no good reason has been advanced in support of the prayer of the petition, therefore we refuse to approve the terms of settlement which have been proposed.

From A. G. Miller, Carlisle, Pa.

Com. ex rel. Elkin, Attorney-General, v. Continental Trust
and Finance Company of Philadelphia.

Corporations—Constitutional law—What constitutes a bona fide corporate organization under section 1 of art. 16 of the constitution of 1873.

The Act of June 2, 1871, P. L. (1872) 1838, provides that certain persons named therein, their associates, successors and assigns, "are hereby authorized and empowered to form and be a body corporate to be known as the Susquehanna Improvement Company" (now Continental Trust and Finance Company of Philadelphia), "which shall be and is hereby vested with all the powers, privileges, duties and obligations conferred upon the Continental Improvement Company" by the Act of April 13, 1868, and its supplement. The third section of the Act of April 13, 1868, P. L. 882, thus made part of the Susquehanna Improvement Company's charter, provides that the capital stock of the company shall consist of 2000 shares of the aggregate value of \$100,000, and that the corporators or a majority of them "shall have power to open books for subscriptions at such times and places as they may deem expedient; and when not less than 500 shares shall have been subscribed, and 10 per centum thereon shall have been paid in, the shareholders may elect not less than three nor more than seven directors, to serve until the next annual election, or until their successors shall be duly elected and qualified; and the directors so elected of said company, when it shall have been organized, may and they are hereby authorized and empowered to have and to exercise, in the name and in behalf of the company, all the rights and privileges which are intended to be hereby given, subject only to such liabilities as other shareholders are subject to." Prior to June 24, 1872, subscription books were opened and the entire 2000 shares of the capital stock authorized were subscribed, and upon 950 shares 10 per cent. in cash had actually been paid, but upon the remaining 1050 shares nothing had been paid. Upon that date the subscribers met and organized, electing a board of directors, adopting by-laws, &c. In the same year contracts involving large amounts were made and many thousands of dollars worth of work was done under them by the company.

Held, that defendant effected a *bona fide* organization and commenced business in good faith prior to the adoption of the constitution of 1873, and that its charter was not impaired nor affected by section 1 of art. XVI thereof, which provides that "All existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this constitution, shall thereafter have no validity."

Quo warranto. C. P. Dauphin Co., Commonwealth Docket, 1901, No. 39.

John P. Elkin, attorney-general, *Frederick W. Fleitz*, deputy attorney-general, and *C. H. Backenstoe*, for Commonwealth.—There was not a *bona fide* organization prior to the adoption of the constitution of 1873, because 10 per cent. had been paid in on only 950 shares of stock subscribed, and nothing on the remaining 1050 shares of stock subscribed.

By the constitutional amendment of 1857 the legislature was given the power to revoke charters thereafter granted, and the revocation, by section 1 of art. XVI of the constitution, had the same effect as if by an Act of the legislature: *Com. v. Chincleclamouche Lumber and Boom Co.*, 100 Pa. 438.

M. E. Olmsted and *A. C. Stamm*, for defendant.—A charter of incorporation duly accepted is a contract protected by section 10 of art. I of the constitution of the United States from impairment by the State: 2 Story on Constitution, 254; *Dartmouth College v. Woodward*, 4 Wheaton, 518; *Cooley on Const. Lim.*, *279, and cases there cited; *Stone v. Mississippi*, 11 Otto, 816; *The Binghamton Bridge*, 3 Wall. 51; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Com. v. Pittsburgh and Connellsville R. R. Co.*, 8 P. F. Smith, 26; *Brown v. Hummel*, 6 Barr, 86; *Com. v. Cullen*, 1 Harris, 140; *Iron City Bank v. Pittsburgh*, 1 Wr. 340; *State Bank v. Knoop*, 16 How. 369. At the time of the adoption of the constitution of 1873, defendant's charter had been granted such a short time that its annulment, either by constitutional or legislative enactment, was not within the power of the State, even had there been up to that time no attempt to organize and no transaction of business.

But defendant did organize and commence business in good faith in 1872, the

Com. ex rel. Elkin, Attorney-General, v. Continental Trust and Finance Co. of Phila.

year following the passage of its enabling Act, and made important contracts and transacted business to the extent of many thousands of dollars in pursuance of such contracts, prior to the adoption of the constitution of 1873.

Defendant's organization was conditioned upon the subscription to 500 shares of its stock and a payment of 10 per centum thereon, but it did more. The whole 2000 shares were subscribed and 10 per cent. paid in cash upon 950 shares. The number of shares subscribed in excess of 500 and the amount paid in in excess of 10 per cent. on 500 shares was just that much in excess of the amount required by the company's charter.

SIMONTON, P. J., March 29, 1901.—This case comes into court upon the suggestion of the attorney-general for a writ of *quo warranto*. By the written agreement of the parties it was heard by the court without a jury in the manner provided in the Act of 1874. From the undisputed evidence in the case we find the following facts:

1. The legislature of Pennsylvania in 1871 passed a special Act, entitled "An Act to incorporate the Susquehanna Improvement Company," which was approved by the Governor June 2, 1871, and is printed in the appendix to the published laws of Pennsylvania for 1872, at page 1338. Said Act contains only one section and reads as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That H. E. Passmore, John Minsker, Alexander Frank, Daniel Hinkle, Samuel Rudy, and their associates, successors and assigns, be and they are hereby authorized and empowered to form and be a body corporate, to be known as the Susquehanna Improvement Company, which shall be and is hereby vested with all the powers, privileges, duties and obligations conferred upon the Continental Improvement Company by the Act of the legislature of Pennsylvania, approved April 13, 1868, and the supplement thereto."

2. The general Act of May 1, 1868, P. L. 106, requires a certain enrollment tax to be paid upon any special Act of Assembly creating a corporation. The report of the auditor-general for the year ending Nov. 30, 1872, shows this tax to have been paid within that year by the Susquehanna Improvement Company.

3. The 3rd section of the Act of April 13, 1868, being the Act referred to in the special Act incorporating the Susquehanna Improvement Company, is as follows:

"The capital stock of said company shall consist of 2000 shares of stock, of the value of \$50 each, being \$100,000, with the privilege to increase the same, by a majority of the stockholders, at any annual or special meeting, to such amount as they may from time to time deem needful; and the incorporators, or a majority of them, named in the first section of this Act, shall have power to open books for subscriptions at such times and places as they may deem expedient; and when not less than 500 shares shall have been subscribed, and 10 per centum thereon shall have been paid in, the shareholders may elect not less than three nor more than seven directors, to serve until the next annual election, or until their successors shall be duly elected and qualified; and the directors so elected of said company, when it shall have been organized, may and they are hereby authorized and empowered to have and to exercise, in the name and in behalf of the company, all the rights and privileges which are intended to be hereby given, subject only to such liabilities as other shareholders are subject to, which liabilities are no more than for the payment to the company of the sums due or to become due on the shares held by them; and should the capital stock at any time be increased, the stockholders, at the time of such increase, shall be entitled

10 Dist. R.

Com. ex rel. Elkin, Attorney-General, v. Continental Trust and Finance Co. of Phila.
to a *pro rata* share of such increase upon the payment of the par value of the same."

4. Upon June 19, 1872, a majority of the corporators named in the Act of June 2, 1871, incorporating the Susquehanna Improvement Company, formally signed and duly acknowledged an instrument providing for the opening of books to receive subscriptions, agreeably to the provisions of said Act incorporating the said company and the Acts of Assembly therein mentioned, and upon June 24, 1872, upon the books opened in pursuance of said instrument, there were subscribed 2000 shares of capital stock of the par value of \$50 each. Upon 950 shares there was actually paid in the amount of 10 per cent. in cash, but upon the remaining 1050 shares there was nothing paid at the time of said subscription.

5. Upon June 24, 1872, the subscribers aforesaid met at 239 South Sixth Street, Philadelphia, for the purpose of organization, and duly elected a board of five directors. Upon the same day, an elaborate set of by-laws was adopted for the government of the corporation. Upon the same day, upon the adjournment of the stockholders' meeting, the board of directors thus chosen met and elected a president and secretary.

6. On the second Tuesday of March, 1873, the stockholders of the Susquehanna Improvement Company held an annual election for that year and elected a board of five directors, which board, upon the same day, met and elected a president and secretary.

7. There were held by and in the name of the Susquehanna Improvement Company annual meetings of stockholders in March of each year to and including the year 1883. At each of said annual meetings a board of directors was elected, and the other necessary officers were elected or appointed by the board of directors to and including the year 1883, in which year the title of the corporation was changed, as will hereinafter appear.

8. On Sept. 30, 1872, the Susquehanna Improvement Company entered into a contract with the Maryland and Pennsylvania Railroad Company, a corporation of the State of Maryland, for the construction of a railroad from Baltimore to the Pennsylvania State line, near Octorara creek, Lancaster county, Pa., and considerable work was done by the Susquehanna Improvement Company upon the said railroad, some of which as early as November, 1872. The Susquehanna Improvement Company appears to have entered into a contract with Brown, Gillican & Company to perform part of the work, and for work performed during the month of November, 1872, paid the said firm the sum of \$2306.08. Prior to April 1, 1873, the Susquehanna Improvement Company had furnished labor and material to the Maryland and Pennsylvania Railroad Company, under the contract of Sept. 30, 1872, to the following amount:

30,190 cubic yards earth excavation, at 35c.	\$10,566.50
16,746 cubic yards loose rock excavation, at 70c.	11,722.20
200 cubic yards loose rock, hauled 600 feet, at 71½c.	143.00
455 cubic yards solid rock, at \$1.40.	637.00
641 cubic yards arch masonry (2nd class), at \$9.00.	5,769.00
21 square yards paving and foundations, at \$1.25.	26.25
3.141 miles grubbing and clearing, at \$350.00.	1,099.35
	<u>\$29,963.30</u>

Upon which, after allowing a credit to the amount of \$11,601, it claimed a balance of \$18,362.30, with interest from April 1, 1873. The defendant, either directly or through its sub-contractors, graded the railroad from Relay House, on the Northern Central Railroad, to the Gunpowder river.

9. In pursuance of the requirement of section 1 of the Act of May 1, 1868, P. L. 108, defendant, on Aug. 12, 1872, caused to be registered in the office of the

Com. ex rel. Elkin, Attorney-General, v. Continental Trust and Finance Co. of Phila.

auditor-general the date of its incorporation, date of organization, place of business, amount of capital paid in, the name of the president and the name of the treasurer, said certificate of registry being signed by its secretary. According to said certificate, the amount of capital paid in at that time was \$10,000, equal to 10 per centum upon the entire 2000 shares of capital stock subscribed.

10. By the decree of the Court of Common Pleas No. 4 for the county of Philadelphia, dated April 14, 1883, defendant's corporate title was changed to Metal Railroad Tie Construction Company. By this title it transacted business and regularly maintained its organization until 1890, when, by decree of March 29, 1890, of the Court of Common Pleas No. 1 of Philadelphia, its name was again changed to Continental Trust and Finance Company of Philadelphia, by which name it transacted business, and has regularly maintained its organization to the present day.

11. The bonus and taxes due the Commonwealth from 1872 to 1900, both inclusive, have been paid by defendant. For the years 1872 to 1882, both inclusive, they were paid in the name of the Susquehanna Improvement Company; from 1883 to 1889, both inclusive, in the name of the Metal Railroad Tie Construction Company; and from 1890 to 1900, both inclusive, in the name of the Continental Trust and Finance Company of Philadelphia.

Discussion.

The suggestion filed by the relator alleges two grounds for the forfeiture of defendant's charter. First, that it did not properly organize and in good faith commence business prior to the adoption of the present constitution in 1873, and that, therefore, its charter privileges were annulled by section 1 of art. XVI of the constitution, which declares that "all existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this constitution, shall thereafter have no validity; and, second, that in any event defendant has not continuously maintained an organization, and is not, therefore, entitled to exist and do business as a corporation.

The defendant was incorporated by a special Act of Assembly, approved June 2, 1871, entitled "An Act to incorporate the Susquehanna Improvement Company." This Act did not enumerate the franchises to be possessed by the corporation thus incorporated, but, after the manner of legislation in those days, declared it "vested with all the powers, privileges, duties and obligations conferred upon the Continental Improvement Company by the Act of the legislature of Pennsylvania, approved April 13, 1868, and the supplements thereto."

The charter of the Continental Improvement Company, which was thus made the charter of the defendant corporation, confers powers various in character, it being of the variety known in the language of that day as an "omnibus" charter. As appears in the facts above found, defendant's subscribing stockholders did organize or attempt to effect a legal organization on June 24, 1872. If that organization was legal, it is practically conceded by the Commonwealth that the organization has been continuously maintained from that time until the present. We have also found, and it was not indeed denied by the Commonwealth at the hearing, that the defendant did commence business in good faith in 1872, prior to the adoption of the present constitution of Pennsylvania, and the issue narrows itself down to the determination of the single question, whether the organization made or attempted to be made in June, 1872, was a legal organization?

The 3rd section of the Act incorporating the Continental Improvement Company, which, by the terms of the Act of 1871, became a part of its charter, 10 DIST. R.

Com. ex rel. Elkin, Attorney-General, v. Continental Trust and Finance Co. of Phila.

declares that "the capital stock of said company shall consist of 2000 shares of stock, of the value of \$50 each, being \$100,000, . . . and when not less than 500 shares shall have been subscribed, and 10 per centum thereon shall have been paid in, the shareholders may elect not less than three nor more than seven directors, to serve until the next annual election, or until their successors shall be duly elected and qualified; and the directors so elected of said company, when it shall have been organized, may, and they are hereby authorized and empowered to have and to exercise in the name and in behalf of the company, all the rights and privileges which are intended to be hereby given," etc. The whole 2000 shares were actually subscribed June 24, 1872. Upon 950 of the said shares, 10 per centum was actually paid in, and on the remaining 1050 shares nothing was paid at the time of subscription. It does not appear just when payment was made upon those 1050 shares, but it must have been made not later than Aug. 12, 1872, as the report filed in the office of the auditor-general for registration shows that at that time \$10,000 had been paid in, which would be 10 per centum upon the whole 2000 shares. It is contended, on behalf of the relator, that the organization of June 24, 1872, was illegal because of the fact that, as to 1050 shares subscribed, 10 per centum had not at that date been paid in, but we do not so construe the 3rd section of the Act of 1868. It did not require that 10 per centum should be paid in upon the whole 2000 shares, or that the whole 2000 shares should be subscribed. As an evidence of good faith on the part of the corporators, it required that before organizing and availing themselves of the franchises granted, they should cause to be subscribed not less than 500 shares; but when that many had been subscribed, "and 10 per centum thereon shall have been paid in," the Act distinctly authorized the organization of the corporation. The subscription and payment of 10 per cent. upon 500 shares was sufficient to authorize the organization of the company. In defendant's case the requirements of the Act were exceeded, for 950 shares were subscribed and 10 per centum actually paid thereon at the time of subscription. The fact that 1050 additional shares were also subscribed, upon which the 10 per centum was not paid in until shortly after the organization of the corporation, did not affect the validity of the said organization, the requirement of the Act having been already more than complied with: *Chincleclamouche Lumber and Boom Co. v. Com.*, 100 Pa. 438, is not an analogous case. There the corporation had been chartered in 1867, and there had been no organization nor attempted organization until 1882, fifteen years later, and nine years after the adoption of the constitution of 1873; but in defendant's case there was an organization and an actual commencement of business in good faith prior to the adoption of that instrument. Whether defendant's charter constituted such a contract with the State that it could not, in any event, have been annulled by the provisions of art. XVI, section 1, of the constitution, it is not necessary to decide nor discuss, as in the view of the case we have taken, defendant was not, in any event, within its purview. We have no difficulty in arriving at the following

Conclusions of law.

1. The organization of the defendant corporation by its shareholders June 24, 1872, was a lawful and valid organization.

2. Defendant corporation, having been duly organized and commenced business in good faith prior to the adoption of the State constitution of 1873, the validity of its charter was not impaired nor affected by section 1 of art. XVI thereof.

Judgment is directed to be entered in favor of defendant, unless exceptions be filed as provided by law.

From William M. Hargest, Harrisburg, Pa.

Public Road in Potter and Tioga Counties.

Road law—Abandoning road—Report of viewers—Written notice—Acts of June 13, 1836, May 2, 1899, and April 3, 1899.

Whenever a portion of a road is abandoned, under the provisions of the Act of June 13, 1836, P. L. 551, the report of the viewers should find that the portion abandoned has become or will become, by reason of the alteration, "useless, inconvenient or burdensome." Where the proceeding is to vacate or change the location of an existing road, the Act of May 2, 1899, P. L. 176, does not require written notice to be served upon the supervisors of the township or filed with the papers, but the Act of April 3, 1899, P. L. 28, requires a written notice to be served upon the county commissioners and a copy of the same returned with the report.

Exceptions to final confirmation of road. Q. S. Potter Co.

Peck, Stone, Heck & Dubois, for exceptants, filed the following exceptions:

1. The road to be changed lies within the borough of Galeton, and therefore Court of Quarter Sessions has no jurisdiction.
2. Petition does not allege that any portion of the original road has become useless, inconvenient or burdensome.
3. Report of viewers does not find that any portion of original road has become useless, inconvenient or burdensome.
4. No written notice was served upon the supervisors of the township and a copy thereof filed with the papers in the case as required by Act approved May 2, 1899.
5. No written notice was served upon the county commissioners of Potter county and a copy thereof filed with the papers in the case as required by Act approved April 3, 1899.

Dornan & Ormerod, contra.

OLMSTED, P. J., Jan. 24, 1901.—The Act of June 13, 1836, P. L. 551, authorizes the court to make alterations in public roads "wherever the same shall become useless, inconvenient or burdensome." The view in this case reported in favor of an alteration in the road, but they do not state that the portion abandoned has become or will become, by reason of the alteration, "useless, inconvenient or burdensome." We think the third exception to the report of the viewers should be sustained. The several exceptions based upon the fact that notices were not given and filed as required by the Act of May 2, 1899, P. L. 176, would be valid exceptions if this were a proceeding to lay out and open a "new road." It is, of course, difficult to see why such notices should not be required where the proceeding is to vacate or change the location of an existing road, as well as where the road in contemplation is a new road, but the legislature has not made the law to cover anything but the laying out and opening new roads. The fourth exception is therefore not sustained. The fifth exception is based upon the Act of April 3, 1899, P. L. 28, which requires notice to be given the county commissioners and copy of same to be returned with the report. The phraseology of this Act is not precisely like the one above cited, requiring notices to be served on supervisors. The one applies to "new roads" and this one to proceeding to view and lay out a public road.

This is a proceeding relative to a public road, and, although not strictly within the letter of the Act, we think it is within its spirit and that the Act applies. We therefore sustain the fifth exception.

We think the proceedings as stated above are defective and that the report should not be confirmed.

From A. S. Heck, Coudersport, Pa.

Brenner v. Carter.

Partnership—Contributions—Interest.

Contributions by partners to the capital of the firm do not carry interest, in the absence of express agreement to that effect.

Partnership—Loans by liquidating partner—Interest.

Interest earned by loans made to strangers by a liquidating partner from the firm's money is an asset of the firm, and to be so treated in adjusting the accounts between the members of the firm.

Partnership—No agreement as to losses—Contribution.

An agreement to share the profits of a business, nothing being said about the losses, *prima facie*, implies an agreement to share the losses also in the same proportion as the profits, unless the capital of one partner is staked against the skill of the other, when the partner supplying the capital must sustain the whole loss. But, in the absence of evidence showing that the case falls within the exception, the partner who did not contribute the capital is not relieved, unless there is an agreement to that effect, from his obligation to share the losses.

Partnership—Settlement of partnership account—Allowance of interest.

In the settlement of partnership accounts, the allowance or refusal of interest depends upon the circumstances of each particular case, and the defendant in a partnership bill for an account will not be charged with interest when it appears that the plaintiff in the bill, who was the liquidating partner and acquainted with the accounts, made no demand on the defendant for contribution until he filed his bill, six years less one day, after the dissolution of the firm, and it also appeared, from an examination of the bill, that the plaintiff threw no light on the nature or amount of his demand, and the defendant had no means of knowing what, if anything, he owed.

Bill, pleadings and proofs. C. P. No. 2, Phila. Co., Dec. T., 1889, No. 308.

R. E. Shapley, for plaintiff; *J. De F. Junkin*, for defendant.

SULZBERGER, J., Aug. 1, 1901.—This cause was heard on the pleadings and proofs on June 10, 11 and 21, and July 1, 1901. The bill was a partnership bill and prayed for an account. The court finds the following facts:

1. Prior to Jan. 1, 1881, there was a firm, John G. Brenner, Son & Company (referred to in the books as No. 1), composed of John G. Brenner, 5-10ths interest; John C. Brenner, 3-10ths interest, and James B. Carter, 2-10ths interest. The said James B. Carter was guaranteed a minimum of \$2500 per year.

2. John G. Brenner died during 1880, and on Jan. 1, 1881, a new firm was formed, which carried on the business under the same name (referred to in the books as No. 2). This firm was composed of the complainant, John C. Brenner, and the two defendants, James B. Carter and J. Harry Brenner. This is the firm whose accounts are the subject of the present controversy.

3. It was, among other things, agreed by the articles "that after all expense shall be deducted from the gross profits of the said business, the balance or net profits shall be divided as follows, that is to say: The said John C. Brenner shall receive as his share 50 per cent. of the net profits, the said J. B. Carter 25 per cent. thereof, and the said J. H. Brenner 25 per cent. thereof." No provision was contained in these articles for the guaranty of a minimum.

4. The articles of co-partnership did not contain a provision for capital, but it appears from the partnership books and from the evidence that the estimated and agreed value of the assets at the beginning of the partnership was \$65,486.44. Of this, John C. Brenner was credited with \$64,859.25, and James B. Carter \$627.19. These amounts represented the stock of merchandise which was turned over by the old firm, John G. Brenner, Son & Company (No. 1), to John G. Brenner, Son & Company (No. 2). John C. Brenner's capital, which exceeded \$40,000, was included in his credit. The exact amount of his capital cannot be ascertained. Carter had no capital.

DISTRICT REPORTS.

Brenner v. Carter.

5. This firm carried on business from Jan. 1, 1881, to Dec. 31, 1883, when it was dissolved by mutual consent. During the years 1881 and 1882 a profit was made and was divided among the several partners according to their interests.

The business of the year 1883 resulted in a loss of.....	\$1002.87
In addition to this, certain accounts carried into the contingent fund were shown to be losses to the extent of.....	743.97

Making the total loss.....	\$1746.13
----------------------------	-----------

One-quarter of this is James B. Carter's share, \$436.53.

6. At the close of the year 1882 the defendant, James B. Carter had withdrawn the \$627.19 standing to his credit at the beginning of the partnership and his own share of profits, had overdrawn his account, and was indebted to the firm for overdrafts to the amount of..... \$580.37

He drew during the year 1883 (during which there were no profits)..	2521.33
---	---------

On Dec. 31, 1883, his indebtedness to the firm for overdrafts was therefore..... \$3101.70

7. In addition to the said overdrafts, amounting on Dec. 31, 1883, to.. \$3101.70 James B. Carter is to be charged with one-quarter of the losses as above..... 436.53

Making his total indebtedness upon the winding up of the business..	\$3538.23
---	-----------

8. On Jan. 1, 1884, the firm was dissolved. At that time John C. Brenner was the only member of the firm having anything standing to his credit upon the books of the company. The firm's stock and business was sold to H. & G. E. Knight, the outstanding accounts were collected and all the outstanding indebtedness paid out of the firm's assets by John C. Brenner as liquidating partner. Carter carried on another business and took no part in the liquidation.

Under the agreement with H. & G. E. Knight, \$40,000 of the consideration paid by them for the firm's stock and assets was, pending the liquidation, contributed to their firm as a special contribution in the name of John C. Brenner, who treated it as his own, and collected interest thereon at the rate of 9 per cent. per annum. The amount of this contribution was charged in the books of John G. Brenner, Son & Company against John C. Brenner. Said amount remained in the Knight firm for about two years, and interest to the amount of \$7041.68 was paid thereon and received by John C. Brenner.

As this was partnership funds on which interest was actually earned, the defendant, Carter, was entitled to 25 per centum of the interest so collected, or \$1760.47.

9. The account must, therefore, be stated as follows :

James B. Carter. Dr.....	\$3538.23
James B. Carter. Cr.....	1760.47
Net debit balance due by James B. Carter to the plaintiff.....	\$1777.76

Opinion.

Three questions of law are to be determined. The first is, assuming the defendant to be liable to contribution, is he also liable to pay interest to the plaintiff on the amount of the capital standing to the plaintiff's credit?

The bill avers that the profits and losses were to be shared in the following proportions: The plaintiff, one-half; J. Harry Brenner, one-quarter, and the defendant one-quarter. No express agreement to pay interest was averred or proved, and the court has been unable to find as a fact from the evidence that any agreement to pay such interest existed between the parties.

10 DIST. R.

Brenner v. Carter.

While the duty to pay interest on a loan by one person to another may fairly be inferred, no such presumption arises from the contribution of capital by a member of a partnership. The object of a partnership is to earn profits which, in the absence of an express stipulation, are divided equally between the partners: *Lindley on Partnership* (Am. ed.), 348; 17 Am. & Eng. Ency. of Law, 1227.

As the investment of capital is for profits alone, a provision for interest is in effect a preferential dividend of the profits in favor of him to whom the interest is to be paid. In a case like the present, where the plaintiff receives 50 per cent. of the profits, there would seem to be no reason for presuming a provision for a further preference. We are, therefore, of opinion that the defendant, Carter, was not liable for interest. At all events, such interest, even if provided for by express agreement, ceases at the dissolution of the firm: 17 Am. & Eng. Ency. of Law, 1228.

The liability of the plaintiff for interest on the \$40,000 of the firm's money invested by him in a new firm, of which the others were not members, rests on a different principle. This interest was actually earned by the loan of that amount of the firm's money to strangers, who paid it. Of course, the interest so received was part of the firm's assets.

The second question is raised by the defendant. He contends that as there is no provision in the partnership agreement that James B. Carter should share any proportion of the losses, he is not liable for any such losses.

This view, however, overlooks the unquestioned fact that there was a partnership, and that Carter was a partner. The general principle in such cases is stated in *Lindley on Partnership* (4th Eng. ed.), *19, thus: "An agreement to share profits, nothing being said about losses, amounts, *prima facie*, to an agreement to share losses also; for it is but fair that the chance of gain and of loss should be taken by the same persons; and it is natural to suppose that such was their intention if they have said nothing to the contrary."

The defendant apparently relies on the class of cases of which *Everly v. Durborrow*, 8 Phila. 93, is a type. These are spoken of by Theophilus Parsons in his work on *Partnership* (2nd ed.), 51, in the following language: "If in such an arrangement it was provided that one should find all the money and the other do all the work, and that the profits should be divided, and the transaction resulted in no profit whatever, but in a considerable loss, the party supplying funds would be obliged to sustain the whole loss."

The intent in this class of agreements is held to be that the contribution of skill and knowledge by one partner is accepted by the partners as valuable in itself, and of a quality similar to the other partner's money-capital. Hence, it is but a short step to the inference that the loss on the skill-capital may be assumed to be equal to the loss on the money-capital, and if the latter be a total loss, so is the former. This view excludes the idea of additional contribution by the partner who has furnished skill only, since by such additional contribution his loss would be doubled.

In the case before us, however, there is not a scintilla of evidence to indicate that the capital of the plaintiff was staked against the skill of the defendant. There is, on the other hand, positive evidence tending to show that the plaintiff contributed skill and labor in addition to his capital.

This leaves the defendant in the position of a partner who happens to have no capital. Such lack of capital, however, does not relieve him from the obligation of his contract to contribute ratably to pay the losses of the firm: *Emerick v. Moir*, 124 Pa. 498.

This leaves for determination the third question, to wit, whether the plaintiff is entitled to interest on the amount found to be due to him.

Brenner v. Carter.

The Pennsylvania rule on this subject was laid down by Mr. Justice Sharwood in Gyger's Appeal, 82 Pa. 73: "In the settlement of partnership accounts, the allowance or refusal of interest depends upon the circumstances of each particular case; any unbending rule would work injustice in some case." And this rule has been frequently restated: *Jones v. Farquhar*, 186 Pa. 396.

The circumstances here are peculiar. There is no evidence that the plaintiff, who was the liquidating partner and acquainted with the accounts, ever made a demand on Carter for contribution until he filed the bill in this case, six years, less one day, after the dissolution. This was, to say the least, extraordinary. An examination of the bill shows that the plaintiff threw no light on the nature or amount of his demand, and Carter himself had no means of knowing what, if anything, he owed.

Under the circumstances, we think that the defendant should not be charged with interest.

A decree should be entered in favor of the plaintiff and against the defendant, George Junkin, Esq., executor of, and trustee under, the will of James B. Carter, deceased, that the defendant, James B. Carter, was indebted to the plaintiff, John C. Brenner, in the sum of \$1777.76, and that that amount, with interest from the date of the filing of this opinion, be paid by George Junkin, Esq., executor and trustee as aforesaid, from the funds of the estate of the said James B. Carter in his hands, the costs to be borne in equal shares by the plaintiff and defendant.

Harris v. Richardson et al.

Joint torts—Judgments—Practice, C. P.

When a plaintiff, in an action of trespass to recover damages for negligence, declares for a joint tort by two defendants, and the evidence, instead of showing a joint tort by both defendants, shows only a separate tort by one, a verdict and judgment against such defendant for the separate tort will not be sustained.

If no concert is shown, and therefore no joint tort, and the case is one of separate tort or torts upon the part of one or of several defendants, the action is not sustained, and there should be no verdict against any one.

Rule for new trial. C. P. No. 4, Phila. Co., Dec. T., 1897, No. 783.

Bradbury Bedell, for rule; *J. R. K. Scott*, contra.

AUDENRIED, J., Aug. 19, 1901.—The plaintiff claims damages to compensate him for injuries alleged to have been received through the negligence of the employees of the defendants, who, it is averred, "carelessly dropped and allowed a piece of iron pipe to drop down upon him." Under the construction of its rather inartificial language most favorable to the plaintiff, his statement charges the defendants with a joint tort.

At the trial, it appeared that the defendants, Jacob Myers & Son, had been employed by the defendant, Richardson, to make certain alterations in his store; that Smith had contracted with Jacob Myers & Son to perform a part of the work which they had undertaken, and that Harris, the plaintiff, had been hired by Smith to carry bricks for him. As the plaintiff, in the course of his employment, carrying on his shoulder a hod of bricks, was climbing a ladder, which was placed in a shaft in Richardson's store, a piece of pipe (whether of brass or of iron is, of course, immaterial) dropped from one of the floors above and struck him on the foot. He was badly injured, and for a time incapacitated for work. The pipe that struck Harris fell from a pile of pipes which the servants of Richardson were removing from their place near the shaft to another part of the building. Nobody connected with Jacob Myers & Son had anything to do with the pipes.

10 Dist. R.

Harris v. Richardson et al.

The trial judge directed a verdict in favor of the defendants last mentioned, and instructed the jury to determine whether Harris's injuries had been caused by the negligence of Richardson's employees, and, if so, the amount of damages to which he was entitled. A verdict was rendered against Richardson for \$1000.

That this disposition of the case worked practical justice cannot be disputed. The evidence amply sustains the findings of the jury on the questions submitted to them. In taking a verdict against that one of two defendants charged with a joint tort, who was proved to have been responsible for the injury complained of, when nothing was shown to connect the other defendant with that injury, the trial judge followed a usage long established in Pennsylvania and based on very ancient authority: See Sir John Heydon's Case, 11 Coke, 5a (10 Jac. I); also *Player v. Warn and Dews* (Exchequer Ch.) Croke Car., 54 (2 Car. I).

The Supreme Court of Pennsylvania has, however, just decided that this practice is improper, a decision which is supported at least by the argument *ab inconvenienti*.

In the opinion filed July 17, 1901, in the case of *Wiest v. Philadelphia* (not yet reported), it was said by Justice Potter: "The cases do not, we think, when rightly understood, justify the practice of joining as defendants, in suits for negligence, every one against whom any ground of liability seems to exist, without regard to the question of whether the case is really one of joint tort."

"It is hardly asking too much of a plaintiff that, before settling the machinery of the law in motion, he be sufficiently sure of the facts as to know whether the injury for which he complains was a separate act of one party or a joint act of two or more:" *Wiest v. Philadelphia, supra*.

"If no concert is shown, and therefore no joint tort, and the case is one of separate tort or torts upon the part of one or of several defendants, the action is not sustained, and there should be no verdict against any one. In a suit for a joint tort there should be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved in order to sustain the action. The allegation and the proof must agree in cases of tort as in other cases:" *Wiest v. Philadelphia, supra*.

"Where a plaintiff in an action of trespass to recover damages for negligence declares for a joint tort, and the evidence shows no joint action by defendants, a verdict and judgment against one defendant for a separate tort should not be permitted:" *Wiest v. Philadelphia, supra*.

In conformity with this view of the law, we are constrained to set aside the verdict and grant a new trial.

Sheetz's Estate.

Guardian and ward—Animosity between same—Removal of guardian.

A guardian will not be removed from the guardianship of the person and estate of the ward where no gross neglect, fraud or mismanagement on his part is shown, merely because, owing to some trifling incidents and faults on both sides, a feeling of animosity has arisen between them, principally on the part of the minor, and an estrangement resulted.

Petition for removal of guardians. O. C. Phila. Co., Jan. T., 1892, No. 41.

Charles Hart, for petitioner; *R. H. Hinckley*, contra.

HANNA, P. J., June 15, 1901.—The petitioner, by her next friend, is a minor, now more than nineteen years of age. She is a niece of her guardians, who were appointed by her mother in her last will and testament, and were her sisters. The mother of the minor died in January, 1896. Until sometime in the year 1899, nothing but friendly relations existed between the aunts and their

DISTRICT REPORTS.

Sheetz's Estate.

niece, but then, owing to some trifling incidents and faults on both sides, a feeling of animosity arose, principally on the part of the minor, and an estrangement resulted, which has continued until the present time. The consequence is, the best interests of the ward have not been promoted by such a condition of affairs. The ward is not wholly without fault, and the guardians, perhaps, have not fully performed their duty. But after a careful examination of the voluminous testimony, much of which wholly irrelevant, we are fully satisfied that for the so-called derelictions of duty imputed to them, it will be highly unjustifiable and inequitable to remove them from the guardianship of the person and estate of their ward. No gross neglect on their part has been shown, nor fraud, nor mismanagement, that will warrant such a procedure. The evidence is to the contrary, and demonstrates the affection and solicitude of the guardians for the welfare of their niece, and the prudent care of her estate, guided by the constant advice of counsel. And the reason for the non-payment of income for the personal expenses of the minor is satisfactorily explained.

After a careful consideration of all the facts and circumstances, we discover no good reason for the discharge and removal of the guardians.

The petition is therefore dismissed, with costs to be paid by petitioner.

Witzel's Estate.
Decedent's estate—Damages to freehold—Principal and income.

Where houses have become untenable by reason of the construction of a drain, damages awarded, not for the loss of rent, but for injury to the freehold, should be treated as belonging to principal.

Decedent's estate—"Lumping item"—Counsel fees—Practice, O. C.

Where no proof is produced at the audit sustaining a lumping item for car fare, meals and extra witnesses, and a counsel fee alleged to be for services rendered to accountant in his individual behalf, the credits allowed by the auditing judge under objection will be stricken out.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1897, No. 398.

James E. Hood, for exceptions; *E. O. Michener*, contra.

ASHMAN, J., June 29, 1901.—The item of \$4438.99 for damages "causing loss of rents," with which the executor debits himself in the account, while true in fact, is misleading. The injury resulted from the laying by the city of a street drain or trough which was intended to carry off the water of a small creek near the decedent's premises. From some fault in its construction, or from its insufficient capacity, the drain proved a failure, and diverted water into the cellars of the buildings. As a result, the structures themselves became unsafe and were practically untenable. The life-tenant was, of course, deprived of most of the rents which the houses had formerly yielded, but it was very evident from the testimony which was submitted at the trial, as well as from the charge of the trial judge, that the jury awarded damages, not for the loss of rent, but for injury to the freehold. It was error therefore (although from the peculiar presentation of the case it was a natural error) to treat the sum so awarded as belonging to income.

For the lumping item of \$270 for car fare, meals and extra witnesses, and that of \$100 for counsel fees for services alleged by exceptants to have been rendered to the accountant in his individual behalf, no proof appears from the stenographer's notes to have been produced at the audit, and the credits must be stricken out.

The exceptions are sustained, and the adjudication is amended accordingly.

10 Dist. R.

York Manufacturing Company v. Oberdick et al.

Criminal law—Conspiracy—Striking workmen—Refusal to handle strikers' work—Attempts to persuade remaining workmen to cease work—Picketing—Adequate remedy—Injunction—Equity.

An unlawful conspiracy to injure the complainant in a bill in equity, and to interfere with and destroy its business, is shown when it appears that the members of labor organizations, of which complainant's workmen, who were on a strike, were also members, working for firms and corporations independent of and unconnected with the complainant, refuse to handle any material which is intended for complainant, and, together with its striking workmen, endeavor to persuade its remaining workmen and apprentices to cease work and its prospective workmen from seeking employment, and for this purpose make use of both threats and a system of pickets.

Such acts and conduct continuing and threatening are injurious to the complainant, and, when done by some one hundred and thirty or one hundred and forty men, complainant has no adequate remedy at law. Therefore, relief can be obtained in equity.

Strikes—Picketing—Illegality of—Restraining same by injunction.

The picketing by striking workmen and their sympathizers of railroad stations and the approaches to and from the works or plant where the striking workmen were employed, in order to accost the remaining and prospective workmen and induce them to cease work, is illegal and will be restrained by injunction.

Bill for injunction and other relief. C. P. York Co., Aug. T., 1901, No. 2.

George S. Schmidt and Niles & Neff, for complainants.

E. D. Ziegler and J. S. Black, for respondents.

STEWART, J., July 23, 1901.—The complainant, the York Manufacturing Company, is a corporation duly organized under the laws of Pennsylvania, engaged in the manufacture of machinery, and located and doing business in the city of York, Pennsylvania. The respondents are Charles Oberdick and other individuals, who are members of the International Association of Machinists, the local lodge being No. 243, and members of Iron Moulders' Union, No. 33, a local branch of the Iron Moulders' Union of North America. These two organizations are secret associations, known as labor organizations, and operating under charters held from their respective national organizations. The respondents of the said organizations, and those associated with them, or some of them, were employees of the York Manufacturing Company; S. Morgan Smith & Sons, also founders and machinists; Hench & Dromgold, founders and machinists; the York Safe and Lock Company, founders and machinists; Baugher, Kurtz & Co., founders and machinists, and George F. Motter & Sons, machinists, all located and doing business in the city of York prior to May 20, 1901.

The complainant charges that it is engaged in the manufacture of machinery, and employs machinists, moulders and other laborers and mechanics; that prior to May 20, certain members of the International Association of Machinists presented to the officers of the complainant a contract, demanding a reduction in the hours of labor, an increase in wages, a regulation of the shop as to the number of apprentices to be employed, and the method of adjusting disputes; and threatened that, if the terms as expressed in the printed agreement then presented were not agreed to, that the respondents and others associated with them would decline to remain in their employment, and would prevent any other persons accepting the employment of the complainant, and cause the complainant's works to stop and injure and destroy its business; and that these threats would be carried into execution unless these demands were acceded to on or before May 20. That complainant then had in the usual conduct of its business entered into contracts with other manufacturers of machinery at certain prices, to be delivered at certain times, based upon the then existing rate of

York Manufacturing Company v. Oberdick et al.

wages, and that they were not able to comply with the respondents' demands. That the respondents did, on May 20, leave the employ of the complainant, and confederated and combined and conspired to carry out their threats. That since May 20 certain other respondents, members of the organization known as the Iron Moulders' Union, are conspiring with the respondents in their illegal designs as follows :

(a) That the respondents caused certain of their number, from May 20 to the time of the filing of the bill, to gather at and about the doors and approaches of the works of the complainant in large numbers, and by loud, insulting, abusive and angry words and tones, and violent gestures, action and demeanor, interfere with the employees and workmen who desired to remain in the employ of the complainant, and attempted to deter, intimidate and prevent them from entering and remaining in said employment; and that they have been, since May 20, maintaining a system of pickets under command of captains, who, at regular intervals, are posted at certain approaches to the works, and patrol public streets near and around the complainant's works, and are directed, placed and relieved with military form.

(b) That certain of the respondents, in large numbers, met, followed and surrounded, on the public streets and elsewhere, and besieged at their abodes, certain employees and workmen of the complainant who desired to remain in its employment, and by threats of personal harm and injury, and angry words, and violent and abusive conduct and gestures, attempted to prevent, intimidate and deter, and have succeeded in preventing, intimidating and deterring certain of said employees from remaining in the employment of the complainant.

(c) That respondents caused and appointed certain of them to picket the railroad stations, and intercept workmen on their way to complainant's works, who were contemplating accepting employment under it.

(d) That respondents congregated at an appointed place known as Codorus Hall, and upon the passage of workmen and employees of the complainant by the said place, on the public street, would greet them with insulting words and threats of personal injury, calculated to deter them from continuing and remaining in the employment of the complainant.

(e) That complainant has in its employment certain apprentices, who have contracted to learn their trades with the complainant, and that respondents have succeeded in some cases, by threats, promises and inducements, in persuading said apprentices to violate their contracts against the desires and commands of their parents.

The respondents have threatened to prevent any of the shops or manufactories in or near the city of York from assisting complainant in completing its said contracts, and have caused and induced certain machinists, mechanics and workmen of other shops to decline working upon material of the complainant, and that all said illegal and wrongful acts, threats and conduct on the part of the respondents are being done in carrying out said illegal conspiracy, combination and design of all, and authorized, approved and caused to be said and done by all of said respondents. That the said complainant's works are a large manufacturing plant, in which complainant has invested large sums of money, and upon the continued operation of which depends the support and daily maintenance of large numbers of workmen and their families; that said works are composed of various departments, and dependent upon each other, and that the inefficiency of one destroys the efficiency of the whole, and that the conduct of the respondents has caused and will cause irreparable injury to the complainant and its workmen. That by reason of this illegal and wrongful conduct of the respondents, the complainant is unable to fulfill its contracts, and will be unable to deliver the articles as contracted by it, to its irreparable

injury. That the respondents threaten to continue in their conduct in compelling the complainant to close down its works and discontinue its business, and that the respondents are financially irresponsible. That said wrongs are daily increasing, in accordance with the threats of the respondents, and are becoming more dangerous and oppressive, and that the complainant has no adequate remedy at law. That the International Association of Machinists and the Iron Moulders' Union are associations, the membership of which is numerous, and all the members and officers are not known to the complainant, and it is impracticable to make them all parties to this bill.

The respondents have filed two answers, one by the members of York Lodge, No. 243, International Association of Machinists, and the other by Iron Moulders' Union, No. 33, of York, Pa. The respondents admit that they are members, that is, the respondent machinists, that they are members of the International Association of Machinists, but deny that they are members of the Iron Moulders' Union, and that they are engaged in any concerted action with said Iron Moulders' Union, as alleged in complainant's bill. They admit having made the demand alleged in complainant's bill for an increase of wages, shorter hours, as contained in said printed, unsigned agreement presented to the complainant, and that "it was possible that said machinists belonged to said York Lodge, No. 243, and would quit work and leave complainant's employ." They deny making any threats against the complainant, its business or its employees. They admit they did leave the complainant's employ, the complainant having refused to increase their wages or reduce the hours in a day's work. They deny that they combined, confederated or conspired with the Iron Moulders' Union or its members to injure the complainant, or that they are in any combination with said Iron Moulders' Union, as individuals or members of the International Association, and they deny that they gathered in large numbers about the doors and approaches to the shops of the complainant, and, by loud, insulting and abusive words and threats, and violent gesture and demeanor, interfered with the employees and workmen who remained in the employ of the complainant, or attempted to intimidate and thereby prevent them from entering or remaining in said employment. They further deny that they followed or surrounded the employees of the complainant on the public streets, or besieged them at their homes, or made any threats of personal harm or injury against them, or attempt to intimidate them and thereby prevent them from remaining in the employ of the complainant, or that they used intimidation or threats to deter persons coming from other places to work for the complainant. They further deny that they congregated at Codorus Hall, and by threats of personal injury or insulting language attempted to deter the employees of the complainant company.

They deny that they used threats or other unlawful means in an effort to detach the apprentices from the working force of the complainant. They deny that they have threatened to prevent any of the shops in or near York from assisting the complainant in its work, or by threats to induce machinists from continuing in the employ of the complainant, or workmen of other shops to decline to work upon material of the complainant. They deny generally that they are now, or were at any time, guilty of the words, acts, conduct or threats set forth in complainant's bill.

They admit as follows: "We have, as members of the said York Lodge, No. 243, together with other members of said lodge, from time to time appointed persons commonly called pickets, whose duty it was and is to accost such machinists as are now working for the manufacturing company, or propose to seek employment there, in a quiet or orderly manner, wherever they might be found, whether at the railroad station or on public streets, and to explain to

such persons the circumstances of the dispute between the complainant company and the respondent members of said York Lodge, No. 243, thereby hoping and expecting to induce such machinists as are now in the employ of said complainant company to quit work, and such as proposed to take employment there to change their purpose. Such pickets are not appointed in large numbers, and have not and do not collect in large numbers at any point. They have not and do not trespass upon complainant's property, and they have not and do not use threats, violence or any other means of intimidation against the complainant's employees or those proposing to take employment with the complainant."

The respondents, who are members of the Iron Moulders' Union, No. 33, answering for themselves, denied that they were members of the machinists' organization, and that there was any joint or concerted action or design between the two. They denied having made any demand, on May 1, 1901, for shorter hours, increased pay or shop regulations. They deny that they quit work on May 20, or that on that day they appointed or directed certain of their number to gather about the doors and approaches of the works of the complainant with the view to deter, interfere with or prevent the other employees or workmen in the employ of the complainant from entering or remaining in said employment. They admit that some of the respondents have gathered in small numbers near the approaches to the works of the complainant, but did so in a lawful and peaceable manner, without the use of force, threats or menace or harm to any person or property. "We admit that since we were discharged by complainant, we have maintained a system of pickets, who, at regular intervals, were posted near certain of the approaches to the complainant's works, but deny that we were trespassers on property of complainant; and we admit that said pickets patrolled the public streets near the complainant's works, and that they were directed, placed and relieved in the discharge of their duties as their business required." They deny that they surrounded on the public streets and elsewhere, and besieged at their homes, certain of the employees or workmen of the complainant, and by threats of harm and injury, and angry words and tones and violent gestures, attempted to prevent, intimidate or deter, or succeeded in attempting, preventing, intimidating or deterring any of the employees from remaining in the employ of the complainant, or that they are now daily doing so.

They deny that they intercepted at the railroad stations men who were on their way to the works of the complainant, having agreed to enter the employment of the complainant, by threats of personal injury and violent actions and gestures, words and conduct and intimidation, to frighten them from entering said employment. They admit that some of the respondents met certain men at railroad stations who were on their way to the works of the complainant, and by peaceable means attempted to persuade said men not to enter the employment of complainant. They admit that they do meet at Codorus Hall, but deny that, upon the passage of workmen and employees of the complainant by or near said place on the public streets, they greeted them with insulting words and threats and violent conduct, intended to deter them from continuing and remaining in the employment of complainant. They aver that they do not know of the employment of certain apprentices by complainant, but deny that they have attempted, or are attempting, by threats or by inducements, to persuade them to violate their contract. They deny that they struck, and aver that they were discharged on May 24 on account of the strike of the machinists. They deny having threatened to prevent any of the shops or manufactories in or near York from assisting the complainant to complete the fulfilling of its contracts; and they deny that they have caused or induced certain machinists,

mechanics and workmen of other shops, by means of threats of personal injury and violent language or conduct, to decline working upon the material for the complainant. They deny any combination, conspiracy or design as alleged in the sixth paragraph of complainant's bill. They admit that the works of complainant make up a large and valuable manufacturing plant, in which complainant has invested large sums of money, and upon the continued operation of which depends the support and daily maintenance of large numbers of workmen and their families; but they deny that the efficiency of the entire plant is affected by their conduct, or that irreparable injury will be caused to the complainant or its workmen; and they deny that the complainant will be unable to fill its contracts, and that the complainant, on account of the conduct of the respondents, will be obliged to discontinue its business, and that the respondents are financially irresponsible. They deny that their conduct is becoming more dangerous and oppressive, and deny irreparable injury. This is a summary of the allegations of the bill and answers filed.

Findings of fact.

The York Manufacturing Company, the complainant, as stated, has a large foundry and machine-shop, employing a great many men, moulders and machinists, as well as other mechanics. It is conducting a large business, and is shown to have had large contracts on hand unexecuted at the time this trouble originated. These contracts are time contracts, in which the compensation is paid as the work progresses, and which, if not executed within the time limit, will result in serious damage to complainant. The effect of the conduct on the part of the respondents, as hereinafter stated, tends seriously to cripple and injure the complainant in its business, and to occasion it heavy, if not irreparable, loss. The strike of the machinists took place on May 20, 1901, and the moulders were discharged on May 24, 1901, since which time the conduct of the respondents has been aggressive against the complainant, as shown by the proof and admitted by their answers.

The proof shows that the complainant company had in its employ several apprentices; that the respondents visited the homes of these apprentices and solicited and urged their leaving their employment, and stated to them that if they did not join the union and come out with them, that they would be marked; that they would not be able to get employment elsewhere hereafter, and that they were taking the bread out of their—the strikers'—mouths by continuing in the employment of the complainant. They were invited and urged to attend the meetings of the unions, and when there were solicited and urged to join and to come out with the strikers. They were also approached and solicited and argued with, whenever opportunity offered, at the works or on their way to and from the works. They were told that they would have a black mark forever if they didn't join the union and leave their employ; and at least two apprentices, Samuel Rockey and Willard Kessler, were induced to break their contracts and quit the employment of the complainant.

Other men who remained in the employ of the complainant were also accosted on the streets and visited at their homes, and argued with, persuaded and threatened. The nature of these threats was that their names would be published in the journal of the organization; that they would not be able to get work anywhere else; that they would be called scabs, and that even their little children would be marked, and these marks would follow them as long as they lived. The wives of some of the workmen were terrified in order to get them to induce their husbands to leave their employment. Some of the employees were so worked upon that they left the shops by back ways and alleys, so as to

York Manufacturing Company v. Oberdick et al.

escape the solicitations and importunities of the respondents. It was said to several in different instances that when the strikers won, and that they would win, there would no longer be any employment for them in the works of the York Manufacturing Company, and that they would all be turned out and that they would not get work elsewhere.

The respondents, both moulders and machinists, as admitted by them in their respective answers, established a system of pickets by which all the approaches to the complainant's property were guarded, and all persons who seemed likely to be seeking employment there or intending to accept employment, as well as those who were employed, were approached and questioned and urged not to accept employment and to refuse employment with the complainant. This was not confined to the approaches to the complainant's works, but was instituted also at the railway stations in the city, and all trains were inspected, and all persons who had the appearance of mechanics likely to be on their way to the complainant's works were approached and interrogated, and some turned back. The system of picketing began in the morning as early as 5.30 o'clock, and continued until after the evening trains arrived, at 8 or 9 o'clock.

The complainant sent a man to Waynesboro to secure workmen, and his presence there was immediately reported to the organization here, and a committee, consisting of one man from each organization, was sent to Waynesboro to intercept and prevent workmen at that point from coming to work for the York Manufacturing Company. This committee inserted a notice in one of the Waynesboro papers, as follows: "Wanted.—Moulders and machinists to stay away from York during the strike there. By order of the committee." This committee personally saw and interviewed men who contemplated coming and accepting employment with the plaintiff, and prevented them from doing so.

This system of picketing was regularly established and changed from time to time during the day. They had captains, who looked after them, and a man to carry water and coffee to them, thus showing the diligence and persistence with which the work was performed. The picketing consisted of a large number of men, usually two at each post, one moulder and one machinist, besides their associates and confederates, who hung around in numbers, but who were not on regular duty. The Pennsylvania and Western Maryland Railroad West York stations are located right at the works of the complainant, and these stations were strictly guarded, and all persons arriving were closely scrutinized. It is but fair to say that the strikers were informed by counsel that they had the right to maintain these pickets, and in a quiet and orderly way to approach people and prevent them from accepting employment with the complainant.

The Iron Moulders' Union is made up of moulders working in all the different foundries in York. The York Safe and Lock Company carries on a foundry business, and from February up until the time of the strike was engaged in making castings for the complainant. After the strike, the moulders of the York Safe and Lock Company declined to make castings for the complainant and struck. This strike at the York Safe and Lock Company was ordered by the Iron Moulders' Union, No. 33, of York, as testified to by George W. Test, who was business manager of the union, after it had been reported to M. J. Keough, here at York, second vice-president of the Iron Moulders' Union of North America, a national organization, that work was being done by the York Safe and Lock Company for the York Manufacturing Company. Mr. Keough, who is a resident, according to his testimony, of Green Island, New York, was in York in charge of the strike. He represented the superior body, the Iron

Moulders' Union of North America, and remained in charge of it until this injunction was continued.

The complainant sent a pattern to Hensch & Dromgold, who are also founders in the city of York, with the request to have some castings made off it. This pattern was put in the hands of the foreman of the foundry, who gave it to a union moulder to make. He declined to make the castings, and was reported to the office. He was directed to be discharged, and was discharged. The same pattern was tendered to two more union moulders, who declined to make any castings off it. They were also discharged. This was reported to M. J. Keough and to George W. Test. Test went to the office of Hensch & Dromgold and demanded the reinstatement of the discharged men. The firm declined to reinstate them. Test then went out to the foundry, and, although it was afternoon, and the iron was hot and running from the cupola, ready to be poured, he called out all the moulders in the shop, and they immediately gathered up their tools and left the place. The foreman, William Kessler, said to George Watson, one of the union moulders, "You are not going to let me stick with the heat?" And he said, "We cannot help it; we are ordered out." Watson is a respondent.

George F. Motter & Sons, who conduct a machine-shop, were doing certain work for the York Manufacturing Company, and had in their employ union machinists. One of these, after the strike at the complainant's, said to Frank Motter, the general manager, that if they would keep away from the York Manufacturing Company's work, they did not think there would be a strike in their place. Motter declined to refuse the work of the complainant, because he was under contract to complete it. Thereupon two of the union machinists belonging to Machinists' Association, No. 243, struck.

Baughner, Kurtz & Co., of this city, conduct a foundry and machine-shop, and were engaged on machine work for the York Manufacturing Company. The foreman directed one of the respondents, Henry Oberdick, a union machinist, to work on this work of the complainant. He declined to do so, and the foreman then put an apprentice on the job. Henry Oberdick then tried to induce the apprentice to refuse to do the work, and thereupon Oberdick was discharged.

With a few exceptions, the respondents were peaceable and orderly in their conduct. They did congregate at Codorus Hall, and when an employee of the complainant passed on one occasion he was called a scab. On another occasion, at the American House, another employee of the complainant was surrounded and besieged by a large number of the respondents, who approached him in an angry and irritated manner, and he was threatened and called a scab. He was so terrified by the circumstances that he requested a companion to see him home, and escaped through a back yard of the hotel, and ran to his home, a square or more distant, through the alley. The person most aggressive on this occasion, as shown by the proof, was John Austin, who was a machinist, had been in the employ of the complainant, but was not a member of the union. He is a respondent, and was co-operating with the other respondents. Austin threatened this employee, Oyler, and called him other vile names, besides calling him a scab, and tried to create a breach of the peace.

On another occasion, several of the striking moulders assembled on the sidewalk at the approach of Thomas R. Shipley, who is a director and the general manager of the complainant company, and blocked his progress and menaced him to such an extent that, although a man of courage, he walked off the sidewalk and around them to avoid a collision.

The testimony abundantly shows the concert, combination, confederation and co-operation of all the respondents, and of the two labor organizations. This is evidenced by the fact that each gang of pickets was made up of a moulder and a

York Manufacturing Company v. Oberdick et al.

machinist, by the fact that the committee who visited Waynesboro was made up of a moulder and a machinist; that they met at the common meeting place of both at Codorus Hall, the place to which the striking moulders from S. Morgan Smith's and the striking machinists from the complainant's shops, first marched after coming out, and from which place they selected and sent out their pickets. Every step in the progress of the strike shows the mutual conduct and understanding between the machinists and the moulders; and the conduct of the moulders and machinists at the other manufactories, in refusing to work on the work of the complainant, further shows this concert. The combination and conspiracy among all the respondents is also shown in their efforts to induce the apprentices to violate their contracts of apprenticeship, and leave the complainant's employ, and the efforts to prevent other men from taking employment with the complainant, and to induce men in the complainant's employ to leave, and to oppress and injure the complainant in its business to such an extent as to oblige it to accept the terms and stipulations tendered by the strikers and which it refused to accept. Nothing could be plainer than that this was their purpose, and that the complainant would be so injured and annoyed and embarrassed in the conduct of its business, and delayed in the execution of its contracts, that it would be obliged to surrender to the terms of the strikers. This was avowed by Charles Oberdick, one of the officers and active spirits in the whole matter, by the assertion that they would probably be able to stop the smoke from coming out of the York Manufacturing Company's stacks.

Conclusions of law.

1. The conduct on the part of the respondents, as shown by the preceding findings of fact, constitutes an unlawful conspiracy to injure the complainant, and to interfere with and destroy its business.
 2. These acts and this conduct continuing and threatening were injurious to the complainant and its interest, as well as prejudicial to its rights.
 3. There are some 130 or 140 respondents, so that the complainant would be obliged to resort to a multiplicity of suits. It had, therefore, no adequate remedy at law.
 4. The efforts on the part of the respondents to induce the apprentices to leave the employment of the complainant were illegal, and will be restrained.
 5. The picketing of complainant's works was illegal, and will be restrained.
- For these reasons remedy by injunction was proper.

Argument.

A court of equity in Pennsylvania has a right to prevent or restrain the commission or continuance of acts contrary to law, or prejudicial to the interests of the community, or the rights of individuals: Act of June 16, 1836, § 13, clause 5, P. L. 790. Although the general rule is that equity will not intervene by way of injunction to restrain the commission of a criminal offence, yet this is not a universal rule, even in Pennsylvania; public nuisance is a crime, yet in *Com. v. Rush*, 14 Pa. 186, such a crime was restrained. A continued injury to property or business may be enjoined, although it is punishable as a nuisance or other crime: *Cranford v. Tyrrell*, 128 N. Y. 341.

A court of equity in such a case exercises its jurisdiction to protect property or property rights, or business, against molestation, where the injury or injuries are continuous and not remediable at law; a well-settled exception to the general rule that equity does not interfere in matters of mere crime: *In re Debs*, 158 U. S. 564. The right to carry on a lawful business without obstruction is a property right, and its protection is a proper object for the granting of an injunction when the ordinary remedies are inadequate: *Nashville Ry. Co. v. McConnell*, 10 Dist. R.

York Manufacturing Company v. Oberdick et al.

82 Fed. Repr. 65. Where it is clearly shown that the complainant's rights are being violated and that injury results, and the only remedy at law is by a large number of suits for damages, which, by reason of their number and cost, would produce no substantial results, the injury is irreparable, and affords grounds for injunction: 82 Fed. Repr. 65. A malicious and unlawful interference with the business of another, by inducing his employees to leave his service, is an actionable wrong, and subjects the offender to the liability of loss occasioned: *Thomas v. Cincinnati Ry. Co.*, 62 Fed. Repr. 803. Remedy by injunction to restrain persons from enticing apprentices to break their contract with their employer and join a union is proper, and will be sustained: *Flaccus v. Smith*, 199 Pa. 128; *Moore & Co. v. Bricklayers' Union*, 23 W. L. B. (Ohio), 48. A court of equity may restrain by injunction discharged or striking employees, members of the union, from gathering about their former employer's place of business, or following the workmen whom he has employed in place of the strikers, from gathering about the boarding-houses of such workmen, and from interfering with them by threats, menaces, intimidation, ridicule and annoyance on account of their working for the plaintiff: *Murdock, Kerr & Co. v. Walker*, 152 Pa. 595; *Wick China Co. v. Brown*, 164 Pa. 449.

In the case of the American Steel and Wire Co. v. Wire Drawers, &c., 90 Fed. Repr. 598, Judge Hammond, of Cleveland, Ohio, enjoined the defendants, and each and all of them, from going, either singly or collectively, to the homes of the plaintiffs' employees, or any of them, for the purpose of intimidating and coercing any or all of them to leave the employment, and as well from intimidating or threatening in any manner the wives and families of said employees at their said homes.

Where new men, employed to take the place of strikers, are on their way to work, their time cannot be lawfully taken up and their progress interfered with by the strikers on any pretence, or under any claim of right to argue or persuade them to break their contracts: *O'Neil v. Behanna*, 182 Pa. 236. In view of this authority, therefore, picketing is unlawful. It is seriously contended by counsel for the respondents that they had a legal right to approach either workmen in the employ of the complainant, or others contemplating accepting employment with the complainant, and to persuade and induce them either to quit or not to accept such employment. This proposition is perhaps responsible to a large extent for this proceeding. There is no such legal right, and the cases in which picketing has been restrained are numerous.

Sherry v. Perkins, 147 Mass. 212, is a case in point. It is there held that banners displayed in front of a manufacturer's premises, with inscriptions calculated to injure his business and deter workmen from entering into and continuing in his employ, constituted a nuisance which equity would restrain by injunction. The court said that the plaintiffs were not restricted to their remedy at law, but were entitled to relief by injunction; that the scheme, in pursuance of which banners were displayed and maintained, was an injury to plaintiff's business by intimidating workmen, so as to deter them or keeping them from making engagements with the plaintiff. The banners were a constant menace to all who were, or wished to be, in the employment of the plaintiff, to deter them from entering his premises, and the court maintained that it was a continuous unlawful act, injurious to his business and property, and a nuisance such as a court of equity would grant relief against.

In *Vegeahn v. Gunter*, 167 Mass. 92, an injunction was granted by Mr. Justice Holmes, as follows: "Restraining respondents, and each and every of them, their agents and servants, from interfering with the complainant's business, by patrolling the sidewalk or street in front of or in the vicinity of the premises occupied by him, for the purpose of preventing any person or persons who now

are, or may be hereafter, in his employ, or desirous of entering it, or continuing in it, or by obstructing or interfering with such business, or any others, in entering or leaving the said premises, or by intimidating by threats or otherwise any person or persons who now are, or may hereafter be, in the employment of the plaintiff, or desirous of entering the same, or of continuing in it, or by any scheme or conspiracy among themselves or with others, organized for the purpose of annoying, hindering or interfering with or preventing any person or persons who now are, or may hereafter be, in the employment of the plaintiff, or desirous of entering the same, from entering it or from continuing therein." In this same case, it was said by Mr. Justice Field that patrolling was an unlawful interference with the plaintiff and of the workmen, within the principle of many cases, and when instituted for the purpose of interfering with his business it became a private nuisance. "To picket the plaintiffs' premises in order to intercept their teamsters, or persons going there to trade, is unlawful; it, itself, is an act of intimidation, and an unwarranted interference with the right of free trade. Highways and public streets must be free to all for the purposes of trade, commerce and labor, and the law protects the buyer, the seller, the merchant and manufacturer and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference in effect whether the picketing is done 10 or 1000 feet away. It will not do to say that these pickets are sent out for the purpose of peaceable argument and persuasion; they are intended to intimidate and coerce."

As applied to cases of this class, the lexicographers thus define the word "pickets:" "A body of men belonging to a trade union sent to watch and annoy men working in a shop not belonging to a union, or against which a strike is in progress:" Century Dictionary and Webster's Dictionary. "The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it:" *Beck v. Teamsters' Protective Union*, 118 Mich. 520. In *American Steel and Wire Co. v. Wire Drawers' and Dye Makers' Unions*, 90 Fed. Repr. 598, it is said: "Defendants who have formerly been employees of plaintiff in its mills as wire drawers, but who had gone out on a strike, for more than two months had patrolled the streets adjacent to plaintiff's works both day and night, keeping in call at all times a large body of men for the plain purpose of dissuading other workmen from taking employment in their places." This was held to be illegal and was restrained.

If any additional authority were necessary to support the proposition it will be found in the vigorous language of Mr. Justice Mitchell of the Supreme Court of Pennsylvania, in the case of *O'Neil v. Behanna*, cited above. Mr. Justice Mitchell said: "It is further urged that the strikers, through their committees, only exercised ('insisted on,' were the words their counsel used in this court) their right to talk to the new men to persuade them not to go to work. There was no such right. These men were presumably under contract with the plaintiff, or certainly in search of work; if not, yet actually under pay. They were not at leisure, and their time, whether their own or their employer's, could not lawfully be taken up, and their progress interfered with, by these or any other outsiders on any pretence, or under any claim of right, to argue or persuade them to break their contracts."

In the celebrated *Debs's Case*, 158 U. S. 564, the court enjoined the respondents from compelling or inducing, or attempting to induce by threats, intimidation, persuasion, force or violence, any of the employees to refuse or fail to perform any of their duties as employees. And in *United States v. Sweeney*, 95 Fed. Repr. 434, the respondents were "enjoined from compelling, inducing or attempting to compel or induce, by threats, intimidation, unlawful persuasion, force or

York Manufacturing Company v. Oberdick et al.

violence, any of the complainant's employees to refuse or fail to perform their duties as such, and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, unlawful persuasion or violence, any of the employees of the complainant to leave the service of the complainant; and from preventing or attempting to prevent any person, by intimidation, force, threats, unlawful persuasion or violence, from entering the service of the complainant, and from doing any act whatever, in furtherance of any conspiracy or combination, to restrain or hinder the complainant, or his officers and employees, in the free and unhindered control of the business of the complainant; and from ordering and directing, aiding, assisting and abetting, or encouraging in any manner whatever, any person or persons to do any of said acts; and from congregating at or near the premises or property of the complainant for the purpose of intimidating its employees or coercing said employees, or preventing said employees from rendering service to the complainant, and from inducing and coercing, by threats, intimidation, force or violence, any of the said employees to leave the employment of the complainant, and from in any manner interfering with it in carrying on its business in the usual and ordinary way, and from in any manner interfering with or molesting any person who may be employed or seeking employment with the complainant."

In view of this finding of facts and these conclusions of law, it is necessary and proper that the injunction heretofore granted be continued, and counsel for complainants will prepare a decree accordingly.

From Richard E. Cochran, York, Pa.

Magoffin's Estate.

Competency of witnesses—Suit against administrator—Incompetency of party not cured by subsequent calling of enabling witness.

The competency of a witness in a suit against an administrator must be determined by the condition of things at the time the witness was called, and the subsequent calling by the other side of a witness, who, if called before the incompetent party, would have rendered her testimony competent, does not make such testimony competent.

Guardian and ward—Laches—Statute of limitations applied by analogy—Ratification of investment.

Where a guardian is sought to be held liable on the ground of negligence alone, the statute of limitations applies by analogy.

A guardian, the mother of her ward, acting on the advice of her surety, invested some of the estate in some railroad bonds; on coming of age, the daughter was advised by her mother to take charge of her own estate, the bonds in question being mentioned, but refused so to do. Four or five years thereafter, default having been made in the payment of interest on the bonds, and the investment proving worthless, the daughter, together with her mother, consulted an attorney as to the liability of her mother's surety, upon whose advice the investment had been made; and on advice that she would have to proceed first against her mother, said that she did not propose to proceed against her, that she did not consider that she had any claim against her. Five years later and two years after the mother's death, the daughter filed a petition against her mother's estate to compel an accounting. *Held*, that, under the circumstances, the ward had ratified it, and was guilty of laches, and that the petition should be dismissed.

Petition for citation to file an account. O. C. Allegheny Co., June T., 1900, No. 322.

John L. McCutcheon and David L. Starr, for petitioner.

T. E. White and McCready & Moore, for respondent.

OVER, J., June 12, 1901.—The petitioner in this case, Adaline H. Magoffin, who became of age July 12, 1891, prays for an order directing the administrator of her mother, who was her guardian, and died on Aug. 22, 1898, to file an

DISTRICT REPORTS.

Magoffin's Estate.

account of her guardianship. It is admitted that she had received all of the investments of her estate from the guardian's administrator; but it is claimed that of these investments, bonds of the Grand Rapids and Indiana Railroad Company, of the par value of \$5000, are worthless, and the purpose is to charge her mother's estate with the amount invested in them. The respondent admits that no account was filed, but denies her right now to have one, alleging (1) that there was a verbal settlement between petitioner and her mother soon after she became of age; and (2) that her right to an account is barred by her laches.

The only witnesses testifying as to a settlement are the petitioner, whose deposition was taken subject to objections to her competency, and her brother, W. H. Magoffin, administrator of her mother's estate. She was clearly incompetent when called, and under the authority of Roth's Estate, 150 Pa. 261, the fact that her brother, subsequently called by the estate, testified that a verbal settlement had been made between her and her mother, which she had denied in her evidence, did not make her testimony competent. The objection to her competency must, therefore, be sustained.

It appears from the testimony of W. H. Magoffin that the investment was made by the guardian in these bonds by the advice of William Thaw, the surety on the guardian's bond. That soon after the petitioner became of age his mother told her, in his presence, she should take possession of her estate; that these bonds were mentioned, they being then considered first-class securities; that she declined to do so, but preferred to have her mother continue to manage it for her; that she did so, the witness collecting the interest on these bonds until default was made, four or five years thereafter, and paying it to his mother or sister, at least one payment being made directly to her. In 1895, after default in payment of interest, the petitioner, in company with her brother and mother, consulted counsel as to the liability of the surety, under whose advice the investment had been made. He testifies that he advised her that she would have to proceed first against her mother, and that "as soon as I stated this, Miss Magoffin said, 'Very well, there is no use in discussing the matter further, because she did not propose to proceed against her mother. She did not consider that she had any claim against her, and that she would not enter into litigation with her mother.'" There can be no doubt from this evidence that these bonds were retained in the guardian's possession after the petitioner's majority, with her knowledge and consent, as her agent, and that she thereby ratified the investment. It was only after default in payment of interest that any question was raised by her as to the legality or advisability of the investment, and then only with a view to charge the surety presumably for his mistaken judgment; and as the petitioner then declined to proceed against her mother and renounced any claim against her in her lifetime, surely she should not be permitted to prosecute a claim now, two years after her mother's death. We think, also, the petitioner's claim is barred by her laches. She knew that no account had been filed; there was no fraud or concealment, and if she desired an account she should have demanded it prior to her mother's death. In *Bones's Appeal*, 27 Pa. 492, cited and approved in *Maulfair's Appeal*, 110 Pa. 402, and in *Chorpenning's Appeal*, 32 Pa. 315, it was held that where a guardian was sought to be held liable on the ground of negligence alone, that the statute of limitations applied by analogy, and the citation to file an account was dismissed. See, also, *Miller's Estate*, 43 Pitts. L. J. 344. Here it is sought to hold the guardian's estate liable, nine years after the majority of the ward, because of an alleged illegal investment, made, however, in good faith and under the advice of an experienced business man of excellent but not infallible judgment.

The petition must therefore be dismissed, at the cost of petitioner.

From Edwin L. Mattern, Pittsburgh, Pa.

Cooper v. Duval.

Equity practice—Responsive averments in answer.

A responsive averment in the answer is to be taken as verity at the trial until overcome by proof.

Resulting trusts—Parent and child.

The rule in equity that when one man buys land in the name of another and pays the consideration money, the land will be held by the grantee in trust for the person who so paid the purchase-money, does not apply to a purchase by a parent in the name of a child, and such a purchase will be deemed *prima facie* an advancement.

Recording Acts—Recording conveyance equivalent to delivery.

The recording of a deed duly executed, attested and acknowledged, which is entitled to record under the recording Acts, is equivalent to delivery.

Hence, where a father took a bond and mortgage in the name of his daughter, caused the mortgage to be recorded in the proper office, kept both instruments in his own custody, and collected the interest during his lifetime, on bill filed by the executor and residuary legatee of the vendor, praying for an assignment of the securities to the complainant, *held*, (1) that, in the absence of proof overcoming the responsive averment in the answer, that the decedent had told the defendant that he had taken the mortgage in question in her name to make up in part moneys she had expended for his benefit, the bill would be dismissed; (2) that decedent made an absolute gift of the bond and mortgage to defendant.

Bill, answer and proofs. C. P. No. 2, Phila. Co., March T., 1900, No. 878.

R. T. Corson, for plaintiff; J. R. Embery and W. E. Dudley, for defendant.

SULZBERGER, J., Aug. 1, 1901.—This cause came on for trial on June 11, 1901, and was duly heard on the pleadings and proof, on that and the following day. The bill averred that James Cooper, the plaintiff's husband and testator, did, on July 6, 1896, lend the sum of \$800 on mortgage to John Schumann and Annie, his wife, for the period of one year; that he took the bond and mortgage in the name of his daughter, Sallie B. Cooper (now Sallie B. Duval), the defendant; that at that time it was understood and agreed between the testator and his said daughter that the bond and mortgage should belong exclusively to the testator; that the testator retained custody of the bond and mortgage till his death, and received the interest accruing semi-annually thereon; that, after the testator's death, the interest on the mortgage was paid to the plaintiff with the knowledge and consent of the said Sallie B. Cooper, she disclaiming all interest or right in and to said moneys, and that she refuses to assign the bond and mortgage to the plaintiff. It was further averred that the Orphans' Court of Philadelphia county had awarded the bond and mortgage to the complainant individually. The bill prayed for an injunction and assignment.

The defendant, by answer, denied any understanding or agreement with her father that the bond and mortgage should belong to him; denied that she had ever said that it belonged to her father; but averred that shortly prior to his death, which occurred on July 25, 1898, he told her that he had taken the mortgage in question in her name to make up in part moneys she had expended for his benefit. She further denied the award by the Orphans' Court of the bond and mortgage to her mother, the plaintiff.

Facts.

The following facts are found by the court:

1. On July 6, 1896, the testator took the bond and mortgage in question for \$800, in the name of his daughter, Sallie (also known as Sue), the defendant, and caused the mortgage to be duly recorded in the proper office.
2. There was no cotemporaneous agreement between the testator and the defendant that the latter should have no individual interest or ownership in the bond and mortgage or in the moneys secured thereby.

3. The testator took and kept the bond and mortgage in his custody and collected and kept the interest thereon.

4. The defendant had no knowledge of the existence of the bond and mortgage until shortly before her father's death, which occurred on July 25, 1898. The exact time when she learned of their existence cannot be determined from the evidence, but it was no earlier than sometime in the month of June, 1898, and was probably later.

5. The allegation that the defendant, during the whole of the time between July 6, 1896, and July 25, 1898, disclaimed all personal interest in said bond and mortgage is not proved.

6. The allegation that the defendant disclaimed such interest after her father's death is not proved.

7. The allegation that the matters in controversy have been adjudicated by the Orphans' Court of Philadelphia county is untrue.

The main fact in the case remains to be determined, namely, whether, from the whole evidence, it appears that the decedent made a gift of the bond and mortgage to the defendant. That he did not make such a gift in the usual form by personal delivery on or about July 6, 1896, is admitted. The defendant claims in the tenth paragraph of her answer that her father did, shortly prior to his death, state to her that he had taken the mortgage in question in her name to make up in part certain moneys she had expended for his benefit.

At the trial, she offered to prove such a conversation with her father, which, as she alleged, had taken place on July 20, 1898, just five days before his death. The plaintiff, by objection, closed the defendant's mouth as to this interview, and we are, therefore, as to it, remitted to the pleadings. They show the defendant's responsive averment of such a statement by the father, to overcome which the plaintiff has put in no evidence or offer of proof. This is practically a failure of the plaintiff's case, and the bill ought, perhaps, at this point be dismissed. But the plaintiff's cause has been so earnestly pressed that we feel inclined to indicate briefly the essential weakness of the evidence on which it is based.

In our view, the whole of it is vague, inconsistent and self-contradictory. For instance, on the important question as to when the family learned of the existence of the bond and mortgage, the inconsistencies are glaring. Annie L. Raven, the plaintiff's daughter, testified that it was on June 17, 1898, in a room downstairs to which the testator descended from his sick-room to meet his daughters, whom, at his request, his wife had asked to be there. The plaintiff, who, according to Annie's account, was present at this solemn interview, does not say a word about it. On the contrary, the first time she heard of the bond and mortgage was later; the interview was not downstairs, but in the sick-room, and Annie Raven was not present. Annie, however, gives an account of the sick-room interview, in which the defendant, after going out, comes back and has a conversation with her father, in express contradiction of the plaintiff, who says that the defendant remained below with her betrothed husband and did not return to the sick-room.

It is also impossible to ignore the circumstance that the bill was sworn to as true and correct by the plaintiff, when its main averment, to wit, an agreement by defendant with her father on or about July 6, 1896, was not known to be true, and the affiant had not then or thereafter a scintilla of evidence to induce her to believe it. We regret to conclude that the plaintiff herself, and at least one of her witnesses, permitted passion and prejudice to override the duty to state the truth without addition or reserve.

The family circumstances, as disclosed by the evidence, show that the decedent might well have believed it his duty to give the bond and mortgage

10 DIST. R.

to the defendant. That he did it upon reflection is apparent, since he resolved upon it after he had first directed the mortgage to be taken in his own name. That his reflection was connected with a family difficulty, as Mr. Dudley testified, is also obvious from the evidence. What the family difficulty was and how it influenced him is quite plain. The defendant had been a helpful and faithful daughter for many years. The testator had accumulated a small estate. Suddenly an important slice of it, \$800, had to be sacrificed by him to save the honor of the family from the untoward effect of thoughtless conduct by his son, John, who had never been helpful. The son, as sometimes happens, was the mother's favorite, who, in the language of one of the parties, could get everything from her to the exclusion of the girls. The father was reflective and reticent to the point of secretiveness. His wife had not in forty-four years of married life discovered the amount of his weekly wages. What more natural for him than to resolve, as he was giving \$800 of his estate on account of one he deemed undeserving, that he should at the same time give a like amount to one long tried and not found wanting.

We cannot avoid the conclusion that the true ground of the plaintiff's earnest contention is the fact, which doubtless to her mind seems controlling, that the decedent retained the bond and mortgage in his own possession. On this view, we may dismiss from our minds all curious inquiries as to the testator's motives, because the question brings us back to solid ground.

The plaintiff's case is made to stand on the plain allegation that the decedent's failure to hand over the papers is a failure of the gift. This view, however, leaves out of account the influence of the recording acts, which provide a mode of giving notoriety to the transfer of property in lands and mortgages equal, if not superior, to the ancient method of calling in a few witnesses from the neighborhood. In considering this phase of the question, we have ample guidance in the decisions of our own Supreme Court.

In the leading case of *Phillips v. Gregg*, 10 Watts. 158, decided in 1840, Mr. Justice Rogers laid down the rule as follows: "It is a general rule in equity that when a man buys land in the name of another and pays the consideration-money, the land will generally be held by the grantee in trust for the person who so paid the purchase-money. But this doctrine must be taken with some exceptions, which are not inconsistent with the general principle; for when a parent purchases in the name of the son, the purchase will be deemed, *prima facie*, an advancement, so as to rebut the presumption of a resulting trust for the parent. The moral obligation of a parent to provide for his children is the foundation of the exception, or rather of the rebutter of the presumption, since it is not only natural, but reasonable, to presume that a parent, by purchasing in the name of a child, means a benefit to the latter in discharge of the moral obligation, and also as a token of parental affection."

The principle thus established was broadly reaffirmed, in 1897, in *Kern v. Howell*, 180 Pa. 315. In that case Mr. Justice Green said (and the remarks are pertinent to the facts of the present case): "The deed, in terms, conveyed the whole title; it was recorded almost immediately, thus eliminating all question of delivery; and if it was intended as a complete transfer of the whole title, it was efficacious to that end from the beginning. In *Ingles v. Ingles*, 150 Pa. 397, it was held that the signing, attestation and acknowledgment of a deed by the grantor, and the recording of it, raises a presumption of delivery which cannot be overcome by declarations of the grantor that the deed was not delivered. The possession of real estate by a vendor, after execution and delivery of a deed therefor, is in trust for the vendee. . . . In *Ingles v. Ingles* we said: 'This well-established rule applies with special force between a father and his son. In such instances it is not unusual for the vendee to leave the vendor in

Cooper v. Duval.

possession for an indefinite period or even for life. Such transactions are often arrangements to suit the family convenience. The possession of the vendor is the possession of the vendee.'"

Considering the testimony before us with this guidance, we fail to perceive any merit in the plaintiff's case. The acts of the decedent were in themselves striking evidence of his intent to make an absolute gift of the bond and mortgage to the defendant. As regards the interest thereon accruing between the date of the gift and the donor's death, we need not concern ourselves, the question not being involved in this case. Even if the decedent intended to keep the interest for his own use during his life, this fact would not impair the validity of the gift. It might be sustained as a family arrangement: *Kern v. Howell*, 180 Pa. 315.

We find as a fact that the decedent made an absolute gift of the bond and mortgage to the defendant on July 6, 1896. The bill should therefore be dismissed, at the costs of the plaintiff.

And now, Aug. 1, 1901, it is ordered that the prothonotary notify the parties or their counsel of the filing of this opinion, and if no exceptions are filed thereto within ten days from Sept. 16, 1901, a decree will be entered in accordance therewith.

Douglass's Estate.

Decedent's estate—Petition to recommit adjudication to auditing judge—Practice, O. C.

A petition to recommit an adjudication to the auditing judge to correct a finding of fact and an alleged inconsistency in an award, will be refused when no error of fact appears in the conclusion of the auditing judge, and the petition to recommit does not aver that other testimony, since discovered, can be produced, unknown to the petitioner at the date of the hearing, and the alleged inconsistency is not a matter of which the petitioner can complain.

Petition to recommit account to auditing judge. O. C. Phila. Co., Oct. T., 1900, No. 386.

Henry C. McDevitt, for petition.

Edward Brooks, Jr., and *Frederick J. Geiger*, contra.

HANNA, P. J., July 6, 1901.—The prayer of this petition is that the adjudication be recommitted to the auditing judge to correct a finding of fact and an alleged inconsistency in the award of the balance in the hands of the accountant. The fact referred to is the finding by the auditing judge, under the testimony, that the assignment was without consideration and to defeat the creditors of the legatee. There was no proof offered of consideration for the assignment other than the testimony of the subscribing witnesses, and each testified no money passed at the time of its execution. And the petition now presented does not aver that other testimony can be produced, unknown to the assignee at the date of the hearing, since discovered, to prove a valuable consideration for the assignment. Ample notice was given to the assignee that he would be required to prove consideration, and, having failed to do so, no good reason is now shown for recommitting the adjudication. No error of fact appears in the conclusion of the auditing judge. And as to the inconsistency in his finding, this is not a matter of which the petitioner can complain, for the reason that it affects the attaching creditor whose preference to the assignment was recognized.

The petition must therefore be refused.

10 DIST. R.

Douglass's Estate.

Practice, O. C.—Assignment of legacy without consideration—Attaching creditor.

When a residuary legatee assigns his share of an estate without consideration and to defeat creditors, and one of his creditors issues an attachment execution against his share, the proper practice is to ascertain the share to be paid to the legatee and direct the accountant to retain it until the final determination of the attachment execution.

Decedent's estate—Credit claimed by accountant—Onus of proof.

When a credit claimed by the accountant is objected to, the *onus* is upon him to prove that it is a debt, either due by the decedent or properly incurred by the accountant in the course of the settlement of the estate.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 386.

E. L. Tustin, for accountant; *Henry C. McDewitt*, for assignee.

F. G. Geiger, for attaching creditor.

HANNA, P. J., July 13, 1901.—The auditing judge having found that the assignment by the legatee is without consideration and to defeat creditors, the award of the balance to the attaching creditor, when he obtains a judgment on his attachment execution, is entirely proper. This is fully in accord with the universal practice of the court. As early as Poulson's Estate, 11 Phila. 151, it was held that where an attachment execution issues against the share of a distributee or legacy of a legatee, the proper practice is simply to ascertain the amount of the distributive share or of the legacy to be paid to the legatee, and direct it to be retained by the accountant until the final determination of the attachment *sur* judgment.

This practice was approved in Valentine's Appeal, 3 W. N. C. 471, and again followed in Reese's Appeal, 19 W. N. C. 420. The able counsel for the exceptant must have overlooked this well-settled practice. The fifth and sixth exceptions are therefore dismissed. Those remaining relate to the allowance of the credit claimed by accountant, viz.: "Walter J. Brooks, for services rendered to the estate of Maria C. Douglass, a weak-minded person, \$700."

This was objected to by the attaching creditor of the residuary legatee. It is needless to say that, in view of the objection, the *onus* was cast upon the accountant to prove the claim was either a debt due by the testatrix or incurred by him in the course of the settlement of the estate, and therefore properly payable out of the funds of the estate. It is somewhat remarkable the accountant paid this large claim upon his own responsibility. He admitted it was paid by him at his own risk and responsibility.

After a careful examination of the testimony, practically that of the accountant alone, we think the amount paid for the so-called services rendered by the claimant to the accountant is exorbitant. We are unable to gather that the compensation due him for his alleged services is justified by the evidence. The claimant himself, although competent to prove what services he had rendered in the employment of the accountant, was not called as a witness. Nor does the accountant testify the alleged services of the claimant are worth nearly double the amount of commissions claimed by the accountant, and more than three times the allowance to his counsel for professional services, and far in excess of the amount charged by accountant for his professional services rendered to the lunatic in her lifetime.

On the other hand, the testimony of counsel for the attaching creditor showed that it was impossible that the claimant could render any services in the collection of the judgment belonging to testatrix, and which formed so large a proportion of her estate. He represented the estate liable to pay the judgment,

Douglass's Estate.

and all his interviews and communications relative to the judgment were with the accountant. There was no defence to the judgment, and it was paid out of the estate of the defendant in the judgment without objection or contest. The claimant is not a member of the bar, and therefore did not render the accountant any professional services as such. And if he was employed by accountant to aid him in the performance of services which might have been rendered by himself personally, and thereby was relieved from their performance, then either the accountant should not be allowed full commissions or thereout compensate the assistant he employed. In view of all the facts and circumstances, and it being conceded that claimant is entitled to some compensation for his assistance to the accountant in the adjustment of the affairs of the estate, we think he will be fully compensated by an allowance of \$200. The credit claimed in the account is therefore reduced accordingly, and the balance found by the adjudication to be due the legatee is increased to this extent, and, as directed by the auditing judge, said balance will be held by the accountant to await the final determination of the attachment execution.

These exceptions are sustained in part, and, as corrected, the adjudication is confirmed.

United States ex rel. Devine v. The International Navigation Company et al.

Habeas corpus—Immigration law—Marriage—Validity of—Conflict of laws.

The general rule that a marriage valid by the law of the place where it is celebrated, or lawful in that country where the contracting parties have their domicile, should everywhere be regarded as valid, has this exception at least, that if the relationship thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this State to recognize the foreign marriage as valid.

A woman and her child were detained by the commissioner of immigration at the port of Philadelphia as alien immigrants under the contract labor law. Their alienage was denied by the husband and father, who had previously come to this country and had become a naturalized citizen. At a hearing upon a writ of *habeas corpus* it appeared that the husband and wife were uncle and niece, and also that this marriage was not prohibited by the law of Russia, from whence these immigrants came, when the parties were of the Jewish faith.

Held, (1) that as, under the laws of Pennsylvania, such a marriage was unlawful and void, and the parties would be liable to prosecution, the United States courts would not recognize it as valid; (2) that the relators should be remanded for deportation.

Habeas corpus. United States District Court, Eastern District of Pennsylvania, May Sess., 1901.

John R. K. Scott (Henry H. Rosenfelt with him), for the relators.—The marriage, being lawful in Russia, where contracted, must be regarded as valid here: *Moul's Estate*, 1 York, 185; *Phillips v. Gregg*, 10 Watts, 158; *Smith v. Thornton*, 5 W. N. C. 372. As the citizenship of Herman Devine has been established by a certificate of naturalization, the citizenship of his wife and child must follow, and hence they were improperly detained as alien immigrants, and should be discharged from custody.

William M. Stewart, Jr., assistant United States Attorney (*Jas. B. Holland*, United States Attorney, with him), for the Commissioner of Immigration.—Whether or not the marriage between uncle and niece be lawful under the laws 10 DIST. R.

United States *ex rel.* Devine *v.* The International Navigation Company *et al.*

of Russia has no bearing upon this case. There is a well recognized exception to the rule that a marriage valid where made is valid everywhere, *e. g.*, in the cases where the marriages are declared to be against the laws of nature, against good morals or sound public policy: *Stull's Estate*, 183 Pa. 625; *Medway v. Needham*, 16 Mass. 157; *State v. Brown*, 47 Ohio, 102. The policy of the State of Pennsylvania upon the subject of marriage between uncle and niece is shown in the following Acts of Assembly, *viz.*: Act of March 13, 1815, § 5, 6 Sm. Laws, 286, Act of March 31, 1860, § 39, P. L. 393, and Act of April 6, 1868, § 1, P. L. 67, which declare such marriages to be "void in all respects," subject the parties to a criminal prosecution, and declare the offspring to be illegitimate.

N. Dubois Miller, for The International Navigation Company.

MCPHERSON, Dist. J., June 26, 1901.—The relator is a naturalized citizen of the United States, and is the husband of Rosa Devine and the father of her idiot son William. Rosa and William are Russian Jews, whom the commissioner of immigration at the port of Philadelphia has ordered to be deported, on the grounds that both are aliens, and that William is an idiot and Rosa is a pauper that is likely to become a public charge. The alienage of both is denied upon the ground that when the husband and father became a citizen, the wife and child ceased to be aliens—and this is the only point to be decided.

The decision is admitted to depend upon the answer to be given to the question, whether Rosa is the relator's lawful wife—or, rather, whether she is to be so regarded in this State; for she is her husband's niece, and such a marriage, if originally celebrated in Pennsylvania, would be void: Act of 1860, § 39, P. L. 393. Among the Jews in Russia, however, where the ceremony took place, it has been satisfactorily proved that a marriage between uncle and niece is lawful; and, being valid there, the general rule undoubtedly is, that such a marriage would be regarded everywhere as valid. But there is this exception, at least, to the rule; if the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this State to recognize the foreign marriage as valid. I think the following quotation from Dr. Reinhold Schmid, a Swiss jurist of eminence, to be found in Wharton's *Conflict of Laws* (2nd ed.), § 175, correctly states the proper rule upon this subject:

"When persons married abroad take up their residence with us, it is agreed on all sides that the marriage, so far as its formal requisites are concerned, cannot be impeached, if it corresponds with the laws of the place where the married pair had their domicile, or with those where the marriage was celebrated. But we must not construe this as implying that the juridical validity of the marriage depends absolutely on the laws of the place under whose dominion it was constituted; for the fact that a marriage was void by the laws of a prior domicile, is no reason why we should declare it void, if it united all the requisites of a lawful marriage as they are imposed by our laws. So far as concerns the material conditions of the contracting of marriage, we must distinguish between such hindrances as would have impeded marriage, but cannot dissolve it when already concluded, and such as would actually dissolve a marriage, if celebrated in the face of them. A matrimonial relation that in the last sense is prohibited by our laws cannot be tolerated in our territory, though it was entered into by foreigners before they visited us. We will, therefore, tolerate no polygamous or incestuous unions of foreigners settling within our limits."

Other authority may be found in *State v. Brown*, 47 Ohio, 102, where it is said, in determining the effect of a statute that forbade sexual intercourse between persons nearer of kin than cousins:

United States ex rel. Devine v. The International Navigation Company et al.

"We hold, therefore, that by section 7019, Revised Statutes, sexual commerce as between persons nearer of kin than cousins is prohibited, whether they have gone through the form of inter-marriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound upon principles of comity to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based upon principles of sound public policy, because they have assumed, in another State or country, where it was lawful, the relation which led to the acts prohibited by our laws."

See also *Medway v. Needham*, 16 Mass. 157, and *Stull's Estate*, 183 Pa. 625.

In view of this exception to the general rule, it seems to me to be impossible to recognize this marriage as valid in Pennsylvania, since a continuance of the relation here would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary. In other words, this court would be declaring the relation lawful, while the Court of Quarter Sessions of Philadelphia county would be obliged to declare it unlawful. Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public. A review of the Pennsylvania legislation affecting the marriage of uncle and niece will be found in *Parker's Appeal*, 44 Pa. 309.

It is accordingly ordered that Rosa and William Devine be remanded.

NOTE.—The objection raised on the hearing, that the question involved the right of an immigrant to land, and that the finding of the immigration officials on such a question was made final by Act of Congress of Aug. 18, 1894, was overruled by the court on the ground that the question was one of citizenship and jurisdiction.

White et al. v. Venango County.

Tax assessment—Appeal—Act of April 19, 1889—Method of valuation on appeal.

On an appeal from a tax assessment under the Act of April 19, 1889, P. L. 37, the Court of Common Pleas is to determine the justice and equity of the tax assessment, with "due regard to the valuation and assessment made of other real estate *in such county or city*," and not with regard to the valuations of other specific properties or in other specific portions of said county or city.

Hence, where certain properties in the city of Franklin were assessed by the assessors at a valuation, which was increased by the county commissioners, and, on appeal therefrom, the owners admitted the assessment was still below the real value of the properties, but contended that other properties in the city of Franklin were assessed at a still lower valuation, but it was proven that the average valuation throughout the county was at a higher rate, the court refused to reduce the assessment made by the county commissioners.

Constitutional law—Act of April 19, 1889.

Quære, whether the Act of April 19, 1889, P. L. 37, is constitutional.

Appeal from assessment of real estate by assessor. C. P. Venango Co., Aug. T., 1901, Nos. 18 to 25.

Dunn & Carmichael, for appellants; *F. A. Sayers*, contra.

PATTON, P. J., 33rd district, specially presiding, June 3, 1901.—L. C. Heasley was duly elected the assessor for the second ward in the city of Franklin, and, 10 DIST. R.

DISTRICT REPORTS.

483

White et al. v. Venango County.

in making the triennial assessment in September, 1900, assessed the property of the appellants as follows :

George H. White, two-thirds of lot No. 483.....	\$4,000	
Lot No. 120.....	8,400	\$12,400
Benjamin Alexander, Part of lot No. 541.....	7,000	
Part of lots Nos. 542, 543.....	2,000	
Part of lot No. 544.....	650	9,650
James Bleakley, lot No. 38.....	4,300	
Part of lot No. 467.....	1,850	
Part of lot No. 467.....	3,600	
Part of lot No. 140.....	6,000	
Part of lot No. 136.....	3,500	
Part of lots Nos. 136, 133.....	16,000	
Part of lot No. 52.....	2,200	
Part of lot No. 52.....	2,000	39,450
R. G. Lamberton, lot No. 476.....	18,000	18,000
Harry Lamberton, lot No. 542.....	4,600	4,600
E. W. Snook, lot No. 463.....	18,000	18,000
W. J. Dewoody et al., lot No. 119.....	5,000	5,000
Alice Snook, lot No. 448.....	5,000	5,000
		\$110,100

Mr. Heasley, the assessor, testifies that he assessed all the property in his ward, which would include the above, at 33 to 35 per cent. of its true value. Upon the return of this assessment into the office of the county commissioners, the said commissioners being of the opinion that the above described properties and others were assessed below their actual value, by a resolution of said board, on Feb. 15, 1901, raised the assessment upon said properties as follows :

George H. White.....	\$12,400	to.....	\$16,500
Benjamin Alexander.....	9,650	to.....	13,450
James Bleakley.....	39,450	to.....	51,500
R. G. Lamberton.....	16,000	to.....	25,000
Harry Lamberton.....	4,600	to.....	10,000
E. W. Snook.....	18,000	to.....	28,000
W. J. Dewoody et al.....	5,000	to.....	8,000
Alice Snook (estimated).....	5,000	to.....	6,500

Assessor's valuation, \$110,100 Commissioners' valuation, \$158,950

It will thus be seen that the commissioners raised the valuation almost 45 per cent. over the assessment made by the assessor.

On Feb. 15, 1901, after the commissioners had fixed these valuations, they directed their clerk to mark them on the books in red ink. This was done by the clerk, a red line being run through the valuations fixed by the assessor, and the valuations as fixed by the commissioners placed in figures in red ink above the assessor's valuation.

Notice was given by the commissioners to the appellants of the change in their valuations, and on Feb. 27, 1901, the commissioners heard the appeals for the city of Franklin, made changes in the valuations of some properties, but refused to change the value of any of the above properties, and on April 24, 1901, the appeals in these cases were filed to the action of the commissioners.

On May 27, 1901, these appeals came on to be heard under the provisions of

DISTRICT REPORTS.

White et al. v. Venango County.

the Act of Assembly of April 19, 1889, P. L. 37, which empowers the court to hear "the proofs in the case, and to make such orders and decrees touching the matters complained of as to the judges of said court may seem just and equitable, having due regard to the valuation and assessment made of other real estate in such county or city."

A large amount of testimony was taken in the case, and the witnesses varied considerably in their estimates of the value of the property, but, taking all the testimony together, we think that the following is a fair average of the value of the various properties :

Appellant.	Property.	Assessor's valuation.	Commissioners' valuation.	Witnesses' valuation.
George H. White.....	3 lot 483.....	\$4,000	\$4,000	\$8,000
	Block 120.....	8,400	12,500	25,000
Benjamin Alexander..	Part lot 541.....	7,000	10,000	20,000
	Part of lots 542-3..	2,000	2,800	4,000
	Part of lot 544.....	650	650	500
James Bleakley.....	Lot 38.....	4,300	5,000	9,000
	Part of lot 467.....	1,850	3,000	6,000
	Part of lot 467.....	3,600	4,500	9,000
	Part of lot 140.....	6,000	9,000	18,000
	Part of lot 136.....	3,500	4,000	8,000
	Lots 136, 133.....	16,000	20,000	40,000
	Lot 53.....	2,200	3,500	7,000
	Lot 52.....	2,000	2,500	5,000
R. G. Lamberton.....	Lot 476.....	16,000	25,000	50,000
Harry Lamberton.....	Lot 542.....	4,600	10,000	17,500
	Part of 543.....			
E. W. Snook.....	Lot 463.....	18,000	28,000	50,000
W. J. Dewoody.....	Lot 119.....	5,000	8,000	15,000
Alice Snook.....	1st ward, lot 448, estimated.....	5,000	6,500	12,000
		<u>\$110,100</u>	<u>\$158,950</u>	<u>\$304,000</u>

The assessors of numerous townships in Venango county were called, as were also assessors from Oil City and Franklin, and from their testimony we arrive at the following conclusions as to the relative assessments in the various townships, boroughs and cities in the county of Venango :

Borough of Pleasantville.....	100	per cent. of value.
Allegheny township.....	100	per cent. of value.
Oil Creek township.....	100	per cent. of value.
Cranberry township.....	100	per cent. of value.
Sandy Creek township.....	100	per cent. of value.
Scrubgrass township.....	100	per cent. of value.
Mineral township.....	90	per cent. of value.
Irwin township.....	90	per cent. of value.
Cherry Tree township.....	90	per cent. of value.
Rockland township.....	80	per cent. of value.
Clinton township.....	75	per cent. of value.

11) 1025

Average assessments of.....	93 + per cent., country districts.
Emlenton borough.....	60 per cent.
Oil City.....	50 per cent.
Franklin.....	50 per cent.
10 Dist. R.	

White et al. v. Venango County.

We also have the evidence of several witnesses that farm land in the country is assessed at its full value. No evidence was given as to the assessments made in a number of townships in the county, but, as said in Richter's Appeal, 8 Pa. C. C. Reps. 119, "In the absence of testimony, we must presume that the assessors did their sworn duty. If so, they were bound to assess the land at what it would sell for at a *bona fide* sale."

We may say, in passing, that the evidence shows that the commissioners directed the assessors to value oil productions at \$300 per barrel. The testimony shows that oil production readily sells for \$1000 per barrel. But this mode of assessments is contrary to law. For correct practice in assessing oil production, *vide* opinion of Judge Lindsey, in Smith v. Forest County, 23 Pa. C. C. Reps. 643.

The appellants in these cases admit that their property is assessed at less than what it would sell for at a *bona fide* sale, but contend that they are entitled to relief, because other property in the city of Franklin is assessed at less than 33 per cent. of its true value, and that the commissioners acted unjustly in raising the valuation of the appellants without, at the same time, raising the valuation of the other real estate. They especially complain of what they say is the difference between the true and assessed value of the following properties:

J. H. Boreland, assessed at....	\$400	true value....	\$2,500 to \$4,000
E. K. Smiley, assessed at.....	800	true value.....	3,000 to 3,500
E. W. Smiley, assessed at.....	3,200	true value.....	9,000 to 12,000
D. J. McVey, assessed at.....	1,100	true value.....	3,000 to 4,000

And they allege and prove that there is other property in the city of Franklin assessed at less than 33 per cent. of its value.

This, then, brings us squarely to the point in the case, viz., can we equitably and justly, having due regard to the valuation and assessment made of other real estate in the city of Franklin and the county of Venango, reduce the valuations of the property of the appellants?

One of the first principles of equity is, "that he who seeks equity must do equity." It has been said by a learned judge that "taxation, like the dew, should fall equally upon all." But in Venango county the "dew" appears to fall more lightly in the cities than in the country districts. It is apparent that if the appellants are assessed but 33 per cent. upon the value of their real estate, and the country districts are assessed on an average of 93 per cent., that the country districts will have to pay more than their just share of the burden.

Indeed, it takes no argument to show that the honest man, who returns his property at its full value to the honest assessor, who returns it to the commissioners at what it would *bona fide* sell for in Venango county, would pay more taxes than the law requires of him. The burden of paying the running expenses of the county must be borne by the people in general, and like any other burden falls more heavily upon those who are required to hold up the load. The effect of relieving the appellants would be to increase the burden of other taxpayers, contrary to the principles that underlie our systems of taxation, viz., that every one shall contribute his just proportion of the public expenses: Moore v. Taylor, 147 Pa. 481.

We have not been able to find any case where the appellants' property was assessed at less than in other districts that they either sought or obtained relief. In Reading Iron Co.'s Appeal, 21 Pa. C. C. Reps. 429, the property was assessed at \$140,000; there was proof by some witnesses that it was worth but \$55,000 to \$73,000; the court fixed the value at \$93,000. In Berwind-White Coal Mining Co. v. Clearfield County, 18 Pa. C. C. Reps. 545, "the appellant claimed that his lands were assessed above their actual value and for more than they would sell for at a *bona fide* sale." In Richter's Appeal, 8 Pa. C. C. Reps. 119, the assessor

fixed the value at \$6500, the commissioners raised it to \$10,000, its true value was \$10,000, and the court reduced it to \$6500, for the reason "the proof is, that the valuation put thereon by the assessor, to wit, \$6500, is fully as high as the assessed valuation of the other real estate in the city and county."

In Heberton's Appeal, 2 District Reps. 794, the real estate was valued by the commissioners "at the rate or price which the same would sell for if sold at a *bona fide* sale." The evidence showed that some of the property in the neighborhood of the appellants' farm was assessed at 50 to 75 per cent. of their market value. Judge Swartz, in his opinion, says: "The Act says that we are to have due regard to the other assessments *in the county*; it does not declare that we are to be governed by the assessments in a particular township or part of such township." The assessment as made by the commissioners was approved by the court. "The comparison is to be made with the generality of property of the same class, and not with a single assessment or a few assessments:" Pringle's Appeal, 6 Kulp, 525.

It must be admitted that a wrong has been done to the appellants, as well as to the great body of taxpayers, by assessing the property of a few at a ridiculously low figure. For every wrong there is a remedy, and the remedy here is a clear one.

The Act of May 15, 1841, § 4, P. L. 394, requires the assessors "to assess, rate and value all objects of taxation according to the actual value thereof, at such rates and prices for which the same would, separately, *bona fide*, sell." The 3rd section of said Act provides that "if any assessor shall knowingly assess any property at less than he shall know and believe the just cash value, he shall be guilty of a misdemeanor in office, and, on conviction thereof, be subject to imprisonment for not less than three or more than twelve months, and fined a sum not less than \$100 nor more than \$200." Under the Act of July 27, 1842, § 9, P. L. 445, the assessor is required to make oath "that he will assess and value every separate lot, piece or tract of land, with the improvements thereon, at the rate or price which you, after due consideration and examination, believe the same would sell for, if sold singly and separately at a *bona fide* sale after full public notice."

In the face of these Acts of Assembly, it is truly remarkable that assessor after assessor will come forward and swear that they assessed property at less than its true value. It is equally the duty of the commissioners to see that all the real estate throughout the county is assessed according to the Acts just quoted. If the appellants, who are among the leading citizens of the county, would see that the laws are obeyed, or that the penalties prescribed therein would follow, there would be no need to seek further relief hereafter.

We will say, in conclusion, that the Act of April 19, 1889, P. L. 37, under which these proceedings were begun, has been severely criticised by the courts. Judge Bittinger, in Kister's Petition, 9 District Reps. 64, strongly intimates that it is unconstitutional, that it is retrospective, and passed for the purpose of allowing appeals in certain cases. In Hamlin v. Peck, 135 Pa. 493, Judge Taylor of the court below doubted its constitutionality. The Supreme Court, in Ferguson v. Pittsburgh, 159 Pa. 435, says that part of the Act "calls for amendment." Under its provisions, the court does not have all parties in interest before it, and hence it is impossible, in a case such as the one now before us, to make a decree that would be just and equitable to the whole body of the taxpayers.

During the hearing of the case, appellants amended their statement, claiming that the action of the commissioners in determining the appeals before them was irregular and void, for the reason that they never sat as a board of revision, and made no minute thereof in their judicial capacity. The testimony shows that the commissioners met at their office on Feb. 15, 1901, and that they

10 DIST. R.

White et al. v. Venango County.

unanimously agreed to raise the assessments to the figures marked in red ink, vide resolution of the board, Feb. 15, 1901, pages 80 and 81.

It appears from the evidence that the commissioners afterwards heard the appeals, that they examined them, that all the commissioners were present, and their decision was unanimous not to reduce the assessments as made by them on Feb. 15, that they worked as a board of revision and passed on each case. No authority has been cited to us, nor do we know of any, that required the board of commissioners to make a minute of their proceedings when they made no change in the assessments.

And now, June 3, 1901, after hearing and due consideration, it is ordered and directed that all the appeals be dismissed at the costs of the appellants, and that the prothonotary enter this decree upon the docket in each case, referring to the opinion filed at No. 18, August Term, 1901, and that notice of this decree be given in writing to the attorneys of record.

From Ross Reynolds, Kittanning, Pa.

Harner v. Thomas.

Mechanic's lien—Surplusage—Amendments—Acts of April 9, 1862, and June 11, 1879.

The addition of the name of an agent as a defendant to a mechanic's lien claim, and his description therein as such, is mere surplusage, and is amendable under the Acts of April 9, 1862, § 1, P. L. 402, and June 11, 1879, § 2, P. L. 122.

Mechanic's lien—Right to file lien for part performance of an uncompleted entire contract—Motion to strike off lien.

A claimant has the right to file a lien for part performance of an uncompleted entire contract. The question whether he has any right to recover by reason of his default in performance of the contract, or whether such default was necessitated by a breach on the part of the owner, is not one to be determined on a motion to strike off the claim, but by a jury on the trial of the case.

Time when lien attaches and may be filed—Act of April 14, 1855.

Mechanic's liens commence at the date of the first stroke of the axe or spade used in making the house.

The Act of April 14, 1855, § 3, P. L. 238, permits a lien to be filed whenever work or materials have been furnished, and successive liens to be filed for subsequent work.

Hence, where the defendant, by reason of his failure to perform his part of the contract, prevents its completion by the claimant, the latter can file a lien forthwith, which at once becomes operative against the ground and building, even though the foundation wall be all that is built at the time.

Motion to strike off. C. P. Perry Co., April T., 1900, No. 115, Mechanic's Lien.

Charles A. Barnett, for motion; James M. Sharon, contra.

ATKINSON, P. J., April 12, 1901.—The facts in this case, as shown by the papers filed, are as follows: By a contract in writing, dated May 21, 1900, between John T. Harner, the plaintiff, and Annie B. Ledane, called Annie Thomas in said writing, the said Harner agreed to construct a two-story frame dwelling-house described in said contract, on Mrs. Ledane's lot in the borough of Newport, and to tear down an old house and use such of the lumber therein as was sound and good. No time seems to have been fixed in the contract for the completion of this house. The consideration for its construction was \$1700, and \$300 of this sum was to be paid the builder by Mrs. Ledane when the stone wall or foundation wall was completed. On June 22, 1900, the plaintiff filed a mechanic's claim or statement of his demand, in which he claimed the sum of \$300 "for materials furnished and work done, to wit, all the materials required and all the work required and done in the excavation for and the erection and

construction of a foundation wall (together with the plumbing) of a certain proposed dwelling-house, and upon the faith and credit thereof, between May 22, 1900, and June 9, 1900, and in pursuance of the contract aforesaid."

It will thus be seen that all the work was done and materials furnished within a period of a little more than two weeks, and that the claim was filed in just one month from the date of the contract.

The reasons assigned for striking off this lien are as follows: 1. Because there is no legal authority for filing a mechanic's lien against an agent, as one of the defendants, Annie Thomas or Annie Ledane, is neither the contractor, architect or builder having power to bind the building. 2. If such lien could be filed against an agent as a defendant, nevertheless, the contract is not signed by Annie B. Ledane as agent, nor does any authority appear from the contract for her to sign as such agent.

These reasons raise the question as to whether a lien can, under the law, be filed against an agent. If the law does not authorize this, what consequences will follow? Should the lien be stricken from the record as against an owner because an agent has been improperly joined?

It seems that the action desired cannot well be predicated upon such a condition of the record. The addition of the name of the agent and characterizing her as such is only, at the worst, surplusage, and falls within the maxim that surplusage does no harm. Besides, the Act of April 9, 1862, § 1, P. L. 402, authorizes the court to permit amendments by striking out the names of all such persons as may by mistake be included therein, and the Act of June 11, 1879, § 2, P. L. 122, extends still further the right of amendment.

The third reason is as follows: 3. The written contract is "to erect, build, set up and finish a two-story double dwelling-house" on the lot of "Annie Thomas," on her lot in the borough of Newport, and the lien is filed for work done in "excavating for and the erection and construction of a foundation wall (together with the plumbing) of that proposed dwelling-house." Wherefore, it appears from the record that the plaintiff has not performed his contract, and it does not appear from the record why he failed to proceed with "the further construction of said building."

This reason raises questions that challenge the right of the plaintiff to recover at all. Before he can obtain judgment, he must issue a *sci. fr.* upon the claim filed. If he has by his default in the performance of his contract lost his right to recover, this default must be shown by proof and found by a jury. As it now appears of record, it is not a ground for striking off the claim filed. The failure of the defendant to pay the first instalment of money due under the contract may account for this non-performance, and this failure may be inferred from the filing of the claim.

The fourth reason for striking off the claim is as follows: 4. A foundation wall lacks "the elements of a building in the sense of the mechanic's lien law," and the said lien law does not warrant the filing of such lien against a foundation wall. The contract in this case is for the erection of a double frame dwelling. The contractor acquired a lien upon the site of the building as soon as operations on any part of the structure began: Mechanic's liens commence at the date of the first stroke of the axe or spade used in making the house: Denkel's Estate, 1 Pearson, 213. In Parrish and Hazard's Appeal, 83 Pa. 111, a mortgage entered July 17, 1872, was postponed to a mechanic's lien, the foundation of the boiler stack, being the first work done, having been commenced on July 16, 1872. It will thus be seen that the plaintiff had a valid lien upon the property described in the mechanic's claim as filed at the time of the filing. The rule to strike off was granted in this case on Aug. 6, 1900. The last work claimed for was done, as stated in the claim filed, on June 9, 1900. The lien

Harner v. Thomas.

growing out of the contract for building, made by Mrs. Ledane and the plaintiff, continued for six months, and had not expired when the rule was granted. If this lien was in existence when the claim was filed and the rule granted, we may inquire when it was lost, if at all? Filing the claim would not destroy the lien, which had its inception at the commencement of the building. The Act of April 14, 1855, § 3, P. L. 238, contemplates that the claimant may file successive liens. It is as follows: That every claimant having a claim for work and materials, or both, who shall afterwards proceed to perform further work or furnish other materials, or both, may make suggestions thereof on the same record, and filing a statement of the amount and particulars thereof, which may be recovered with the original claim under the writ.

This Act does not specify how far a building must be advanced before any claim can be filed, but it seems to contemplate the filing of a claim whenever work or materials have been furnished for or about the construction of a building.

Two cases have been cited by the learned counsel representing the respective parties. These cases are in direct antagonism to each other. In the one, *Florin v. McIntire*, 14 Pa. C. C. Reps. 127, it is held that a mechanic's lien cannot be sustained for "the excavation of a cellar and the erection and construction of a cellar wall;" and in the other, *Thompson v. Porter*, 14 Pa. C. C. Reps. 232, it is held "that, under the provisions of the Act of June 16, 1836, P. L. 646, a lien for labor and materials can be filed against a foundation and ground upon which said foundation was built, and so much of defendant's ground as might be necessary for the use of the building."

Neither of these cases is fully reported, but the facts as stated in the opinions appear to be the same. There was no contract to erect a building in either case, but only to excavate a cellar and construct the necessary wall. We do not know why the building was not constructed upon the foundation walls in the case of *Florin v. McIntire*, but in the case of *Thompson v. Porter* we are told in the opinion that the defendant had changed his mind and did not construct his building as he had intended.

The case in hand differs from both in this, that here we have a contract for the construction of a complete building. No facts are before us to show why the work upon this building was delayed or stopped. But it may be material to know whether the delay was due to the improper performance or non-performance of the contract by the plaintiff or the defendant.

If the foundation walls were improperly made, the defendant may not be indebted to the plaintiff at all. If they were properly built, defendant should pay what she agreed to pay; and if she refuses to pay without just cause, as her contract bound her to do, we shall be inclined to adopt the reasoning in *Thompson v. Porter*, and hold that defendant's failure to perform her contractual duty will not deprive the plaintiff of his right to a lien. It is true that no building was erected when the claim was filed. But two essential and indispensable parts of a building were in place—the excavation and the cellar walls. While the parts were necessarily less than the whole, yet the practice has been to file claims of this character before the completion of the building, and we are not now prepared to say that any or what part may be too insignificant to carry the lien which the law imposes, when, as is said in *Denkel's Estate*, *supra*, the first stroke of the axe or spade has been made.

The mechanic's lien law is exclusively the creature of statute; the common law furnishes rules for expounding statutes: 1 Blackstone's Comm., 68. The common law was adopted in Pennsylvania by the Act of Jan. 28, 1777, § 2, 1 Sm. Laws, 429. Equity is part of the law of Pennsylvania: *Pollard v. Shaffer*, 1 Dallas, 211.

Harner v. Thomas.

This case, in its possible aspects, may come under the maxim that equity looks upon that as done which ought to have been done. In Story's Equity Jurisprudence, § 64g., it is said that the most common cases of the application of this rule are under agreements. All agreements are considered as performed which are made for a valuable consideration in favor of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed. They are also deemed to have the same consequences attached to them, so that one party or his privies shall not derive benefit by his laches or neglect, and the other party, for whose profit the contract was designed, or his privies, shall not suffer thereby.

Bispham, Principles of Equity, § 44, in discussing this maxim, says: For the purpose of reaching exact justice, equity will frequently consider that property has assumed certain forms with which it ought in justice to be stamped. If defendant, by her failure to perform her part of this contract, retarded or prevented its performance by the plaintiff, it seems that the building might be considered as built for the purposes of the mechanic's lien law. It is certain that she should not be permitted to make advantage of her own wrong.

For the reasons above stated, the motion to strike off this mechanic's claim is refused.

From C. H. Smiley, New Bloomfield, Pa.

Road in Mount Joy Township.

Road juries—Report—Duty to note improvements—Presumption that viewers did their duty.

A report of a road jury will be set aside if the improvements are not noted therein. Where, however, the draft shows the residence of at least two of the adjoining to the proposed road plainly set out, it indicates that the land is improved land. Where no proof is produced that there are any other improvements along the line of the road than those noted, it will be presumed that the viewers performed their duty, and that every requirement has been duly complied with.

Exceptions to report of reviewers. Q. S. Lancaster Co., April Sess., 1899, Minute 443.

Among the exceptions filed was the following: "4. The report fails to set forth the location, nature and character of the improvements on the line of the road."

W. U. Hensel and Isaac R. Herr, for exceptions; Coyle & Keller, contra.

LANDIS, J., March 9, 1901.—(After discussing other exceptions.) As to the fourth exception, it may be conceded that it is a requirement of the law that the improvements be noted upon each report, and for a failure to do so, a report should be set aside: Road in Upper Darby Township, 15 Pa. Superior Ct. 652. But an examination of the draft shows the residences of at least two of the adjoining to the proposed road plainly set out, one of them being the dwelling of John M. Snyder, an exceptant, and this would indicate that the land was improved land. No proof has been produced that there are any other improvements along the line of said road than these, and we must assume that the reviewers performed their duty and that every requirement has been duly complied with. In this view, this exception also has no substantial basis.

We therefore dismiss all the exceptions, and do now absolutely confirm the report of the reviewers.

From George Ross Eshleman, Lancaster, Pa.

The Cleveland Builders' Supply Company v. The Hoosier Cement Company.

Foreign corporations—Service on—Corporation, whose president lives in Pennsylvania, but which does no business here, not subject to jurisdiction here—Practice, C. P.

A foreign corporation, which has no office or agency in Pennsylvania and does no business within the State, is not made amenable to judicial process therein by the fact that its president's permanent domicile is in Pennsylvania, as that domicile is personal to himself as an individual and not as an official of the corporation.

Demurrer to plea in abatement. C. P. No. 1, Allegheny Co., June T., 1901, No. 442.

J. McF. Carpenter, for plaintiff; *N. A. Means*, for defendant.

BROWN, J., June 21, 1901.—On April 26, 1901, an action of *assumpsit* was brought by The Cleveland Builders' Supply Company against The Hoosier Cement Company, upon a contract whose *situs* of execution nowhere appears in the record, and the writ was served upon G. E. Sehlbrede, its president, in the city of Pittsburgh. The defendant filed a plea of abatement to the jurisdiction of the court (a), and the plaintiff filed a demurrer (b).

(a) "And now, May 16, 1901, comes above-named defendant, by Nathan A. Means, its attorney, who appears especially in this behalf, and says that this court ought not to take further cognizance of this action, for the reason that it is a foreign corporation, chartered by the State of Indiana on Aug. 29, 1898; that it exists only in the State of Indiana; that it has no office or agency in the county of Allegheny or State of Pennsylvania, and does no business in said county or State."

(b) "And now, June 17, 1901, the plaintiff, by its attorney, demurs to the plea in abatement filed, and, for cause of demurrer, shows that said plea is insufficient in law to defeat plaintiff's action."

By its demurrer, the plaintiff admits the material facts averred in the plea, viz., "that it is a foreign corporation, chartered by the State of Indiana on Aug. 29, 1898; that it exists only in the State of Indiana; that it has no office or agency in the county of Allegheny or State of Pennsylvania, and does no business in said county or State."

It has been ruled in numerous cases that the domicile of a corporation is in the State of its incorporation, "and it retains that domicile irrespective of the residence of its officers, or the place where its business is transacted:" *Boston Investment Co. v. Boston*, 158 Mass. 461; *Railroad Co. v. Koontz*, 104 U. S. 10; *Chafee v. Bank*, 71 Me. 514; *Railroad Co. v. Glenn*, 28 Md. 287, and *Phillips v. Library Co.*, 141 Pa. 462. Its actual *situs* cannot be drawn into a foreign State by the permanent or temporary domicile of an officer or agent of the company, unless such officer or agent is (a) an authorized representative for business purposes and actually transacts business for the company therein, or (b) is designated and registered as such by certificate filed in the office of the secretary of the Commonwealth.

If the domicile (permanent home) of Sehlbrede is in Pennsylvania, that domicile is personal to himself, and not to himself in his official capacity as president of the company.

Section 3 of the Act of March 21, 1849, P. L. 216, provides that "in the commencement of any suit or action against any foreign corporation, process may be served upon any officer, agent or engineer of such corporation, either personally or by copy, or by leaving a certified copy thereof at the office, depot or usual place of business of said corporation."

The Cleveland Builders' Supply Company v. The Hoosier Cement Company.

In passing upon this section, in *Phillips v. Library Co.*, 141 Pa. 462, Chief Justice Paxson, delivering the opinion, says: "The Act of 1849 contemplates a foreign corporation doing business" (*Blakeslee Manufacturing Co. v. Hilton*, 5 Pa. Superior Ct. 184; *Fertilizer Co. v. Kelly*, 10 Pa. Superior Ct. 565; *Phoenix Silk Manufacturing Co. v. Reilly*, 187 Pa. 526) "within this Commonwealth;" and further along in the opinion cites and follows *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15, where it is said: "Upon general principles and in the absence of statutory innovations, it is to be regarded as settled that if a foreign corporation, at the time of the commencement of suit, does not do business, and has not any office or place of business in this State, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any other court of this State. Under such circumstances, the officers or agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or functions, and are not to be esteemed, out of the sovereignty by the laws of which the corporate body exists, the representatives for the purpose of responding to suits at law of such corporate body."

From these conclusions of fact and law, it follows that the defendant is not subject to the jurisdiction of this court, and therefore judgment is directed to be entered for the defendant upon the demurrer, with costs.

From Edwin L. Mattern, Pittsburgh, Pa.

McPherson's Executor v. Blair's Administrator.

Practice, C. P.—Security for costs.

A non-resident executor of a decedent, who was also a non-resident at the time of his death, is within the rule of court requiring a non-resident plaintiff to file security for costs.

Rule on plaintiff, who is a non-resident, to give security for costs. C. P. Cumberland Co., May T., 1901, No. 97.

A. G. Miller, F. E. Beltzhoover and W. F. Sadler, for rule.

Wetzel & Hambleton, contra.

EDW. W. BIDDLE, P. J., July 13, 1901.—The plaintiff resides in the city of Washington, and represents the estate of a testator who, at the time of his death, was also a resident of that city. Does the present case come within the scope and meaning of our rule of court which requires a non-resident plaintiff to give security for costs?

The precise point was determined in *Buck v. James*, 2 Ches. Co. Reps. 401, where it was held that a plaintiff executrix, who removes from the Commonwealth whilst her suit is pending, must enter bail for costs. Judge Ludlow stated in *Appleton v. Ruth*, 15 W. N. C. 127, that the determining question is, can the respondent be served with process? In *Kilmer v. Groome*, 6 District Reps. 540, it was pointed out that the effect of the practice is to place non-residents on a basis in relation to the payment of costs similar to that on which our own citizens stand, because the collection of costs could seldom be profitably undertaken in another State. After careful consideration, we see no reason why a foreign executor should be adjudged to be exempt from the operation of the rule.

And now, July 13, 1901, it is ordered that the plaintiff enter security for costs within twenty days in the sum of \$150, and that in default thereof judgment of non-suit be entered by the prothonotary.

From A. G. Miller, Carlisle, Pa.

Fry's Estate.

Decedents' estates—Adverse claim of assets—Jurisdiction, O. C.

Upon the audit of an administrator's account, no one is entitled to claim any portion of the assets who does not claim it through the decedent and as part of his estate, either as a creditor, legatee or next of kin.

Hence, after the confirmation of an administratrix's account, adjudging certain funds to be a part of a decedent's estate, no claim can be made in the Orphans' Court upon the ground that the decedent had but a life-estate in those funds, and that they passed at the decedent's death to the claimant. Such a claim must be made before another forum.

Exceptions to auditor's report. O. C. Dauphin Co.

D. S. Seitz and F. S. Bowman, for exceptant; *M. W. Stroup*, for report.

WEISS, J., March 12, 1901.—Mary Fry died intestate, Nov. 15, 1899. The account of Rachel Botteiger, her administratrix, by which it appeared that she held a balance of \$1344.26 for distribution, was confirmed absolutely June 25, 1900. She left surviving her three children, Sarah Rickert, Rachel Botteiger and Mary Ann Wert, whose father, John Fry, died testate about October, 1867. The executor of his last will stated an account, which was confirmed May 16, 1870, whereby it appeared that a balance of \$1580.40 remained in his hands for distribution. The will, among other things, provides as follows:

"Item. I order and it is my will that my beloved wife, Mary, shall, after all expenses are paid, have all the money that may be owing or being due me, either by notes, due bills or book accounts.

"Item 2. It is my will and I order that my beloved wife, Mary, shall also have the household furniture, farming implements, and, in short, all my property shall belong to her. That is, all the money, property and all my effects shall belong to her during her natural life.

"Item 3. It is my will and I order that, after the death of my esteemed wife, my two daughters, viz., Rachel, now intermarried with John Henry Botteiger, and Mary Ann, shall have all that will be left by my wife, share and share alike, provided they outlive my wife, but if they, or one of them, dies, then their heirs or representatives shall be the heirs, and if one of them will die without heirs, then the heirs of the other one shall become the heirs."

An auditor was appointed to make and report distribution of the fund in the hands of Mary Fry's administratrix, before whom it was contended, on behalf of Mary Ann Wert, a daughter and a legatee named in the will of John Fry, that the moneys for distribution are the proceeds of the bequest made to Mary Fry in the will of her husband, in and to which she had an estate for life only; that the fund belonged to the estate of John Fry, and that, consequently, division of the fund should be made equally among the two legatees named in the will of their father.

The only evidence to show ownership of the fund for distribution by the estate of John Fry is that given, under objection as to relevancy, by Mary Ann Wert, a daughter and legatee. She states that the executor of the will of John Fry gave to her mother practically the entire amount found to be in his hands by the account. Part of the fund was represented by notes at interest, which were shown the witness by her mother, but the total amount which she says her mother got from Daniel Leffler, the executor of the will of John Fry, and which, according to her statement, came from her father's estate, aggregates about the balance in the possession of the executor, as appears in his account.

The receipt by the widow of the fund in the hands of the executor, pursuant to the will, gave her the right to use and consume it, in whole or in part, and what remained, or what "will be left," at her death would go to the legatees, under the decisions in *Hambright's Appeal*, 2 Grant, 320; *Markley's Estate*,

Fry's Estate.

132 Pa. 352, and Heppenstall's Estate, 144 Pa. 259. The identity of the funds could be shown in a proper proceeding, and thereupon distribution made to the two daughters.

But the account of the administratrix was confirmed absolutely by the court, and this was an adjudication that the amount with which she was therein charged, and which she held for distribution, belonged to the estate of Mary Fry. "The fund for distribution, from whatever source derived, constitutes part of the decedent's estate; and no one is entitled to claim any portion thereof in this proceeding for its distribution who does not claim it through the decedent and as a part of her estate, either as a creditor, legatee or next of kin," is the language of the court in McBride's Appeal, 72 Pa. 480. If the moneys for distribution by the auditor were the moneys originally belonging to the estate of John Fry, it was not made properly manifest, and, accordingly, they lost any alien attribute the moment it was adjudged that the sum belonged to the estate of Mary Fry. Up to that time the contrary might have been shown. Then and thereafter the sum belongs to the estate of Mary Fry. Any claim upon this fund can be asserted by a creditor, or by one who is entitled to participate through the decedent.

There are three children to whom the estate belonging to the intestate descends. Mrs. Wert is entitled to the one-third part, which descends to her through her mother, Mary Fry.

It follows that the exceptions filed to the auditor's report must be dismissed and the report confirmed, which is accordingly done.

From William M. Hargest, Harrisburg, Pa.

Schuylkill Haven Borough v. Schuylkill County.

Commission on liquor license money.

The county treasurer has no authority to charge and retain for the use of the county a commission on money received for liquor licenses. The borough is entitled to receive its full share, with no deduction for commission.

Case stated. C. P. Schuylkill Co., July T., 1901, No. 252.

C. E. Berger, for plaintiff; C. A. Snyder, for defendant.

SHAY, J., July 1, 1901.—The facts agreed upon in this case and submitted to the court show that the treasurer of Schuylkill county collected for the years 1900 and 1901 the sum of \$1440, respectively, as the proportion of the liquor license money due the borough of Schuylkill Haven, and retained as a commission for the collection of these sums \$54.40 each year, and paid the same into the treasury for the use of the county of Schuylkill.

If the court be of the opinion that the borough of Schuylkill Haven is not chargeable with the aforesaid sums of \$54.40 for the collection of its proportion of liquor license money, then judgment be entered for the plaintiff; but if the court be not of that opinion, then judgment be entered for defendant, etc.

This question has been so squarely decided in *Pittsburgh v. Anderson*, 194 Pa. 174, and *Kittanning Borough v. Mast*, 15 Pa. Superior Ct. 51, as to need no discussion from us.

Under these decisions, the county of Schuylkill clearly retained this money unlawfully from the borough of Schuylkill Haven, and the said sum of \$54.40 for the year 1900, and the same sum for the year 1901, must be paid, with interest, to the said plaintiff by the said defendant.

And now, July 1, 1901, judgment is entered on the case stated in favor of the plaintiff and against the defendant for the sum of \$113.69 and costs of suit.

From J. O. Ulrich, Tamaqua, Pa.

Denison v. Ryan.

Municipal control of streets—Philadelphia—Bullitt Bill.

The legislative control of the streets of the city of Philadelphia is vested in councils.

The determination of the question of the consent of the municipality to the obstruction or partial obstruction of its highways by a railroad track, upon which steam motive power is to be used, for a period of time which may continue for eighteen months, is an exercise of legislative power, and is not vested in the chief of the bureau of highways, even though the track is laid by a municipal contractor solely for the purposes of his contract with the city.

Nuisance—Special injury—Injunction.

An abutting property-owner, threatened with a special injury, due to interference with access, may maintain a bill in equity to prevent the laying of a railroad track.

Motion to continue special injunction. C. P. No. 2, Phila. Co., June T., 1901, No. 3371.

Jos. R. Rhoads and Edward G. McCollin, for complainant.—Conshohocken avenue is a public highway, the title to which is in the city of Philadelphia for specific public purposes. Any private erection upon it, even by authority of the city councils, is an offence against the public, and indictable as a common nuisance: *Com. v. Rush*, 14 Pa. 186.

Even a railroad company having the right of eminent domain cannot lay its tracks on a public street unless specially authorized by legislative grant. In the absence of such a grant, a railroad company cannot construct and operate a railway, even with the consent of the municipal authorities: *Pennsylvania R. R. Co.'s Appeal*, 115 Pa. 514; *Barker v. Hartman Steel Co.*, 129 Pa. 551.

The defendants having no right to lay a railroad track in the highway, an abutting owner is entitled to an injunction without proof of irreparable injury: *Pennsylvania R. R. Co.'s Appeal*, 115 Pa. 514.

Dwight M. Lowrey and Alfred R. Haig (of Harrity, Lowrey & Thompson), for defendants.—Where sidings are laid in the public streets for private purposes, *i. e.*, to connect a private establishment with a public railway, formal consent of councils is obtained. But this is not such a siding; it is not constructed for a private purpose, but in aid of the completion of a great public work; though nominally laid by defendants, it is not laid for the purposes of their business generally, but solely for the purposes of their municipal contract, and is to be considered not so much as an extension of the Pennsylvania Railroad as a part of the reservoir and filtration plant of the city of Philadelphia. In no other way can that work be done and the terms of the contract with the city fulfilled. The bureau of highways, therefore, usurps no authority when it authorizes this obstruction of Conshohocken avenue. It is an act analogous to the roping off of streets for the laying of sewers, water-pipe, and for the doing of other municipal work and improvements. Municipal corporations have full power over the highways of the city, and a temporary use for a lawful and proper purpose does not become a nuisance because of performance by one having a private interest therein. No individual interest is permitted to interfere with the free use of both the surface and subsoil by the municipal authorities or by their delegated substitutes: *Wood v. McGrath*, 150 Pa. 456; *Smith v. Simmons*, 103 Pa. 35; *Susquehanna Depot v. Simmons*, 112 Pa. 388.

The granting of the permit to lay the track is a purely administrative act—an act of direction and supervision—necessarily incident to the work instituted by councils, and constantly exercised by the department. It is the appointment of a part of a highway for the special uses of the city.

The track is an obstruction (not a railroad) incident to the construction of a vast municipal undertaking in the immediate vicinity of Conshohocken avenue, whose use in this way the department may lawfully permit.

Denison v. Ryan.

Having entered to lay the track on Conshohocken avenue with proper municipal consent, the defendants may lay this siding, and, notwithstanding the want of a charter, the plaintiff cannot object without proof of special damage. That he is an abutting owner is not sufficient: *Thomas v. Inter-County Street Ry. Co.*, 167 Pa. 124.

PENNYPACKER, P. J., Aug. 14, 1901.—The complainant is the owner of a tract of land on the northwest side of Conshohocken avenue near Forty-ninth street, containing about two acres, upon which he conducts the business of a florist. His only means of entrance is upon that avenue. The defendants have a contract with the city of Philadelphia for the erection of a reservoir, in size 1100 feet by 700 feet, on the east side of Belmont avenue west of Monument avenue, about three-quarters of a mile from Bala station on the Pennsylvania Railroad. In excavating for the reservoir, the defendants propose to use shovels weighing 65 tons each, and they will need materials weighing about 300,000 tons. In order to transport this mass of material they are about constructing railway tracks from Bala station to the site of the reservoir, which will run along the south side of Conshohocken avenue, at the distance of from 40 to 51 feet from the front of the complainant's property. Upon these tracks it is proposed to use steam locomotives. Under the terms of the contract with the city, the reservoir is to be completed within the period of 18 months.

The defendants are not entitled to enter upon the highway of the city and lay tracks for their private use unless it be shown that permission has been given by competent authority. There is no Act of Assembly giving them such a right. No ordinance of councils has been produced showing that the city has assented to such use of its street. The only semblance of authority is a letter from the chief of the bureau of highways to the defendants, dated July, 1901, which says, in reply to a communication, "you desire permission from the bureau of surveys, through this bureau, to lay a temporary track on Conshohocken avenue, . . . said track to pass over Conshohocken avenue and across Belmont avenue into your work, . . . would say that permission is hereby granted to lay said temporary track," etc.

Our attention is called to art. IV of the Act of June 1, 1885, P. L. 43 (*Bullitt Bill*), which provides, "all matters and things in any way relating to or affecting the highways, footways, wharves and docks of the city shall be under the direction, control and administration of the department of public works." The context shows, however, that this part of the Act has reference only to the exercise of executive functions. It was not intended to deprive the councils of the city of the legislative control of the streets. Such control is vested in the legislative branch of the municipal government. The bureau of highways is a subordinate branch of the department of public works, and acts under direction of councils: *Wetherill v. Penna. R. R. Co.*; *Carpenter v. Penna. R. R. Co.*, 195 Pa. 156, 160.

The determination of the question of the consent of the municipality to the obstruction or partial obstruction of its highways by a railroad track, upon which steam motive power is to be used, for a period of time which may continue for 18 months, is an exercise of legislative power, and is not vested in the chief of the bureau of highways.

The complainant being an owner of property abutting upon the street, and being threatened with a special injury due to interference with access, is entitled to file a bill to prevent the laying of the track: *Penna. R. R. Co.'s Appeal*, 115 Pa. 525.

The motion to dissolve the injunction is overruled, and the injunction is continued until the further order of the court.

10 DIST. R.

Campbell's Estate.

Decedent's estate—Dower—Agreement to pay a sum certain to widow in lieu thereof—Principal and income.

A widow who makes an agreement with the other parties in interest which is confirmed by the court and by which a sum certain is to be paid to her each year in lieu of her dower and every interest in the estate, is not a volunteer but a purchaser; and if the income arising from the property set aside for the purpose under the agreement is insufficient to pay the amount agreed upon, the deficit is to be paid out of the principal.

Petition for citation. O. C. Phila. Co., Jan. T., 1901, No. 413.

Frederic M. McFadden, for petition.

Henry S. Cattell and *Charles C. Lister*, contra.

ASHMAN, J., June 29, 1901.—Upon the election by the widow to take against her husband's will, the parties in interest, by an agreement which was confirmed by the court, conveyed certain ground rents and a house and lot to a trustee in trust to collect the said ground rents and the rent of the message "and pay over out of the same the sum of \$600 in equal half-yearly sums of \$300 each" to the widow for life, and in further trust to pay the balance of income, and, at the death of the widow, to convey the ground rents and premises to the parties entitled under the will. Some of the ground rents have been paid off, and the income from the reinvestments and from the remaining rents has fallen below the sum of \$600 per annum. The widow asks that the deficit may be made good by the principal. The question lies in a very narrow compass. Against the objection that she looked to the income of the fund, and that the securities composing the fund are ultimately to be handed over to the remaindermen, is to be placed the covenant of the remaindermen to pay the petitioner the fixed annual sum of \$600. This covenant favored them as much as it favored the petitioner, because, no matter how large might be the income (and until recently the securities realized steadily more than the sum paid to the widow), the latter was entitled to no more than \$600. Aside from the language of the agreement, there is a cogent reason why she should receive no less than that sum. The widow is not a volunteer but a purchaser; and she holds this agreement in lieu of her dower and every other interest in the estate. The point involved was determined in favor of the widow in *Denis's Estate*, 4 District Reps. 1; s. c., on appeal, 169 Pa. 493, where similar relief under a similar agreement was prayed for, and where the fund set apart for her annuity proved to be insufficient for its full payment.

The petition is granted.

Kase's Estate.

Decedent's estate—Wills—Power of widow to contest her husband's will.

A widow cannot contest the will of her deceased husband, since she is not bound by it, and may elect to take her statutory dower and her statutory interest in his personal estate.

Appeal from register. O. C. Phila. Co., Oct. T., 1900, No. 84.

Edgar J. Pershing, for contestant; *Carrie B. Kilgore*, for proponents.

HANNA, P. J., June 24, 1901.—The testator in this instance executed his will with the aid of counsel, who observed the usual formalities attending the execution of such an instrument. He gave all his estate to his executors in trust to pay out of the income to his wife sufficient money for her maintenance during her natural life, and also to use so much of the principal as may be necessary for the purpose. She is naturally the first object of his bounty, and

Kase's Estate.

testator was so solicitous for her welfare he made no gift to his children except of any surplus remaining after the proper support of his wife. Testator's wife survived him, and his will was duly admitted to probate. For the reason, no doubt, that there is no absolute gift to her, or, as she alleged, if the will be permitted to stand, she fears she will be unable to recover certain real estate formerly owned by her and which she conveyed to a third party, reserving a life-estate therein, to secure advances made by him to the testator, she seeks to set aside the will of her husband upon the grounds of his mental unsoundness and incapacity to execute a will, and its execution by him was procured by undue influence. But the widow is mistaken in her right in this respect. She is not bound to accept the provision made for her by her husband, and can claim the same interest in his real and personal estate as if he died without making a will, or, to use the legal term, intestate. She can gain no more if his will be set aside, for then he will die intestate, and, as stated, the same provision is made for her as if he had not executed his will. For this reason the law is well settled that a widow cannot contest the will of her dead husband. She is bound either to accept or refuse what he has bequeathed or devised to her or for her benefit. As was said in *McMasters v. Blair*, 29 Pa. 298, "she has no right to contest her husband's will, for she is not bound by it. She may have her statutory dower and her statutory share of his personal estate, if she does not like the will, and she must leave it to his heirs to dispute the will. Her will is stronger than his so far as affects her right, and that far she may set it aside by a simple election, but she has no right to interfere with his disposition of the residue of his estate. Her contingent right of administration is not an interest in the estate entitling her to dispute the will; but only the legal provision for its settlement in case there be no will."

The appeal is dismissed, issues refused, and the decree of the register affirmed, with costs to be paid by the contestant.

Jones v. Pavay et al.

Replevin—When it lies—Goods in custody of police officer not repleviable.

Goods in the possession of a police officer, by whom they had been taken from a person charged with their larceny, cannot be replevied.

Replevin—Service of writ—Service in office of magistrate invalid.

Service of writ of replevin in the office of a police magistrate, where goods sought to be replevied are held as evidence in a cause, is invalid and will be set aside.

Petition to quash writ of replevin. C. P. No. 3, Allegheny Co., May T., 1901, No. 127.

Marron & McGirr, for petitioners; *Rody P. Marshall*, opposed.

EVANS, J., May 15, 1901.—This is an application on the part of the defendants to quash a writ of replevin at the above number and term. The defences, as they appear from the petition and answer, are as follows: On June 8, 1901, C. E. Jones, the above plaintiff, made information before J. V. McMasters, a magistrate of the city of Pittsburgh, charging one Lucille Jarvis with larceny, by bailee, of a diamond ring, and warrant was issued for the arrest of Lucille Jarvis, and placed in the hands of Jesse Pavay, one of the above defendants, for execution. The defendant was arrested. The ring found on her was taken in custody by Pavay, and, on his return to Pittsburgh, placed in the vault of the police bureau, where it remained until Feb. 28, when it was taken to the office of Magistrate McMasters for use at the hearing in the larceny case. While there, he was requested to produce the ring, which he did, and handed it to the

10 DIST. R.

Jones v. Pavey et al.

attorney for the prosecution, who handed it to the prosecutor, by whom it was handed to the sheriff's deputy.

The defendants contend that this writ should be quashed by authority of the Act of Assembly of April 3, 1779, 1 Sm. Laws, 470: "All writs of replevin granted or issued for any one, unless in case of chattels, levied goods taken in action or by debtors, or otherwise, by any sheriff, naval officer, lieutenant or sub-lieutenant of the city of Philadelphia, or any indicted constable or other officers acting for their several offices under authority of the State, are irregular, erroneous and void, and such writs may and shall, at any time under the service, be quashed by motion of the court to which they are returnable, the said court being certain of the truth of the fact by affidavit or otherwise."

The simple question here is, "Was this police officer, in making the arrest and taking possession of the property alleged to have been stolen, an officer acting under the authority of the State, as set forth by the above Act?"

The legislature has recognized the necessity of the courts exercising some control over property alleged to have been stolen, and by the 5th section of the Act of March 31, 1860, P. L. 427, as giving the magistrate authority to temporarily dispose of the property, pending disposition in the criminal prosecution. But the magistrate having made no disposition of the ring in this case, does it follow that the law loses its control over the stolen property, pending the disposition of the criminal charge? We think not. The administration of the criminal court deems that it shall retain control of all evidence tending to throw light on the criminal charge, and the arresting officer is the agent of the criminal court in retaining possession of the alleged stolen property until after the close of the prosecution.

This question has been so ably considered by the Court of Appeals in New York, in *Simpson v. St. John*, 93 N. Y. 363, that its only answer, referring to the opinion of the court in that case, should justify the quashing of the writ in this one. In that opinion the court says: "The property alleged to have been stolen, which comes into the custody of the peace officer, must be held subject to the order of the examining magistrate. The latter may order its restoration to the one (under the Act of Assembly similar to ours), upon proof of title and payment of the expense of its preservation, unless its temporary retention be deemed necessary in furtherance of justice. Under these provisions, it is apparent that, pending the prosecution of the criminal, the stolen property in the custody of the officer is in the custody of the court. The magistrate may order a return to the one, pending its retention to the trial unnecessary; but if he makes any such order, the retention of the property must be deemed necessary to the process of justice until, by a conviction or acquittal, the custody is ended." The question in the case at the bar is identical with the one cited, and the reasoning in the latter is so convincing we are constrained to follow it.

It may be proper to say a word here in reference to the manner of serving the writ in this case. The property was produced at the hearing before the magistrate as evidence for prosecution, and, while being held for that purpose, was taken possession of by the sheriff, under his writ of replevin, as given in sustaining the service under such circumstances. As soon might we be expected to permit the sheriff to come into our court and seize property being used as evidence in a trial of a case before us.

And we are of the opinion that not only ought service be set aside, but the writ ought to be quashed.

From Edwin L. Mattern, Pittsburgh, Pa.

Luck v. Commonwealth of Pennsylvania.

Constitutional law—Act of June 1, 1887—Art. iii, sec. 3, of Constitution.

If the vindicatory section of a statute is in furtherance of its purposes, it is embraced by a title which clearly expresses the subject of the Act. Everything which the nature of the subject reasonably suggests as necessary or appropriate for the accomplishment of its expressed purpose is sufficiently indicated by such a title.

Hence, sections 3 and 4 of the Act of June 1, 1887, P. L. 287, entitled "An Act for the encouragement of forest culture and providing penalties for the injury and destruction of forests," which sections provide penalties and a mode for their enforcement for certain acts tending to injure or destroy forest growths, are sufficiently indicated by the title within the meaning of art. III, § 3, of the Constitution.

Criminal procedure—Sufficiency of complaint or information—Indefiniteness in complaint or information cured by trial.

An information drawn in the language of the Act is sufficient.

Courts are no longer astute in discovering defects in the complaint or information, and when the charge in the complaint and summons is so specific as to give the defendant fair notice of the time and place of the offence charged, it ought to be regarded as sufficient. And where the defendant appears and goes to trial without any objection to the complaint and summons on account of its indefiniteness, such defects ought to be considered as cured.

Criminal procedure—Transcript of justice—Review by appellate court.

It is the duty of the justice of the peace, in cases of summary conviction, to set out the substance of the testimony. The judgment of the justice on the weight of the evidence is to be taken, but the appellate tribunal must judge of its sufficiency.

Criminal law—Conviction under Act of June 1, 1887, P. L. 287.

To convict under this Act two elements must be shown: 1. The carelessness of the defendant. 2. That the fire was the result of such carelessness.

Words—Meaning of the word "carelessness."

The word "carelessness" in the statute is synonymous with negligence. It is defined as having no care; heedless; inattentive; remiss; negligent; cursory.

Negligence—Test of in machinery, etc.—Usage in business—Proof of.

The unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. However strongly we may be convinced that there are better and less dangerous methods or machinery, no jury can be permitted to say that the ordinary and usual way, commonly adopted by those in the same business, is a negligent way for which liability should be imposed.

A business usage cannot be established by proof of the conduct of a single individual. It must be the uniform practice, and must be known, certain, reasonable, and not contrary to law, although it may be of very recent origin.

Defendant had a saw-mill, about which he had burned for 123 feet, but which space was covered with sawdust, in which were frequent fires, and he had no spark-arrester on his engines. *Held*, that negligence would not be presumed from the mere happening of the fires, and must be proved. It was not a case for the application of the doctrine of *res ipsa loquitur*. Evidence that a single individual had a spark-arrester on his engine, and had burned for 150 to 175 feet about his mill, was not evidence of such a usage in the same business. Hence, as the record of the justice of the peace failed to show "carelessness" on the part of defendant within the meaning of the statute, his summary conviction was reversed.

Certiorari to S. P. Kern, justice of the peace. C. P. Perry Co., Nov. T., 1900, No. 17.

John A. McKee, for plaintiff in error; *Alfred P. Reid*, contra.

ATKINSON, P. J., June 4, 1901.—Frederick Luck, the plaintiff in error, was arrested at the suit of the Commonwealth, upon the charge that he did "carelessly burn and fire upon the lands of John Tyler, in the township of N. E. Madison, in the county of Perry, the timber on which was leased by S. Gibney, trees, brush, stubble and other combustible material, whereby said fire was communicated to the leaves, brush and timber lands belonging to other parties in said county of Perry, in violation of the 3rd section of the Act of Assembly

10 DIST. R.

Luck v. Commonwealth of Pennsylvania.

approved June 1, 1887, P. L. 287, entitled "An Act for the encouragement of forest culture, and providing penalties for the injury and destruction of forests," as amended by the Act of Assembly approved May 14, 1891, P. L. 60.

After a hearing before Justice Kern, the defendant below was convicted of the charge set forth in the information, and a fine of \$5 was imposed upon him, together with the costs.

On Sept. 15, 1900, a writ of *certiorari* was issued, and the record of the proceedings before the magistrate was returned to this court. Exceptions were filed to this record, which were argued and are now before us for adjudication.

The first exception avers that sections 3 and 4 of the Act of June 1, 1887, P. L. 287, are unconstitutional and offend against art. III, § 3, of the Constitution, in this, that the title of the Act is misleading. No notice is given in the title of the subject-matter in said sections 3 and 4. The second exception practically raises the same question, but is argumentative in character. The title of the Act is as above stated. Its 1st and 2nd sections provide one method, whereby it is sought to encourage forest culture, namely, by authorizing the county commissioners to pay a percentage of the taxes assessed against said land to the owner or owners of any lands planted with forests or timber trees. The purpose of such payments is to encourage and induce the owners of lands to grow timber trees, and thus increase or maintain the area of woodland in the State.

The 3rd section provides a penalty of \$50 for certain acts tending to injure or destroy forest growths, and this penalty is imposed upon any one who shall "willfully or carelessly burn or fire upon his or their own land, or that of others, any trees, brush, stubble or other combustible material, whereby fire shall be communicated to the leaves, brush or timber upon any forest or timber land belonging to other parties."

The constitutional provision, of which the above-stated Act is supposed to be a violation, is as follows: Art. III, § 3. "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

The Act is for the encouragement of forest culture. The penalty imposed is germane to the purposes sought to be attained by the statute. It is in furtherance of the objects at which the statute aims.

It is elementary that the essential parts of a statute are the declaratory, the directory, the remedial and the vindicatory. If the vindicatory section of the statute is in furtherance of its purposes, it is embraced by a title that clearly expresses the subject of the Act. Everything which the nature of the subject of a title reasonably suggests as necessary or appropriate for the accomplishment of its expressed purpose is sufficiently indicated by such a title: *Com. v. Jones*, 4 Pa. Superior Ct. 362.

It is futile to expend the public money for the encouragement of forestry if the results sought to be attained may be destroyed with impunity by the careless or willful acts of reckless persons.

The object of the Act being to encourage forest culture and prevent deforesting, the details for accomplishing this purpose need not be referred to in its title, even if the penalty may be imposed upon any person who destroys or injures forests.

The Act is obviously not unconstitutional in any of its sections, nor as a whole, and the first, second and third exceptions are overruled.

The 5th section requires the commissioners of each county to publish the Act in one newspaper of general circulation in the county, and it is contended that the Commonwealth should have established the fact of publication by proof, in order to warrant the conviction of an offender against its provisions. But it is nowhere stated that the Act shall be inoperative until it is published in a newspaper. If it were published in the usual and ordinary way it would be effective,

Luck v. Commonwealth of Pennsylvania.

while the presumption is that the commissioners performed their duty, and the obligation of proving the contrary lay upon the defendant.

The complaint made by R. V. Woods, the prosecutor, was sufficient to give jurisdiction to the magistrate. The prosecutor was not bound to aver or prove that the lands burned over did not belong to the defendant. No presumption of ownership can arise in the defendant's favor. The fire seems to have covered a wide area of forest land, and he was not in possession of any of it, except so much as was occupied by his machinery, wood-yard and boarding-house.

The transcript of the magistrate shows that the defendant was adjudged guilty of the offence charged in the information, and the information was drawn in the language of the Act. This would be sufficient in an indictment, and was adjudged to be adequate in *Com. v. Burkhart*, 23 Pa. 521, which was a case of summary conviction. It is there stated that "the courts are no longer astute in discovering defects in such proceedings, and when the charge in the complaint and summons is so specific as to give the defendant fair notice of the time and place of the offence charged, as is done here, it ought to be regarded as sufficient. And where the defendant appears and goes to trial without any objection to the complaint and summons on account of indefiniteness, such a defect ought to be considered as cured."

The foregoing remarks cover all the exceptions as originally filed but the seventh,

The seventh exception is as follows: "The finding and judgment in this case is not warranted by the evidence, and is contrary to all the evidence in the case."

This exception requires us to determine whether the testimony set out in the transcript is sufficient to justify the conviction. It is the duty of the magistrate in cases of summary conviction to set out the substance of the testimony. In *Com. v. Borden*, 61 Pa. 276, it is said, "on this point, the English cases observe great strictness, and in our own we have never held that less than the essential part or particular substance of the whole testimony should be set forth." The judgment of the magistrate on the weight of the evidence is to be taken: *Com. v. Burkhart*, *supra*, but the appellate tribunal must judge of its sufficiency.

The offence charged in the complaint is, that the defendant "did carelessly burn or fire trees, brush or other combustible material, whereby fire was communicated to leaves, brush or timber, upon timber or forest lands belonging to other parties."

The question presented is, has the offence charged been made out by the proof in the case?

The law is penal; it must be construed strictly, and the offence must be proved beyond a reasonable doubt.

Two elements must be shown in order to convict: 1. The carelessness of the defendant; and 2. That the fire was the result of such carelessness.

We consider that the word "carelessness" in the statute is synonymous with negligence. It is defined as "having no care;" heedless; inattentive; remiss; negligent; cursory."

Negligence is the absence of care according to the circumstances: *Philadelphia, Wilmington and Baltimore R. R. Co. v. Stinger*, 78 Pa. 219.

The standard of diligence is not that of a particular man, but of the average prudent man. The first requisite for the plaintiff is to show the existence of the duty which he alleges has not been performed, and then he must show a failure to observe this duty; that is, he must establish negligence on the defendant's part. "This is an affirmative fact, the presumption always being, until the contrary appears, that every man will perform his duty:" *Cooley on Torts*, 659. It is not sufficient for the plaintiff to prove a state of facts consistent with the
10 DIST. R.

accident having been caused by the negligence of the defendant. He must prove that it was caused by the defendant. Keeping these principles in view, we must determine whether the charge is made out by the testimony.

R. V. Woods testifies that the defendant was warned to burn around mill, and that the defendant told him, Woods, that it was too dry to burn around mill.

Robert Campbell testifies that it was not burned around mill. It was a dangerous place. Witness told Bill Scott it was a dangerous place. William Bayler testifies it might have been a dangerous place. Said, in the presence of the Shilling boys, that it should be burnt around mill. Frank Molder testifies that stack was 31 to 32 feet high. No spark-arrester on engine.

Edwin Garver testifies it was middling windy on that day. The wind was brisk. First fire southeast of stack towards mountain at the boarding-house. Second fire broke out west of the mill. Heard Luck tell Woods that it was too dry to burn around mill, and cleared off ground.

Frank Bailey states, was a windy day when fire occurred.

M. Spotts testifies, at fire when it came towards his mill, about three-quarters of a mile to his mill from Spotts's. Men fired against road. They were fighting the fire from toward Spotts's. D. Rice, constable, testifies, fire was all around stave-mill. Checked at Waterford Narrows. On this side of mountain day of fire. Not familiar with ground. Wind going every way.

Frederick Luck testifies that he set mill last winter; cleared and burned for 123 feet; covered with sawdust; sparks went out southeast. Hired men to help put sparks out. Sparks flew 92 feet from smokestack towards shanty. Seen fire about 12 o'clock; 196 feet direct west. Sparks went southeast in both instances. Frequent fires in sawdust. Would not burn more than 123 feet on account of being too dry. Wind carried sparks 92 feet that day.

Edward Shillings testifies, cleared and burned for 123 feet, then placed mill. Covered burnt area with sawdust as it was made. Luck watched for fires at mill when fire occurred. Helped Luck when wind got up. Sparks dropped above boarding-house. Second fire about 21 feet from mill. Fire turned back when Luck went out. Fire ran towards road, then towards mountain. Fire went away from mill, came back around.

W. A. Martin testifies, have stave-mill about three-quarters of a mile from Luck. Was at dinner when he saw smoke. Fought fire until midnight. Has spark-arrester on his engine. Martin burned 150 to 175 feet around his own mill.

It will thus be seen that the defendant had no spark-arrester on his engine, and that he burned the leaves away for a distance of only 123 feet.

Do these facts constitute carelessness on the part of the defendant? Was it his duty to have a spark-arrester on his engine? How far should he have burned the leaves away?

"The unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. However strongly we may be convinced that there are better and less dangerous methods or machinery, no jury can be permitted to say that the ordinary and usual way commonly adopted by those in the same business is a negligent way for which liability should be imposed:" *Dooner v. Delaware and Hudson Canal Co.*, 171 Pa. 602.

Is it the ordinary usage of persons employed in the business in which the defendant was engaged to have spark-arresters on engines and to burn leaves, &c., for more than 123 feet away from the location of the engine? If such is the usage, the proof should show it. But there is no testimony in this case to establish such a usage among persons in the business in which the defendant was engaged at the time of the fire.

Luck v. Commonwealth of Pennsylvania.

In the absence of proof, we must hold that carelessness or negligence is not made out against the defendant. It is established that the sawdust about the mill had taken fire the same day, presumably from sparks from the engine. But this in itself is no proof of negligence in a civil action, much less in a criminal prosecution. In Philadelphia and Reading R. R. Co. v. Yelser, 8 Pa. 386, it is held that "In an action against a railroad company to recover damages for injury to woods and fences caused by sparks from the company's engines, negligence in managing the fires must be proved. It cannot be inferred from the mere happening of the fire." To the same effect are Taylor v. Penna. Schuylkill Valley R. R. Co., 174 Pa. 171; Shearman & Redfield on Negligence, pars. 668, 675; Philadelphia and Reading R. R. Co. v. Yerger, 73 Pa. 121.

The testimony shows that W. A. Martin, who was operating a stave-mill a short distance from that of the defendant, had a spark-arrester on his engine, and burned from 150 to 175 feet around his own mill. But in the absence of proof that the ordinary usage of the persons in the same business is to have spark-arresters on their engines, and to burn the distance stated about the mill, this testimony is of no particular importance.

A usage cannot be established by proof of the conduct of a single individual. It must be the uniform practice, and must be known, certain, reasonable, and not contrary to law, although it may be of very recent origin. Under the authorities already cited, we consider the doctrine of *res ipsa loquitur* inapplicable to the case, and we, therefore, sustain the seventh exception of the plaintiff in error.

The eighth exception, filed Oct. 16, 1900, is also sustained. The other exceptions are without merit, and were filed, apparently, without considering the effect of the amendment of the Act of 1887 by the Act of 1891.

For the reasons above stated, the judgment of the magistrate in this case is reversed.

From Charles H. Smiley, New Bloomfield, Pa.

Howell's Application.

Liquor license—Requirements of applicants—Duty of court.

In the granting of retail liquor licenses, the court has no discretion except that of determining what the law requires to be done, under the facts as ascertained by it.

The law requires the court to find two things in favor of every applicant before a license can be granted to him: (1) the necessity of the house to accommodate the public and entertain strangers and travelers; (2) that the applicant is a fit person to receive the license. The court has no more authority to grant a license to an unfit person than it has to grant it to an alien, or where the house is unnecessary to accommodate the public.

Hence, although the house is necessary for the public accommodation, a license cannot be granted to an applicant who knowingly and openly violated the law in regard to Sunday selling a very short time before the hearing, unless the court is convinced that he intends to, and will, observe the law, although the house is necessary for the public accommodation.

Liquor license—Stipulation by applicant.

The court can take no cognizance of a stipulation offered by the applicant to transfer his license at once to a fit person, if it is granted.

Liquor license—Presumptions on application.

The fact that a place has been heretofore licensed is *prima facie* evidence of its necessity until the contrary is established by proof. The fitness of the applicant will be presumed from the application and certificate of twelve reputable electors, unless it is attacked by exceptions.

Application for hotel license. Q. S. Wyoming Co., April Sess., 1901, No. 21.

W. E. & C. A. Little, E. J. Jorden and Joseph Wood Piatt, for petition and transfer.

James Wilson Piatt and D. W. Henyon, for remonstrance.

10 DIST. R.

Howell's Application.

DUNHAM, P. J., April 1, 1901.—On March 1, 1901, D. L. Howell filed an application with the clerk of the court, praying for a license for the ensuing year to keep a hotel in the borough of Factoryville, in the county of Wyoming, in a house that for many years had been kept as an inn or hotel under license from court. This application was in proper form, having some eighteen signers, and in all respects complied with the requirements of the law relating to applications for a license. On March 23, 1901, a remonstrance against granting the license, signed by some eighty-six of the electors of Factoryville borough, was filed with the clerk.

By the rules of the Court of Quarter Sessions of Wyoming county, all applications for license to keep hotels, inns or taverns in Wyoming county are to be heard by the court upon the first Monday of April in each year, which at this term came upon the first day of April.

At the time court sat to hear and dispose of the applications for license, counsel for the applicant in the above case informed the court and all concerned that the above license application would only be asked upon condition that the license when granted should immediately be transferred to C. A. Sisk, and filed with the clerk an application to transfer "a license applied for by D. L. Howell" to C. A. Sisk. This application was objected to by the attorneys for the remonstrance against the application of D. L. Howell. The objections to this transfer being as follows: "1. That the court has no power to grant the request. 2. That the applicant for the license now pending, to wit, D. L. Howell, not being entitled to a license, a license cannot be granted to him, in order to transfer the same to C. A. Sisk or any one else."

We neglected to state, in speaking of the remonstrance filed March 23, 1901, against the granting a license to D. L. Howell, the reasons assigned against its being granted, so we will now state that the remonstrance alleged, 1. That the license is not necessary for the accommodation of the public and the entertainment of strangers and travelers. 2. The sale of liquors on the premises asked to be licensed will be injurious to the welfare of the citizens of said borough of Factoryville, as well as to the good order and well being of said locality. 3. That the house asked to be licensed is dilapidated and in such sanitary condition as to be unfit for the purposes. There was also an objection to the signers, as not being a sufficient number of the reputable qualified electors of the borough. On the same date there was also filed an affidavit, made by one of the signers, setting forth as a reason for rejecting the application for a license: 1. The applicant is not an appropriate person with whom to intrust a license for the sale of liquors. 2. The applicant has violated the license laws and the confidence which the court has heretofore intrusted in him by selling liquors on Sunday; to persons visibly intoxicated; to persons of known intemperate habits; to persons whom the applicant was notified were persons commonly known as habitual drunkards; to minors, and after notice by relatives not to sell to persons mentioned, because they were persons who drank intoxicating liquors to excess.

At the hearing in court the attorneys for the application for a license and for the transfer objected to any evidence being given in the case, except upon the question of necessity of the house to entertain the public, strangers and travelers, and as to the condition of the house; objected to any evidence as to the character or fitness of the applicant, D. L. Howell, or as to the violations of the law by him, for the reason that, by the application for a transfer, the character of the original applicant is taken out of the case. In support of this position, counsel cited the case of Townsend's license at Mill City, a case said to have been decided by Judge Sittser, in which it is asserted and not denied by counsel for remonstrance, that it was ruled that where an application was filed for an old house that was found necessary to accommodate the public, and objections were filed,

Howell's Application.

alleging violations of the liquor laws by the applicant, where, at the time of the hearing, an application for a transfer was filed, no evidence would be heard as to the character or fitness of the original applicant; that the license, being for the house, would be granted to the original applicant and immediately transferred to the party asking for the transfer. We have been unable to find this decision, or the reasons given for it by the court, and while we have the highest opinion of the ability of Judge Sittser and respect for his decisions, yet we cannot, in view of the plain and explicit requirements of the Act of Assembly, accept this authority as binding upon us, and we, therefore, permitted the persons remonstrating to give evidence as to the conduct of D. L. Howell, the applicant, under his present license from this court for a hotel at Lagrange. From this evidence, it is clearly established and in no way denied by the applicant, that upon Sunday, March 21, 1901, at his hotel at Lagrange, liquors, beer, whiskey, &c., were sold openly and in considerable quantities. And while considerable has been said in regard to a trap, and being tricked by detectives into selling liquors, yet the evidence clearly shows that no artifice was resorted to to procure the liquors. It was simply called for and obtained by the two detectives, along with several other persons, upon that day. The evidence in regard to the necessity for the house shows, beyond doubt, that there is considerable travel to and through Factoryville, and considerable demand for accommodation by the public and travelers, such as meals, lodging, &c., and that some house where the public and travelers can obtain these accommodations is a necessity. That there are some three other houses in the borough where the traveling public can obtain meals and lodgings; houses well suited for the purpose, furnishing, no doubt, excellent accommodations of this character; but there is no house having a license, or licensed by the court, except this one, in Factoryville borough or vicinity. The evidence as to the condition of the house is, that it is old and somewhat out of repair; but we think the evidence in no way shows the house to be in such a sanitary condition as to render it unfit or unsafe for the purposes it is asked to be licensed for.

We have thus gone over the main features of the case and set forth the facts as they appear to and are found by the court. The next question is, what do these facts establish as to the duty of the court in the premises? Before entering upon the answer to this question, it seems proper that we should state, that as we view the statutes upon the question of granting license to sell liquors, and the decisions of the Supreme Court under them, the popular idea that the courts grant or refuse a license, when objections are filed to it, according as the judges of that court believe in the wisdom and policy of the sale of liquors; those believing it right and just to sell liquors granting such license, while those who do not personally approve of the policy of selling liquors will refuse the license, is unjust and wrong. That the feelings of the judges hearing applications for licenses as to the wisdom or injustice of the law should in no way influence the court in its action; but the court should, in the disposal of license applications, as in all other matters that come before it, honestly endeavor to learn and ascertain what the law requires, what was the intention of the legislature in enacting the law as a whole, and then carry out that intent. And all questions as to the wisdom or justness of the law rest upon the legislature, and not upon the judicial branch of the State government. It is proper to say at the outset, although it will be no news to any lawyer, that the authority of the court over the license question is entirely derived from statute. That the court has just such power as to the granting, refusing, transferring and revoking of licenses as the Acts of Assembly have conferred upon it, and no more. In fact, the courts have no discretion in the matter except that of determining what the law requires to be done, under the facts as ascertained by the court.

Howell's Application.

What, then, are the requirements of the law, and what does the law require the court to do under the foregoing found state of facts? "Licenses for the sale of . . . liquors at retail . . . shall only be granted to citizens of the United States of temperate habits and good moral character." "The court shall fix by rule or standing order a time at which applications for said licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance or counsel." Act of 1887, P. L. 108. The 4th section of the same Act requires persons intending to apply for a license to file with the clerk of the Court of Quarter Sessions a petition at least three weeks before the first day of the sessions of the court at which the same is to be heard. The 7th section of the same Act provides: "The said court shall hear petitions from the residents of the ward, borough or township, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever, in the opinion of the court, having a due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travelers, or that the applicant or applicants is or are not fit persons to whom such license shall be granted."

It is necessary for the applicant to state in his petition whether he has had a license revoked during any portion of the previous year. The law also requires the court to revoke any license granted upon proof that the party holding the license has violated any law of this Commonwealth relating to the sale of liquors.

We do not care to discuss the necessity of the house, as we feel that another branch of the case is more important, and relieves us of the necessity of absolutely determining this question. We may say that, as a matter of practice, when a house has once been licensed, the presumption is that such license is necessary at all times thereafter, and it casts the burden upon those asserting the contrary to establish it by evidence. That we are of the opinion that the mere fact of the remonstrance being signed by a much greater number of electors than the petition, or application, will not of itself shift that burden. That, inasmuch as evidence is required to show the necessity for a new house, so evidence is required to establish the fact that the necessity for such a house has ceased to exist.

The law as we interpret it requires the court to find two things in favor of every applicant for a license before a license can be granted, viz.: 1. The necessity of the house to accommodate the public and entertain strangers and travelers. 2. That the applicant is a fit person to receive the same. As to the first fact, that it has been heretofore licensed is *prima facie* evidence of its necessity until the contrary be established. As to the second, the same will be presumed, from the application and certificate of the twelve reputable electors, unless attacked by exceptions to his fitness. That the court has no more authority to grant a license to an unfit person to receive the same, found so to be by the court, than it has to grant it to an alien, or where the house is unnecessary to accommodate the public. And in ascertaining the fitness of the applicant, the court should inquire into his conduct under a former license, or, if he has not had a license, then into his character, and whether he has been engaged in the unlawful sale of liquors. And where it is shown the applicant has knowingly and willfully violated the laws in regard to the sale of liquors, such as would require the court to revoke a license already granted, this is such evidence as, in our opinion of the law, requires the court to find the applicant to be an unfit person to receive a license, and in that case the law steps in and says the court shall refuse the license. We are aware of and have examined the

Howell's Application.

decisions of the court in the cases of Heilig's License, 2 District Reps. 342; Schuylkill County Cases, 17 Pa. C. C. Reps. 327, and Adams County Licenses, 5 Pa. C. C. Reps. 32; and while we have the utmost respect for the courts making these decisions, and for the judges rendering them, they have failed to convince us that, in order to carry out the *intention* of the law relative to the granting of licenses, we should not only disregard but absolutely overrule and go against the plain and unambiguous letter of the statute and grant a license to a party that the law positively and plainly says the court shall refuse the license to.

In the present case, we are clearly of the opinion that the evidence shows that D. L. Howell, the applicant, knowingly and openly violated the law in regard to selling liquor on Sunday a very short time before the hearing on his application. That this violation was so open and flagrant that, under the law applicable to the case, it compels us to find him an unfit person to be entrusted with a similar license until we are convinced he intends and will observe the law, and that at this time he is not a proper person to receive a license.

We are asked by the applicant, through his counsel, and by the counsel for the applicant for a transfer of the license, notwithstanding this fact, to grant the license to D. L. Howell, with the understanding and on the condition that it be at once transferred to C. A. Sisk, and that Howell can have no opportunity to act under the license. To do this, it seems to us, requires us to go outside of our jurisdiction, and instead of administering the law as made, would require us to legislate or make a law to fit the occasion, and say that, instead of refusing the license in all cases where the applicant is an unfit person to receive it, as the law now requires us to do, that we will refuse it in all cases where the applicant is an unfit person, unless we think the house is necessary (which we must find in all cases before we can grant any license), and no one steps in and asks us to let him take the license after it is found the original applicant is likely to be refused the license. While the owner of the property that has been licensed has rights the court ought to respect, and while the public have rights that courts should look after, these rights are not such as ought to induce the court, sworn to administer and respect the law, to deliberately disregard and set at naught the plain requirements of the law, and attempt to make a law applicable to the case and assume powers never given it. As was so well said by that very distinguished and able jurist, Justice Agnew, in *Schlaudecker v. Marshall*, 72 Pa. 200, on pages 206 and 207, "Whether any or all licenses should be granted is a legislative, not a judicial, question. Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it. . . . It is the duty of the court, therefore, to hear and determine each case on its evidence and facts; to ascertain the fitness of the applicant, the necessity of his house for the public accommodation as a hotel or as an eating-house (and this involves the number of each in the particular locality), and to see that the applicant has fully complied with the law, before his license can be granted." We can readily understand how it is possible that great hardships and probably loss to owners of property, that has been fitted for hotel purposes and used as such for some years, may result from an owner getting as a tenant a person unfit to receive a license, and the owner does not learn the fact until too late to make an application in his own or in a suitable person's name; but it is a hardship for which the court is in no way responsible. Parties desiring redress must look to the law-making power for relief. We know of no other way, unless the owner, out of caution, has two applications filed for the same house, so he may fall back upon his second in case the first should be shown to be unfit. We cannot, in order to relieve parties from a hardship, grant licenses where the Act of Assembly says we must refuse them; but the legislature can, by appropriate legislation, provide for cases of this kind if, in its wisdom, it believes that justice

Howell's Application.

requires that it should; and when it does, we will cheerfully and faithfully endeavor to carry out the laws it may enact.

It follows from what has been said that this license must be refused.

Now, April 1, 1901, license refused.

NOTE.—As sustaining the right of the court to impose conditions and to prescribe rules for the conduct of the licensee's business, see Indiana County Licenses, 6 District Reps. 388; Gerstlauner's License, 5 District Reps. 97; *contra*, Mercersburg Licenses, 5 District Reps. 171. In Donoghue's License, 5 Pa. Superior Ct. 1, it was held that the court had no power to require a promise by the licensee not to apply for a license at the end of the current year.

As sustaining the general position that licenses are granted primarily to the place and not to the person, see Russell's License, 1 District Rep. 267; Heilig's License, 2 District Reps. 343, and Burns's License, 3 District Reps. 429.

From C. O. Dersheimer, Tunkhannock, Pa.

Conway's Estate.

Personal property—Transfer of title—Delivery.

All that is required to pass the title to personal property is such a transfer of the possession as the thing, in its nature and according to the circumstances, is susceptible of.

Where the intention to make a delivery is clear, and the assignment to carry out that intention has been properly executed, the mere fact that the actual delivery is frustrated, against the will of both parties, by an unsurmountable obstacle will not invalidate the gift.

Decedents' estates—Charities—Act of April 26, 1855—Witness—Commissions.

A gift for a religious use, whether made by transfer or by will, within thirty days of the donor's death, is void under the Act of April 26, 1855, § 11, P. L. 323.

If an absolute estate is devised or transferred, but upon a secret trust, assented to by the devisee before the death of the testator, a court of equity will fasten a trust upon him upon the ground of fraud, and consequently the devise or gift will be void if the trust is in favor of a charity. But if the devisee has no part in the devise, and no knowledge of it, until after the death of the testator, there is no ground upon which equity can fasten such trust upon him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator.

C., on the day before his death, gave absolutely to a friend, H., certain bonds, with the mutual understanding that H. should transfer them to a church. He gave to H. a written order to a bank having possession of them to deliver them to H. H. made demand on the bank, but was unable to obtain actual possession of the bonds, by reason of their being in a safe locked with a time-lock, until after C.'s death, which occurred during the night.

Held, that there was a sufficient delivery of the bonds to transfer the title to H.

Held, further, that said gift was invalidated by the Act of April 26, 1855, § 11, P. L. 323.

Held, further, that H. was not a competent witness to sustain the gift, under section 6, clause (e), of the Act of May 23, 1837, P. L. 153, as his claim was adverse to the owner, the decedent, even if he meant to transfer the bonds to the church.

Held, further, that the executor should not be deprived of commissions, or charged with the costs of audit, because he failed to charge himself with said bonds, his course in allowing the question of their ownership to be decided on exceptions to his account being probably the least expensive method of deciding the question.

Decedents' estates—Tombstone—Allowance.

Where a decedent, an unmarried clergyman, leaves an estate amounting to almost \$25,000, which goes to collateral heirs, an allowance by the auditor of \$700 for a tombstone is not extravagant, and will be sustained.

Exceptions to report of auditor. O. C. Lancaster Co.

Coyle & Keller and A. O. Furst, for heirs' and legatees' exceptions.

W. U. Hensel, for accountant's exceptions.

LANDIS, J., Jan. 19, 1901.—In this case exceptions have been filed to the report of the auditor on behalf of both the accountant and the heirs. A reference to the facts as found is, therefore, necessary for a full understanding of the

Conway's Estate.

questions in controversy. David Conway died May 9, 1899. A few days prior thereto, he met with a serious accident, and, as a private patient of Dr. T. C. Detweiler, was brought to the General Hospital, in this city, for treatment. About seven o'clock in the evening of May 9, he, himself, perceived that he was dying, and he thereupon requested his nurse to get paper and pencil, and, at his dictation, she wrote his will. By it, he left \$5000 to the Presbyterian Church of Mount Joy, the church of which he had, for some years, been pastor. This paper was subsequently signed by him in the presence of Dr. Detweiler, Herbert W. Hartman and Dorothy K. Shriver, the head nurse. It seems, however, that Dr. Detweiler was somewhat conversant with the law. Immediately after Mr. Conway had signed his will, according to his testimony, he stated to Mr. Hartman that "the will was not worth the paper it was written on, as to make a bequest to a public institution good, it must be executed thirty days before death, whereas Mr. Conway would likely not live thirty minutes." He, therefore, after some consultation between Mr. Hartman and himself, informed Mr. Conway of this fact. Mr. Conway inquired how it could be fixed, and the doctor then asked him whether he had any ready money in bank, to which Conway answered that he did not have that amount, but that he had some bonds. Dr. Detweiler then informed him that the only way possible that he could give anything to the church would be to make a gift absolute to Herbert W. Hartman, or to anybody, and then let them carry out his wishes after he was gone. Mr. Conway had \$8700 of bonds of the Electric-Peoples' Railway. These were in his box in the Union National Bank of Mount Joy. At his dictation Dr. Detweiler wrote the following order, directed to Isaac H. Longenecker, the cashier: "Dear sir: Deliver to Herbert W. Hartman the envelope in your possession containing \$8700 Electric-Peoples' Trust 4 per cent. bonds of Philadelphia." Mr. Hartman then went to the telephone, telephoned to Mount Joy, and called his father-in-law, T. M. Brenneman, and Mr. Longenecker to the 'phone. He requested Mr. Brenneman, for him, to demand the bonds and bring them at once to Lancaster. Mr. Brenneman did make the demand, but the time-lock of the bank was set, and Mr. Longenecker could not open the safe until the next morning, and before that time Mr. Conway was dead. After the funeral, Mr. Hartman presented his order and obtained the bonds, and has had them in his possession ever since. These are substantially the undisputed facts proven in the case, not narrated with the fullness and accuracy of expression with which the auditor has detailed them, but sufficiently, I think, for a clear understanding of the main issue between the parties.

The auditor, upon these facts, has decided two propositions: First, that there was a sufficient delivery of the bonds to transfer the title to Mr. Hartman; and, second, that the gift was invalid, as in contravention of the provisions of the Act of April 26, 1855, P. L. 332. We concur with him in both these findings. He has, by ample authority, sustained his conclusion that, in the transfer of personal property, all that is required to pass the title is that such a transfer of the possession shall be given as the thing, in its nature and according to the circumstances, is susceptible of. The intention in this case was clear, the assignment to carry out that intention was fully and properly executed, and that the actual delivery was frustrated, against the will of both parties, by reason of the inability of the cashier to open the safe, because of the time-lock having been set, should not, if all other things were sufficient, invalidate the gift. But this question, by reason of the decision upon the second proposition, becomes wholly of unimportance and needs no further reference.

The Act of April 26, 1855, is broad in its provision and truly beneficent in its purpose. It arose out of antecedent evils in the laws of England, which

demanding vigorous correction, and to which the Statutes of Mortmain were applied as a remedy. Says Lord Hardwicke: "In times of popery, the clergy got nearly half the real property of the kingdom into their hands, and he wondered they had not got the whole:" 4 Kent's Commentaries, 597. Our Act is but a continuation of the English law as it had existed for hundreds of years. It is wholesome in its effects, and "is designed to protect the dying from the craft of priest and layman alike, when they come, not to minister comfort and spiritual consolation, but to gather spoil for some favorite charity:" *Reimensnyder v. Gans*, 110 Pa. 17. It should not be frittered away by loose construction. It provides that "no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible and at the same time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

It is of no importance whether a gift for a religious use is made by transfer or by will. Each is equally offensive to the statute. Nor is the good faith of any or all of the parties of any moment. If, therefore, Mr. Conway had made a bequest in his will to Mr. Hartman, it would have been at least equally as efficacious as the claim now set up. Bequests in wills for such purposes have, in several instances, been sustained by the Supreme Court, and *Schultz's Appeal*, 80 Pa. 398, and *McGlade's Appeal*, 99 Pa. 338, are cited as authority for this case. Upon careful examination, I think the cases have been here wrongly interpreted and are not applicable to the present state of facts. If Mr. Hartman had not been present at Mr. Conway's bedside, and Mr. Conway had, either by gift or will, given him absolutely these \$8700 of bonds, without any stipulation coupled therewith, then the gift would be sustainable, even though Mr. Conway had expressed to those around his deathbed the purpose he had in view in making the bequest or gift, or even if Mr. Hartman, after learning of them, had carried out the dead man's desires. In such case, the church would have had no claim, legal or equitable, to enforce payment by Hartman, nor would he have been guilty of a legal fraud against it or the testator if he had retained the bonds. He could have used them for his own benefit if he wished so to do. They would have been absolutely his own, and the testator's declaration of intention would not have bound him. This is the doctrine in *Schultz's Appeal*, *supra*. But that case also establishes two propositions: "1. That if an absolute estate is devised, but, upon a secret trust, assented to by the devisee, either expressly or impliedly, by knowledge and silence, before the death of the testator, a court of equity will fasten a trust upon him on the ground of fraud, and consequently the Statute of Mortmain will avoid the devise if the trust is in favor of a charity; but (2) if the devisee have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust upon him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator:" See *Hodnett's Estate*, 154 Pa. 485. In *McGlade's Estate*, 99 Pa. 338, the gift was sustained; but there it was fully executed, not in the trustee, but in the beneficiary during the life of the giver; and even though this is not a sufficiently distinguishing element, that case was practically overruled in the more recent cases of *Reimensnyder v. Gans*, 110 Pa. 17, and *Luebke's Estate*, 179 Pa. 447.

This, then, being the law of the State, there could be but one conclusion arrived at by the auditor. Mr. Hartman was present at Conway's bedside. In his presence, the sick man was informed of the invalidity of the bequest to the

Conway's Estate.

church, as contained in the will, if he did not live thirty days, and of that, at the time, there was no probability. The transfer was then made with Mr. Hartman's knowledge, for the express purpose of conveying the title of the bonds to the church. That being so, the gift must fail.

In view of this conclusion, and while not of consequence in arriving at the determination of the controversy, I cannot agree with the auditor that Herbert W. Hartman was a competent witness. Holding, as the auditor properly did, that the bonds were placed in Mr. Hartman's hands in trust for the church, and therefore void, Hartman could not, except upon the theory of an absolute executed gift in himself, sustain the transfer. It is true that, on his *voir dire*, he said he had no interest in them "except an implied trust;" but in his examination, among other questions, he was asked: "Do you swear he didn't say that he gave them to you for this church?" to which he answered: "I do." There seems to be some apparent conflict as to the exact position Mr. Hartman actually occupied, and that being so, the law will presume that the claim was made for himself. But if he claimed in his own behalf, he was clearly within section 5, clause (e), of the Act of May 23, 1887, P. L. 158. That he meant to carry out the trust reposed in him did not change the capacity in which he made the claim. The case involved a claim to the property of the owner by a title adverse to the owner, in a proceeding, in effect, brought by the legal representatives of the owner, Hartman being the surviving party to the contract between him and Conway. It, therefore, is an exact instance in which the excluding words of the Act of 1887 are distinctly applicable: *Flanagan v. Nash*, 185 Pa. 41.

The exceptions filed on behalf of the heirs ask that the accountant should not only not be allowed commissions, but shall also be charged with the costs of the audit. I know of no good reason why such a decision should be made. I am not unmindful of the law that where a trustee has been guilty of misconduct or fraud, whereby the estate has suffered, he should not only be deprived of compensation, but should also suffer for his unfaithfulness by loss of commissions and by having the costs of the audit imposed upon him. But this is no such case. So far as we can see, the executor has performed his duties intelligently and faithfully, and has been guilty of no misfeasance. When he entered upon his duties as executor, he found the assignment of the bonds to Mr. Hartman had been executed by Mr. Conway. The question as to their legal ownership had to be determined by this court. That question could be raised in several ways, namely, either by bill in equity against Mr. Hartman for the bonds in specie or by suit for their value, in either of which cases the heirs would likely have intervened, or by waiting, and after the executor's account was filed, permit the ownership to be passed upon by an auditor. The latter course was pursued, Mr. Hartman, in the meantime, holding the bonds and interest. I do not think that, by this proceeding, the estate was the sufferer. In fact, it is likely that it was rather the gainer. Lawyers' fees and other expenses incidental to a trial would have probably consumed more of the estate than was taken by the costs of the audit. The third, fifth and sixth exceptions are therefore overruled.

I am not convinced that there is any merit in the fourth exception. That a tombstone may be erected by the executor out of the moneys of the estate will not now be questioned. That an extravagant expenditure in its erection will be controlled by the court is equally well settled. But, under the circumstances surrounding this case, I do not deem the amount allowed by the auditor as extravagant. The testator was a single man. His whole estate, amounting to almost \$25,000, goes to collateral heirs. Why should not his grave, lying far removed from his kindred, be marked in a substantial way and in a manner

10 DIST. R.

Conway's Estate.

corresponding with the position occupied by him in life? The fourth exception is therefore also overruled.

The conclusions arrived at by the auditor being, in my judgment, in accordance with the law, all of the exceptions are now overruled and the report is absolutely confirmed.

Report confirmed absolutely.

From George Ross Ebleman, Lancaster, Pa.

Notes of Treasury Department Decisions.

From July 25 to September 3, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Additional Instructions Relative to Articles of Merchandise of Porto Rican Manufacture Subject to Internal Revenue Tax.

No. 407, August 22, 1901. 4 Treasury Decisions, No. 35, page 15.

Bay Rum.

Bay rum manufactured in Porto Rico, when brought into the United States, is liable to Internal Revenue tax as distilled spirits. No. 404, August 15, 1901. 4 Treasury Decisions, No. 34, page 17.

Bonds.

Stamp tax. The true construction of the language of paragraph 7 of Schedule A, Act of June 13, 1898, as amended, relating to bonds, considered, and Internal Revenue rulings 371, 377, 378 and 384 reaffirmed. No. 394, August 2, 1901. 4 Treasury Decisions, No. 32, page 9.

Brewers' Sales of Bottled Beer.

Special tax. No. 391, July 30, 1901. 4 Treasury Decisions, No. 32, page 7.

Circus.

Special tax. No. 405, August 20, 1901. 4 Treasury Decisions, No. 34, page 19.

Collection of Internal Revenue Tax upon Articles of Merchandise coming from Porto Rico.

No. 387, July 28, 1901. 4 Treasury Decisions, No. 31, page 19.

Legacy Tax.

Stock in a corporation representing real estate taxable as personal estate. No. 386, July 25, 1901. 4 Treasury Decisions, No. 31, page 19.

Accumulations, income and additions accrued and received subsequent to the death of testator are not taxable; also, depreciations and losses arising subsequent to death of testator are not to be considered in ascertaining the value of the estate. Former ruling inconsistent herewith revoked. No. 388, July 27, 1901. 4 Treasury Decisions, No. 31, page 25.

Legacy tax is a lien upon the entire property of the deceased, real and personal. No. 389, July 29, 1901. 4 Treasury Decisions, No. 31, page 26.

DISTRICT REPORTS.

Notes of Treasury Department Decisions.

The whole amount of the beneficial interest of a legatee is to be considered in determining the rate of tax. No. 392, August 1, 1901. 4 Treasury Decisions, No. 32, page 7.

Payment of tax to be made within one year after testator's death and prior to distribution of the estate. The law is compulsory that every executor, etc., shall give notice in writing to collector, etc., within thirty days after he shall have taken charge of such trust. No. 398, August 7, 1901. 4 Treasury Decisions, No. 33, page 34.

Vested life-interest of a legatee, if the clear value of such interest, either alone or taken in connection with other beneficial interests, exceeds the sum of \$10,000, is taxable, although no benefit from such life-interest is received. No. 406, August 20, 1901. 4 Treasury Decisions, No. 34, page 20.

Fluctuation of stocks after appraisement should not be considered in ascertaining the value of an estate for the purpose of assessing legacy tax. When a substantial sum is realized on a note or any personal property appraised as of no value, it is evident such appraisement was erroneous, and the amount actually realized should govern in assessing the legacy tax. No. 408, August 26, 1901. 4 Treasury Decisions, No. 35, page 17.

In case an estate is to be divided by the heirs without administration, legacy return and payment of tax is required. No. 409, September 3, 1901. 4 Treasury Decisions, No. 36, page 7.

Memoranda of Sales of Grain on Board of Trade.

Stamp tax. No. 393, August 2, 1901. 4 Treasury Decisions, No. 32, page 8.

Puts, Calls and Spreads.

Special tax. No. 400, August 8, 1901. 4 Treasury Decisions, No. 33, page 35.

Redemption of Imprinted Stamps.

No. 403, August 13, 1901. 4 Treasury Decisions, No. 33, page 38.

Sale of Tobacco Scraps, Cuttings and Clippings.

No. 395, August 5, 1901. 4 Treasury Decisions, No. 32, page 10.

Stamp Tax on Bonds used in Internal Revenue Service.

No. 396, August 6, 1901. 4 Treasury Decisions, No. 32, page 11.

Surplus Proceeds from Distraint Sales.

In cases where such proceeds cannot be returned to the person entitled to receive the same, they must be deposited to the credit of the Treasurer of the United States. No. 390, July 29, 1901. 4 Treasury Decisions, No. 31, page 26.

Tax on Capital of Banks.

No. 401, August 8, 1901. 4 Treasury Decisions, No. 33, page 36.

No. 402, August 8, 1901. 4 Treasury Decisions, No. 33, page 37.

Tax-paid Spirits in Hands of Wholesale Liquor Dealers and Rectifiers, October 1, 1901.

No. 397, August 7, 1901. 4 Treasury Decisions, No. 33, page 33.

Transfer of Leases.

Stamp tax. Under the Act of June 13, 1898, a transfer of a portion of a lease required the same stamp as the transfer of a whole lease. No. 399, August 7, 1901. 4 Treasury Decisions, No. 33, page 34.

10 Dist. R.

Speese v. Schuylkill River East Side Railroad Company et al.*Eminent domain—Railroads—Roadbed.*

Where a railroad company condemns land for railroad purposes and the damages for such taking have been assessed and paid, the railroad acquires a complete title in the nature of a base or conditional fee, terminable on the cesser of the use for railroad purposes, in the surface of the land, and so much of the land beneath the surface as may be necessary for the support of the surface, and, coupled with that interest, it acquires the right to exclusive possession of the land so taken, and to deal therewith within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee.

The construction of an overhead crossing by a property-owner whose land abuts on both sides of a railroad, whose roadbed was taken by condemnation proceedings in the exercise of the right of eminent domain, is entirely inconsistent with that exclusive control over its road which, from the nature of things, a railroad company must possess, and is prohibited by the Act of April 16, 1838, § 11, P. L. 464, unless the permission of the managers of the railroad company is first obtained as required by the Act.

Overhead crossing—Agreement with railroad for—Construction.

On July 9, 1900, a railroad company, by instrument under seal, granted to a property-owner whose land abutted on both sides of its right of way "the right to construct, maintain and use an iron bridge over the right of way" at a point shown on a plat attached to the agreement, "in consideration of the release of the second party (the property-owner) of the right to have and maintain a grade crossing over" its right of way at any point upon his land. The agreement further provided that the property-owner, in consideration of the right to erect the bridge, should cease to use the grade crossing within thirty days from date of agreement, and further provided, "and (the property-owner) doth hereby release and surrender unto the first parties all right which he or his heirs and assigns may have as owner or owners of the land hereinafter described to cross at grade the right of way of the Schuylkill River East Side Railroad, and doth agree for himself, his heirs and assigns, that the Schuylkill River East Side Railroad Company shall hold the right of way over the land hereinafter described, free from any right to cross at grade which the second party or any one claiming land under him may have." The agreement further provided that the property-owner "shall have the right, at his, her or their own cost and expense, to take down and remove the said overhead bridge, and to resume, restore, use and enjoy the grade crossing, with all its rights, incidents, privileges and appurtenances as they exist at the date of the execution of this contract, upon giving sixty days' notice to the parties of the first part of an intention so to remove said overhead bridge and to restore said grade crossing, in the same manner and with the same force and effect as if this agreement had never been made." The agreement also provided as follows: "It is a condition of the right to maintain said overhead bridge that the owner of the said land surrender the right to said grade crossing, and if any person who may hereafter become the owner of said land establishes or requires the first parties (railroad) to establish a grade crossing, for them the right to maintain the overhead bridge shall cease" and the railroad companies might require the owner to remove the bridge, or, in case of his failure to do so after thirty days' notice, they might remove it at the cost of the owner. *Held*, that, under the agreement, the property-owner could not maintain an overhead crossing and a grade crossing at the same time.

On Jan. 4, 1901, the property-owner notified the president of the railroad company in writing as follows: "Inasmuch as we have been unable to arrive at a definite understanding relative to my right to continue to use the grade crossing at Twenty-seventh and South streets, Philadelphia, in conjunction with the overhead bridge which was to have been erected, I beg to advise you that, after the expiration of sixty days from the date hereof, it is my intention to terminate the agreement entered into between your companies and myself on July 9, 1900, and thereafter to use the grade crossing and each and every of the incidents of ownership of my property at Twenty-seventh and South streets, with the same force and effect as if that agreement had never been entered into." *Held*, that this letter was not the sixty days' notice stipulated for in the agreement and that the agreement of July 9, 1900, remained in force.

Equity practice—Injunction—Railroads.

An injunction is not of right. It will not be issued when, upon a broad consideration of the situation of all the parties in interest, good conscience does not require it. Hence, *held* that, under the circumstances of the case at bar, a court of equity would not enjoin the railroad company from forcibly preventing the property-owner from constructing the overhead crossing.

Bill for injunction. C. P. No. 3, Phila. Co., June T., 1899, No. 1039, in Equity.

Speese v. Schuylkill River East Side Railroad Company et al.

Henry N. Wessel and John G. Johnson, for plaintiff.

W. B. Linn, for defendants.

MCCARTHY, J., Sept. 12, 1901.—This cause was tried before me, sitting as chancellor, on June 11, 1901. The parties, both plaintiff and defendants, were represented by counsel. Evidence was given in open court on behalf both of the plaintiff and of the defendant companies. After hearing the evidence, the case was fully argued by counsel. Both parties presented requests for findings of fact and of law, which are hereto attached, in order that the same shall be filed by the prothonotary as part of the record in this case.

Abstract of pleadings.

The bill filed in this cause on March 14, 1901, sets forth that one Ward was the owner in fee simple of a certain lot of ground in the city of Philadelphia, and that during his ownership the Schuylkill River East Side Railroad Company, a corporation duly organized under the Act of April 4, 1868, for the purpose of constructing, maintaining and operating a railroad from a point near Twentieth street and Pennsylvania avenue to a point near the intersection of Fiftieth street and Bartram avenue in the said city, by certain proceedings in the Court of Common Pleas No. 1, condemned for the purposes of its railroad a certain strip of ground of the width of 60 feet, crossing the western portion of the premises of the said Ward; that on March 28, 1896, Ward died seized of the said lot of ground, and afterward, by deed dated June 2, 1899, the plaintiff became the owner of the premises, under and subject to the right of way of the said railroad company across the same; that under an agreement with the Baltimore and Ohio Railroad Company, that company or the first-named company, or both, are operating a railroad over the right of way; that the plaintiff purchased the tract to use it for the storage and sale of coal, wood and other materials, and, in order to use both pieces of the land lying on either side of the right of way, and to avoid the danger of continually crossing the railroad at grade, entered into an agreement with certain contractors for the construction of an overhead bridge to carry materials above grade, over the railroad, from one part of the land to the other; that a plan of the proposed work has been submitted to the defendants; that the construction of it is under the supervision of a competent engineer: that the proposed work is not, except in its overhead portion, upon or over any part of the right of way; that it is to be of steel, 22 feet from the top of the rails to the lower chord of the bridge, and will not interfere with the use of the railroad by the defendants; that the work will be constructed in the best manner at an expenditure of \$5000; that the plaintiff, on July 9, 1900, entered into an agreement with the defendant companies to abandon the grade crossing and use the overhead crossing, with the right, upon sixty days' notice, to annul the agreement; that, finding total abandonment of the grade crossing impracticable, plaintiff, under the provisions of the said agreement, gave notice to the railroad companies of his intention to annul it; that the companies threaten to prevent plaintiff from erecting the overhead crossing, and have already blocked and prevented its erection, employing gangs of men to tear down the scaffolding; that the plaintiff has offered to enter into an agreement to construct the overhead crossing in such manner that the use by the defendants of their tracks will not be impaired; that defendants have declined to permit the said overhead construction, depriving the plaintiff of the use of a large part of his premises, and especially of his wharf, and inflicting damage which cannot be adequately redressed at law. The prayers are for injunctions: (1) to restrain the defendants from interfering with the construction of the said overhead bridge; (2) to restrain them from interfering with the

10 DIST. R.

Speese v. Schuylkill River East Side Railroad Company et al.

operation and use of the bridge when constructed, and for further relief. The defendants, by their answer, among other things, admit the incorporation of the East Side Railroad Company, the condemnation of the right of way over Ward's land, and the operation by defendant companies of the railroad upon and over it; assert lack of knowledge as to the purposes for which plaintiff purchased the ground, or as to his contract for the construction of an overhead bridge; aver that plaintiff's purchase was expressly subject to the right of way of the East Side Railroad Company across the said premises; that they disapprove of the plans of the proposed work submitted to them; that they have no knowledge whether the construction will be under a competent engineer or not; that the said work, if constructed as alleged in the bill, will remain in the space above the tracks of the railroad and interfere with the continued use of their right of way and the convenient and safe operation of the railroad; that the plaintiff intends to enter upon the right of way not only to make the overhead construction, but to repair the same from time to time, preventing the exercise of their franchises, threatening the lives of passengers in their trains and injuring and threatening injury to their property; that the construction will restrict the operation of signaling devices; that the plans submitted are defective, setting forth in detail the deficiencies therein, and that the bulkhead upon the west side is insufficient and inadequate to support the structure and the weight upon it when in use; they admit the execution of the agreement of July 9, 1900, but deny plaintiff's interpretation of it, and pray the court to construe it; they aver lack of knowledge as to the total abandonment of the grade crossing being found impracticable, and if the plaintiff's averment as to notice of his intention to annul the agreement is a proposal to annul it, they decline the proposal; they admit that in the absence of any decree of court they will, in the exercise of their just and legal rights, prevent the plaintiff from trespassing on their right of way; they aver that they declined to enter into the agreement offered by the plaintiff as to construction of the overhead crossing, because compliance would have resulted in great danger to the operation of the railroad, and that they have no knowledge as to the plaintiff being deprived of the use of a large part of the premises purchased by him, nor as to the expenditures he has made; they pray that they may avail themselves of all matters of defence as if specially demurred or pleaded, and to be dismissed with costs.

Findings of fact.

The following findings have been agreed upon by the counsel of record representing both parties, plaintiff and defendants:

1. Frank K. Ward, previous to and at the time of the institution of the condemnation proceedings hereinafter set forth, was the owner in fee simple of all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate in the Seventh Ward of the city of Philadelphia, described according to a survey thereof made by W. C. Cramner, surveyor and regulator of the Third District, on April 18, 1899, as follows, to wit: Beginning at the point of intersection on the west line of Twenty-seventh (formerly Chippewa) street, with the north line of South street (as widened by the addition thereto of 5 feet); thence extending northward along the west side of said Twenty-seventh street 117 feet to a point; thence westwardly on a line parallel with the north line of South street as continued westwardly from Twenty-seventh street 570 feet 2 inches, more or less, to a point in the Port Warden's line in the easterly bank of the Schuylkill river; thence southwardly along said Port Warden's line 2 feet 1½ inches to a point at the distance of 40 feet northwardly from the centre line of South street bridge and in the northern boundary line of the land taken by the city of Philadelphia for said bridge; thence along

Speese v. Schuylkill River East Side Railroad Company et al.

said boundary line and at the distance of 40 feet northwardly from and parallel with the centre line of said bridge the three following courses and distances, to wit: Southeastwardly 156 feet $1\frac{1}{2}$ inches to a point; thence further southeastwardly on a curve with a radius of 120 feet, the distance of 69 feet $11\frac{1}{2}$ inches to a point, and thence eastwardly 11 feet 8 inches to a point; thence southwardly on a line at right angles to the last-mentioned line 9 feet 6 inches to a point on the north line of South street widened as aforesaid, and thence eastwardly along the north line of said South street 362 feet 9 inches to the place of beginning. That the said Frank K. Ward, being seized thereof, departed this life on or about March 28, 1896, and by deed dated June 2, 1899, recorded at Philadelphia in Deed Book J. V., No. 71, page 83, &c., complainant became the owner of all of the estate of the said Frank K. Ward in and to the premises hereinbefore set forth, under and subject to the right of way of the Schuylkill River East Side Railroad Company across the western portion of the said premises, as the same was at that time constructed to the width of 60 feet.

2. That the Schuylkill River East Side Railroad Company is a corporation duly organized under the provisions of an Act of Assembly of the Commonwealth of Pennsylvania, approved April 4, 1868, entitled "An Act to authorize the formation and regulation of railroad corporations," for the purpose of constructing, maintaining and operating a railroad from a point near the intersection of Twentieth street and Pennsylvania avenue, in the Fifteenth Ward of the city of Philadelphia, State of Pennsylvania, to a point in the Twenty-seventh Ward of the city of Philadelphia, near the intersection of Fiftieth street and Bartram avenue, all in the city and county of Philadelphia.

3. By certain proceedings in the Court of Common Pleas No. 1 of Philadelphia County, of September Term, 1883, No. 142, the said Schuylkill River East Side Railroad Company, one of the defendants, by virtue of its powers of eminent domain, condemned for the purposes of its railway and roadbed a certain piece or part of the property hereinbefore described, the said part so condemned being as follows: All that certain lot or strip of ground, situate in the Seventh Ward of the city of Philadelphia, beginning at a point marked "D" on the plan annexed to the report of the jury in said proceedings on the north building line of South street extended north 74 degrees 22 minutes 15 seconds, west 523 and 42-100ths feet from the west building line of Chippewa street; thence north 50 degrees 56 minutes, east 73 and 69-100ths feet; thence on the same line north 50 degrees 56 minutes, east 75 and 80-100ths feet to a point marked "C" on said plan on the dividing line between the properties of said Frank K. Ward and Henry Bumm; thence north 74 degrees 22 minutes 15 seconds, west 73 and 52-100ths feet along said dividing line to a point marked "B" on said plan; thence south 50 degrees 56 minutes, west 35 and 21-100ths feet; thence on the same line south 50 degrees 56 minutes, west 114 and 20-100ths feet to a point marked "A" on said plan on the north line of South street extended; thence along said north line of South street extended south 74 degrees 22 minutes 15 seconds, east 76 and 52-100ths feet to place of beginning.

4. The said Schuylkill River East Side Railroad Company has leased to or entered into an agreement with the Baltimore and Ohio Railroad Company for the operation of the said railroad, and the said Baltimore and Ohio Railroad Company, or the Schuylkill River East Side Railroad Company, or both, are operating a railroad upon and over the strip of ground last hereinbefore described.

5. The Schuylkill River East Side Railroad Company paid the amount awarded by the jury of view to the owner of the property (complainant's predecessor in title) at the time of the condemnation of the right of way which divided the property into two parts.

10 DIST. R.

Speese v. Schuylkill River East Side Railroad Company et al.

The following facts are fully established from the evidence :

6. Prior to the purchase by the plaintiff of the Ward lot there was a crossing at grade over the railroad between the two portions of the lot lying to the east and west of the right of way. The plaintiff uses the property for the handling and storage of coal and wood, and in the prosecution of that business he has made use of and continues to use the crossing at grade over the railroad, above referred to, between the two parts of his lot of ground. He desires to acquire a second crossing over the railroad by means of a structure elevated in the air, the lowest portion of which is designed to be at an elevation of at least 22 feet in the clear from the tops of the rails forming the tracks of the railroad. This overhead structure is intended to cross the railroad immediately over the crossing at grade. It is the desire and intention of the plaintiff to make use of both crossings. Plaintiff has caused plans to be prepared for the construction of this desired overhead crossing, and has entered into a contract with a firm of bridge-builders to erect the structure, and the approaches to the desired overhead crossing on either side have been erected by the plaintiff's contractors; but the span required to bridge over the gap between the approaches and effect the overhead crossing has not been constructed.

The following finding of fact has been mutually agreed upon by the counsel representing both parties, namely :

7. That the said Schuylkill River East Side Railroad Company and the Baltimore and Ohio Railroad Company forcibly prevented complainant from erecting the said span, and have blocked and prevented the erection thereof, employing gangs of men to tear down the scaffolding or derricks necessarily used in the erection of the said bridge.

The following facts are fully established by the evidence, viz. :

8. On July 9, 1900, the defendant companies and the plaintiff executed and delivered a certain agreement in writing, a true copy of which is attached to the bill as exhibit A. By this agreement the railroad companies grant unto the plaintiff and his legal representatives "the right to construct, maintain and use an iron bridge over the right of way of the Schuylkill River East Side Railroad," at a point as shown upon a plat attached to the agreement, "in consideration of the release of the second party of the right to have and maintain a grade crossing over the Schuylkill River East Side Railroad at any point" upon the plaintiff's land. The terms and conditions of the grant are that the bridge shall be constructed upon plans to be submitted to and approved by the chief engineer of the Baltimore and Ohio Railroad Company, who shall have the right to inspect the construction, and require such additional details as he may think necessary; that the plaintiff shall keep the bridge and the wharf and bulkhead upon which its foundation is placed in repair; shall make such repairs as the said chief engineer shall require, and, failing to make repairs, the same may be made by the railroad companies at the cost of the plaintiff, or the bridge may be removed by them at his expense; that the plaintiff shall indemnify the railroad companies against all loss and damage arising from the construction, maintenance, operation or removal of the bridge. The plaintiff covenants that in consideration of the grant of the right to erect the bridge he will cease to use the present grade crossing within thirty days from the date of the agreement, "and doth hereby release and surrender unto the first parties all right which he or his heirs and assigns may have as owner or owners of the land hereinafter described to cross at grade the right of way of the Schuylkill River East Side Railroad, and doth agree for himself, his heirs and assigns, that the Schuylkill River East Side Railroad Company shall hold its right of way over the land hereinafter described, free from any right to cross at grade which the second party or any one claiming land under him may have." The agree-

Speese v. Schuylkill River East Side Railroad Company et al.

ment also provides that the plaintiff or his legal representatives "shall have the right, at his, her or their own cost and expense, to take down and remove the said overhead bridge, and to resume, restore, use and enjoy the grade crossing, with all its rights, incidents, privileges and appurtenances as they exist at the date of the execution of this contract, upon giving sixty days' notice to the parties of the first part of an intention so to remove said overhead bridge and to restore said grade crossing, in the same manner and with the same force and effect as if this agreement had never been made." The agreement also further stipulates: "It is a condition of the right to maintain said overhead bridge that the owner of the said land surrender the right to said grade crossing, and if any person who may hereafter become the owner of said land establishes or requires the first parties to establish a grade crossing, for them the right to maintain the overhead bridge shall cease," and the railroad companies may require the owner to remove the bridge, or, in case of his failure to do so after thirty days' notice, they may remove it at the cost of the owner.

9. On Jan. 4, 1901, the plaintiff, in writing, notified the president of the defendant companies as follows: "Inasmuch as we have been unable to arrive at a definite understanding relative to my right to continue to use the grade crossing at Twenty-seventh and South streets, Philadelphia, in conjunction with the overhead bridge which was to have been erected, I beg to advise you that, after the expiration of sixty days from the date hereof, it is my intention to terminate the agreement entered into between your companies and myself on July 9, 1900, and thereafter to use the grade crossing and each and every of the incidents of ownership of my property at Twenty-seventh and South streets, with the same force and effect as if that agreement had never been entered into."

10. All ways that cross over a railroad in operation are dangerous. The least dangerous is a crossing beneath the grade of the railway. A crossing elevated above the grade of the railway is more dangerous than a crossing beneath the grade. A crossing at grade is more dangerous than a crossing above grade. A combination of two crossings at or near the same place, one of which is at the grade of the railroad and the other elevated above it, is still more dangerous and objectionable than a single crossing at grade.

11. The right of way of the defendant companies in the vicinity of the plaintiff's lot is crossed by a number of overhead crossings. One of them is the South street bridge, which adjoins the plaintiff's lot to the southward, and is 22 feet in the clear above the tracks of the railroad. The other overhead crossings are upon private properties and have been constructed in consequence of agreements between the railroad company and the owners of the several properties, the consent of the company having been given in mitigation of damages for condemnation of the right of way and as part of the consideration for the same. Some of these overhead structures are less than 22 feet in the clear above the rails of the railroad. For various causes, four of them have been precipitated upon the railroad since their erection.

Findings of law.

1. The title of the Schuylkill River East Side Railroad Company to the right of way over the plaintiff's lot, acquired by its condemnation for railroad uses and the assessment and payment of the damages for such condemnation, is a right to the exclusive possession of the land so appropriated, subject only to the right of the plaintiff to use the established crossing at grade between the two sections of his lot separated by the railroad. This right of exclusive possession is not limited to the surface of the land, but extends indefinitely beneath the surface and above it, so that the plaintiff has no right either to construct or to

Spence v. Schuylkill River East Side Railroad Company et al.

maintain an overhead bridge across the railroad at any elevation without the prior consent of the company and against its protest.

The vital question in this case is, What interest and rights does a railroad company acquire in the land which it takes by reason of condemnation proceedings? This question arose in the Pennsylvania Schuylkill Valley Railroad Company's case, and in delivering the opinion of the Supreme Court therein, Mr. Justice Mitchell, after referring to the ownership by the railroad company of a certain wedge-shaped piece of land, continues in the following language: "This wedge the complainant has acquired by condemnation for railroad uses, the damages having been assessed and paid. The title of complainant is therefore complete. Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over the whole surface, to raise and maintain any appropriate superstructures, including necessary foundations, and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. There was no such easement at common law, and it may well be doubted if it is not a misnomer to extend to this newly-invented interest in land the name of easement, perhaps appropriate enough to the railroad's ordinary right of way for its tracks. It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But whatever it may be called, it is in substance an interest in the land special and exclusive in its nature:" *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 Pa. 18.

The language of this opinion, as it appears in the foregoing extract, is cited with approval by Mr. Chief Justice Paxson, in delivering the opinion of the court in the subsequent case of *Pittsburgh, Fort Wayne and Chicago Ry. Co. v. Peet*, 152 Pa. 488, in which the contention was that the railway company was not entitled to recover the strip of ground in controversy in an action of ejectment, for the reason that it had not acquired a fee in the ground by virtue of its condemnation proceedings, but only an easement, and ejectment will not lie for a mere right of way. In answering this contention, the learned chief justice says: "The vice of this argument consists in treating the plaintiff's right as a mere easement or right of way. It is a great deal more than a right of way. It has the actual possession of the property, and that possession is exclusive at all times and for all purposes, except where a way crosses it. The estate acquired by a railroad company by a condemnation of land is often spoken of as an easement, but the term is used in a loose way for the purpose of distinguishing it from a fee." And he then proceeds with the quotation from the *Schuylkill Valley Railroad Company's* case as above cited: *Pittsburgh, Fort Wayne and Chicago Ry. Co. v. Peet*, 152 Pa. 488.

In the case of *Reading City v. Davis*, 153 Pa. 360, the municipality had condemned and taken a part of Davis's farm for the purposes of a pumping station, and compensation therefor had been awarded and paid to him. A temporary road or lane ran over a portion of the lot condemned, over which the defendant, under a claim of right, drove wagons to and from what remained of his farm adjoining the lot condemned. These acts of defendant did not interfere with the city's use of the plant or of the lot of ground; but his act being regarded as a technical trespass, although only occasioning nominal damages, action was brought by the city to determine whether the right acquired by her in virtue of the condemnation proceedings was exclusive of any right in the defendant to enter upon or use the land without her authorization. The opinion of the Supreme Court, delivered by Mr. Chief Justice Sterrett, first quotes the defendant's requests for charge, which set out the defendant's contention substantially that he remained the owner of the property which had been appropriated by

Speese v. Schuylkill River East Side Railroad Company et al.

the city, with the right to use it or any part of it, provided such use in no manner interfered with or obstructed the use of the property for the purposes for which it had been condemned, and that, as his acts in no wise interfered with or impaired the full, free and ample enjoyment of the said property by the plaintiff for the purposes for which it had been appropriated, he was entitled to a verdict. The learned chief justice then continues: "These points clearly indicate the difference between the defendant's contention and the rulings of the learned trial judge. We have no doubt the latter was right in holding that, under and by virtue of the condemnation proceedings, the city acquired the right of exclusive possession and enjoyment of the property in question. The character of the city's title is similar to that acquired by railroad and other corporations invested with the power of eminent domain. It is sometimes called an easement, but that does not adequately express the nature and extent of the title thus acquired." He then proceeds to quote the language of Mr. Justice Mitchell in the *Schuylkill Valley Railroad Case*, as hereinbefore cited: *Reading City v. Davis*, 153 Pa. 360.

In the comparatively recent case of *Philadelphia v. Ward*, 174 Pa. 45, decided in 1896, Mr. Justice Green cites with approval and follows the three foregoing cases. It may be, therefore, taken as the well-settled law of this Commonwealth, that where a railroad company condemns land for railroad purposes and the damages for such taking have been assessed and paid, the railroad acquires a complete title in the nature of a base or conditional fee, terminable on the cesser of the use for railroad purposes, in the surface of the land, and so much of the land beneath the surface as may be necessary for the support of the surface, and, coupled with that interest, it acquires the right to exclusive possession of the land so taken, and to deal therewith within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee.

But it may be said, conceding this rule of law to be sound, that ownership in fee of the surface of the land—which at common law conveys with it as a necessary incident the ownership of all the space above the surface, "even to the heavens"—has no such effect in the case of the base or conditional fee acquired by railroads, but that the extent of their ownership of the overlying space is restricted by the limitation that their rights must be exercised within the limits of railroad uses, and that, as the plaintiff in the present case proposes only to erect his overhead crossing at such an elevation as to be beyond the limit of the overlying space required for railroad uses, his action will be within a region of the overlying space, the right to use which remains to him and has not been acquired by the railroad company.

In the *Northern Central Railway Company's* cases, wherein a street railway company sought to cross a railroad by spanning the same with an overhead bridge or viaduct, 100 feet or more in length by about 22 feet above the tracks, at a point where the railroad was not crossed by any public highway, the application of the railroad for a perpetual injunction against the street railway company was granted by the Supreme Court of this State. The decision was based, among other things, upon the position that the plaintiff had a substantial property interest in its right of way which the street railway company was bound to respect, and that that interest had some of the incidents of an estate in land; that whether the proposed crossing was overhead or underground the general and controlling question would be practically the same in both cases. In either case there would be an unauthorized occupation of the plaintiff's property, and that the operation of the crossing under the most favorable circumstances would occasion an appreciable increase of the danger to the railroad and the public traveling thereon: *Northern Cent. Ry. Co. v. Harrisburg, &c., Elec. Ry. Co.*, 177 Pa. 142; *Cumberland Valley R. R. Co. v. Harrisburg, &c., Elec. Ry. Co.*, 177 Pa. 155.

Speese v. Schuylkill River East Side Railroad Company et al.

In *Junction R. R. Co. v. Boyd*, the facts were that the company had located their railroad upon the line of Thirty-second street, in the city of Philadelphia, as laid out upon the plan, but not opened, from a point north of Market street to a point about 75 feet south of Chestnut street, the location being in a deep cut, which, between the points named, is arched over and two or three feet of soil placed above the crown of the arch, thus transforming the cut in appearance and effect into a tunnel, across which the travel upon Market and Chestnut streets, where the same intersect the line of Thirty-second street, now passes. The city of Philadelphia, by ordinance, having authorized Boyd to erect a temporary wooden chapel on Thirty-second below Chestnut street, that is to say, over the railroad and above the arch just described, the railroad company applied for an injunction to restrain this erection, and it was contended that they were not entitled to the equitable relief prayed for, not being owners of the fee and having but an easement in their property. Judge Paxson, delivering the opinion of the court, however, sustained the application for injunction because the use by a railroad company of the land taken by them for their road "is practically an exclusive one and permanent in its nature. And herein it differs essentially from the case of land taken for an ordinary highway. For a railroad company must, from the very nature of their operations—for the security of life and property—have the right to the exclusive use of the road for themselves and workmen, and to exclude all concurrent occupancy by former owners in any mode or for any purpose. . . . The company first made a deep cut, and then arched over their track, and placed two or three feet of soil over the crown of the arch. It is in effect a mere covered way, and the building complained of rests not upon the surface soil but upon the structure placed there by the company. . . . If the principle contended for here be correct, it is difficult to see where it would stop, and the road of the company might be built over its entire length by merely leaving room enough for the passage of the trains. Such a view is entirely inconsistent with that exclusive control over their road which, from the nature of things, a railroad company must possess. But the very act which the defendant has attempted is expressly prohibited by law. Section 11 of the Act of April 16, 1838, provides that 'no person shall construct any building, wharf, platform, switch, sideway, lateral railroad or crossing place, or make or apply any device whatsoever on the ground set apart for, or belonging to, or forming part of, or on the banks or excavation of any railroad as aforesaid, without permission given under the authority of the managers of the proper railroad company, which permission shall only be given in writing by a person duly authorized for that purpose:'" *Junction Railroad Co. v. Boyd*, 8 Phila. 224.

The facts of this case are very instructive. By placing over its right of way so permanent a structure as a brick archway covered over with earth so as to obliterate from above all appearance of a railroad, the company would certainly seem to have declared that it had no use for railroad purposes of the space lying above and beyond the arch, and yet their right to exclude any one else from occupancy or use of that space in any mode or for any purpose is recognized and upheld. So, also, in construing and applying the Act of 1838 to the facts of that case, and thus in effect holding that the building therein sought to be erected, although virtually at all points elevated far above the tracks of the railroad lying at the bottom of the deep cut underneath, was nevertheless a building on the ground set apart for or belonging to or forming part of the railroad, the learned judge has established an interpretation which would control the point to be decided in the present case, inasmuch as what the plaintiff seeks to construct is both a platform and a crossing place, and therefore plainly within the letter of the Act of 1838. The conclusion seems irresistible, there-

Spese v. Schuylkill River East Side Railroad Company et al.

fore, that whether in consequence of the statutory prohibition just alluded to or of the exclusive right of possession and user attached by law to the interest acquired by the railroad company, the plaintiff in this action has no right either to construct or maintain an overhead bridge across the railroad at any elevation, unless the defendant companies agree to such construction and maintenance.

2. The defendant companies, by the written agreement of July 9, 1900, consented to the construction, maintenance and use of an overhead crossing upon the terms and conditions specified in the instrument and for the consideration named therein. The interpretation of this instrument is for the court, and its meaning is very clear. The plaintiff is not to have both an overhead crossing and a crossing at grade. The consideration for the grant is in express terms the release of the right to have and maintain a grade crossing over the railroad at any point upon the plaintiff's land. The plaintiff covenants, in consideration of the grant of the right to erect the overhead crossing, to cease the use of the grade crossing within thirty days from the date of the agreement. The plaintiff surrenders all right to cross the railroad at grade, and agrees that the East Side Railroad Company shall hold its right of way over his land free from any right to cross at grade which he or any one claiming the land under him may have. It is expressly stipulated that a condition of the right to maintain the overhead crossing is the surrender of the right to the grade crossing, and that if any future owner establishes or requires the companies to establish a grade crossing, the right to maintain the overhead crossing shall cease, and the companies shall have the right to require the same to be removed. Finally, the plaintiff has the reserved right to notify the defendants that he intends to remove the overhead bridge and restore the grade crossing upon giving sixty days' notice of an intention so to do. In view of these reiterated statements, it is beyond all question that the agreement precludes the use by the plaintiff of more than a single crossing over the right of way. He may cross at grade, or, if he will abandon his grade crossing, he may cross overhead, but he clearly agrees not to have or use both crossings at the same time.

3. The agreement of July 9, 1900, is still in force, and has not been affected by the plaintiff's notice of Jan. 4, 1901 (see ninth finding of fact). This letter is plainly not the sixty days' notice stipulated for in the agreement. A notice under the agreement would be substantially to the effect that the plaintiff intended to take down and remove the overhead bridge, and to resume, restore, use and enjoy the grade crossing with all its rights and incidents as they existed on July 9, 1900, in the same manner and with the same force and effect as if the agreement had never been made; but the notice actually given is of a very different tenor. It says that, after sixty days, it is the plaintiff's intention to "terminate the agreement" of July 9, 1900, and thereafter "to use the grade crossing, and each and every of the incidents of ownership of my property at Twenty-seventh and South streets, with the same force and effect as if that agreement had never been entered into." Very clearly, this is not a giving up of the overhead crossing and a resumption of the abandoned grade crossing; on the contrary, it is distinctly to be inferred from it that the plaintiff intends to resume the grade crossing without resigning his claim of right to construct, maintain and use an overhead crossing as well. The notice is, therefore, not in pursuance of the agreement, but in attempted destruction of it. It requires no citation of authorities to show that one party to an agreement cannot annul it or release himself from its obligation without the consent of the other contracting party, and as the railroad companies have by their answer expressly refused their consent, it follows that it is still in force, and that the plaintiff is bound by its terms.

Speese v. Schuylkill River East Side Railroad Company et al.

4. An injunction is not of right. It will not be issued when, upon a broad consideration of the situation of all the parties in interest, good conscience does not require it. This proposition is established *in hæc verba* by the opinion of the Supreme Court in *Heilman v. Lebanon, &c., St. Ry. Co.*, 175 Pa. 199, cited and followed in *Pennsylvania R. R. Co. v. Glenwood, &c., Ry. Co.*, 184 Pa. 237. Reviewing the situation in the present case, the plaintiff is not in the position of one who, having purchased a lot of ground for a special purpose, finds his intended use of it destroyed or seriously impaired by the subsequent unforeseen condemnation of a right of way over it. On the contrary, the East Side Railroad was constructed and in operation, and the crossing at grade connecting the two portions of the lot divided by the railroad was established and in use at the time the plaintiff purchased the lot, and he bought with full knowledge of the situation. Not contented with a single crossing, he desired to have two, and, failing to secure the consent of the railway company, he attempted to make a second crossing without their consent, but was forcibly prevented from doing it. He then, by a formal instrument in writing, agreed with the companies to abandon the crossing at grade in consideration of their assent to his crossing overhead, and stipulated, in case of a resumption of the grade crossing, to abandon the overhead crossing. Six months after entering into this agreement, he attempted to repudiate it, and subsequently, without obtaining the consent of the railroad companies, and without abandoning or intending to abandon the grade crossing, attempted again to construct a second crossing above and over the railroad. Being again forcibly prevented from accomplishing this purpose, he now appeals to the chancellor for aid to accomplish it. On the other hand, the defendant companies have imposed on them by law a very grave and imperative duty to reduce to a minimum all sources of danger to the public traveling over their railroad. Two crossings, one at grade and one above grade, at or near the same point, being more dangerous than the existing crossing at grade, it is their clear duty to resist such an increase in the danger to their passengers. A crossing over grade being less dangerous than a crossing at grade, they are clearly right in endeavoring to secure a substitution of the former for the latter. Warned by experience from the fall of several overhead crossings in this vicinity, as well as from other sources of information, it is their plain duty to require that any overhead structures, to the erection of which by the plaintiff they may consent, shall be upon firm and sufficient foundation; that the superstructure shall be substantial enough to withstand the shocks of possible derailments, and that the structure crossing the road shall be so built and operated as to minimize the risk of having the span itself and the materials which are to be conveyed across it accidentally precipitated upon the railroad beneath. It is apparent, upon this review, that the plaintiff has no just ground of complaint. It is true that he has voluntarily agreed, upon sufficient consideration, not to maintain two crossings, and that his agreement is still binding upon him in law and in morals. Without insisting upon this, however, but leaving his agreement entirely out of consideration, it does not appear that any property right of his is in any wise interfered with. The defendant companies have a clear right to the exclusive use of their right of way at grade or at any elevation above it, and an equally clear duty not to permit the use of it by another, under such conditions as will increase the risk of danger to the public traveling upon their railroad, and it would be against equity and good conscience for the chancellor to interfere with them in the enjoyment of that right and the exercise of that duty.

The injunction prayed for should therefore be refused and the bill should be dismissed.

City, to use, v. Gabell et al.

Municipal claim—Payment to person designated by city—Estoppel.

When the city, by the proper authorities, directs the owner of property to underdrain his premises by making connection with a sewer recently constructed, and gives him information as to the person to whom payment for the construction of the sewer should be made, in order that the owner of the property may take such steps as will enable him to obtain a permit to underdrain as directed, the city and all parties claiming in the right of the city are estopped from asserting that such payment was invalid, notwithstanding the fact that regular assessment bills had not been issued to the person so paid.

Rule for new trial. C. P. No. 4, Phila. Co., March T., 1900, No. 88.

Samuel G. Birnie and Francis G. Taylor, for plaintiff.

Edward Wiener and Henry Wiener, Jr., for defendants.

WILLSON, J., June 22, 1901.—This action was brought to recover the amount of a municipal claim filed, alleged to be due for the construction of a sewer in front of the premises owned by the defendants. There is no dispute that the work was done under a contract which the city had made with one August Sachs. Suit was brought to his use and to the use of several others, who, in turn, seem to have occupied some position of surety towards him or others who were engaged in the performance of the contract. It is also beyond question that, about the time when the work of laying the sewer upon the street upon which the defendants' premises were situated was finished, the city notified the contractor, Sachs, that in consequence of his alleged failure to do the work called for by the contract, the same was annulled, so far as he was concerned. From that time the work seems to have been prosecuted under the charge of his surety. By the terms of his contract with the city, he was to be paid by the transfer of assessment bills against the properties fronting on the streets where the work was done, in the manner which is common and well understood in this city.

The defence against the claim is, that the amount due was paid; that payment was made under the following circumstances: The defendants were notified by the proper city authorities to underdrain their premises; that is, to make connection between their premises and the sewer. In order to make this connection it was necessary and required that they should prove that the bill for the construction of the sewer in front of their premises had been paid. Accordingly, one of the defendants inquired at the proper department as to who the contractor was, and was told that it was Sachs. Then payment was made to Sachs, who gave his receipt for the amount paid, and under such circumstances the city issued a permit for making connection with the sewer.

It is now contended on behalf of the use-plaintiffs that such payment amounted to nothing, in view of the fact that no regular assessment bill had been issued or transferred to Sachs, and that, using the name of the city as legal plaintiff, they can require the owners of the property again to pay the amount already paid for the construction of the sewer.

There is a great deal of force in the argument urged that the contractor could not be regarded as entitled to any payment from the city, or to make any use of the city's claim against individual properties, until the bills for the work had been regularly made out, certified to and transferred to the contractor. Under ordinary circumstances, it is very likely that that is the correct view to take of the position of the contractor. In the case before us, however, we are asked to say that, when the city, by its proper authorities, has directed the owner of property to underdrain his premises by making connection with a sewer recently constructed, and gives him information as to the person to whom payment shall

City, to use, v. Gabell et al.

be made, in order that the owner of the property may take such steps as will enable him to obtain a permit to do that which is required, the city or any persons claiming in the right of the city may subsequently be justified in asserting that payment made under these circumstances was no payment at all, but that recovery could again be had for the amount which the owner had in point of fact actually paid in pursuance of the demand of the city.

We are not prepared to adopt any such view. It is unquestionably true that the owners of the property, in entire good faith, moved by the city, paid for the laying of the sewer in front of the premises in question to the contractor who had actually done the work, and who presumably was entitled to receive from the city the assessment bill covering such cost. It would be grossly inequitable to require a second payment to be made for the same work. The city must be regarded as having tied its hands against requiring any second payment, and the use-plaintiff cannot claim to have any better right than the city.

We are of the opinion that the defence against the claim has been made good, and that the verdict which was rendered by the jury was correct.

A new trial must, therefore, be refused.

Furlong's Estate.

Decedent's estate—Trustees—Unexpired lease—Executrix taking new lease to herself.

An unexpired lease containing a clause against assignments is an asset of the estate, and the executrix is a trustee of its value for the benefit of creditors, and cannot derive personal advantage therefrom by taking a new lease to herself, retaining possession of the premises thereunder and continuing the business for her own emolument. In such case, she will be surcharged with the value of the old lease, notwithstanding the clause against assignments.

Decedent carried on a saloon at the southwest corner of 13th and Filbert streets. The business had been carried on since 1883. In 1885 the then tenant sold out to one O'Kane, to whom a lease for five years was given on April 6, 1892. In June, 1893, O'Kane sold his unexpired term to the decedent for \$17,000. This lease expired April 6, 1897, and a new lease was then executed to decedent for five years from June 1, 1897, at \$1500 for the first three years, \$1650 for the fourth year, and \$1800 for the last year. All these leases contained the usual provisions against assignment without the consent of the lessor. The decedent died on Aug. 26, 1899. One of the owners of the premises called on the executrix, to whom the license had already been transferred, and, after telling her that there could be no assignment of the unexpired term, said that he would see if a new lease directly to her could not be obtained for eight years from June, 1899. Such a lease was finally given, all the owners of the premises agreeing thereto. \$25,000 had been offered the decedent before his death for the unexpired lease, and witnesses testified at the audit that they would be willing to pay \$10,000 and \$15,000 for the unexpired lease and take the risk. The auditing judge surcharged the executrix with \$10,000 as the value of unexpired term. *Held*, no error.

Exceptions to adjudication. O. C. Phila. Co., July T., 1900, No. 285.

W. Horace Hepburn, for exceptants; *S. W. Cooper*, contra.

ASHMAN, J., June 29, 1901.—When the decedent died he was lessee of a tavern property, in which he was carrying on a profitable business, under a lease which still had several years to run. The widow, who was also executrix, secured a transfer of the license to herself as an individual, but was refused a transfer of the lease because of a clause against assignments. She was granted, however, a new lease for the term of five years, and under it continued in possession of the premises and of the business, and settled with most of her husband's creditors. The unpaid creditors claim that, as to the value of the unexpired lease, the executrix was a trustee for their benefit, and in that contention we think they are right. The lease was an asset of the estate, and there was substantive evidence that it was of great value—one witness declaring that he would have been willing to purchase it, notwithstanding its clause against

Furlong's Estate.

assignments, for \$10,000. What its value may have been, however, is of secondary consequence; the primary facts are the neglect of the widow to take any steps to realize its value, and, what is more significant, her appropriation of its value to her own use. Her conduct in this regard is condemned by the equitable principles which have been established in a long line of cases. In *Davoue v. Fanning*, 2 Johns. Ch. 252, a trustee sold part of the trust-estate, at public auction, to a third person for the benefit of the trustee's wife, who was one of the *cestui que trusts*. Chancellor Kent, in setting the sale aside, declared that, however innocent in a given case such a purchase may be, "it is poisonous in its consequences." In *Randall v. Errington*, 10 Ves. 423, the trustee bought at auction for a full price, but the sale was opened on petition of the *cestui que trust*. In *Johnson's Appeal*, 115 Pa. 129, a partner, after the dissolution of the firm, retained the lease, which had some months to run, and, at its expiration, secured a renewal. He was held liable to account for the value of such renewal. These authorities fully sustain the surcharge decreed by the auditing judge. It was not necessary for him to consider to what extent the license, which, as a personal privilege, died with the licensee, and was not an asset of his estate, entered into the value of the lease. Purchasers might or might not have appeared who would have bought the lease and run the risk of securing the license. The difficulty is, that the executrix made no effort to find a purchaser, and, on the contrary, precluded the possibility of a sale by taking a new lease to herself.

The exceptions are dismissed.

Reynolds et al. v. The Supreme Conclave Improved Order of Heptasophs.

Life insurance — Beneficial associations — Suicide — Insanity — Burden of proof.

Where no provisions to the contrary exist in the contract, suicide by the insured, retaining his sound mind, is a full defence to an action on a certificate of insurance issued by a beneficial association. His sanity is presumed until disproved.

Beneficial associations—By-laws subsequently adopted.

Where a contract of insurance is issued by a beneficial association, conditioned that it shall be subject to such by-laws as "are now in force or may in future be enacted," by-laws subsequently passed become a part of the contract. Where there is no such provision in the original contract, by-laws subsequently passed do not become a part thereof.

Rule for judgment for want of a sufficient affidavit of defence. C. P. Lancaster Co., Oct. T., 1900, No. 2.

D. F. Magee, for rule; *W. H. Roland*, contra.

LANDIS, J., Jan. 19, 1901.—This suit is brought upon what is termed a "Contributor's Benefit Certificate," dated June 16, 1896, issued to Gilpin Reynolds by the Improved Order of Heptasophs. The certificate provides that, upon condition that the statement made by Reynolds in his application for membership in Fulton Conclave, No. 428, of the Order, and the statement certified to him by the medical examiner be made a part of the contract, and upon the condition that the insured should thereafter comply with the laws, rules and regulations then governing said Conclave and Benefit Fund, or that might, in the future, be enacted by the Supreme Conclave to govern said Conclave and Fund, the Order bound itself to pay out of its Benefit Fund to his wife, Louise C. Reynolds, and his daughter, Mary L. Reynolds, equally, within sixty days from the receipt of satisfactory proof of death, the sum of \$2000, etc.

The statement alleges that Gilpin Reynolds performed and fulfilled all things 10 Dist. R.

Reynolds et al. v. The Supreme Conclave Improved Order of Heptasophs.

on his part to be performed according to the tenor and effect of the said certificate, and that he, while insured, died on Oct. 15, 1899, and that proof of his death, in accordance with the laws and rules of said Order, was duly furnished, and that thereupon the said Order became liable, within sixty days after proof of death, to pay the sum of \$2000 to the said Louisa C. Reynolds and Mary L. Reynolds, but that they have failed to make such payment. A copy of the said statement was duly served upon the defendant, and it then filed an affidavit of defence, in which, while admitting the certificate, it stated that the said Gilpin Reynolds committed suicide, and, because of this, the beneficiaries are not entitled to receive the whole sum represented by the benefit certificate. The affidavit states, from the certificate, that he (Gilpin Reynolds) agreed to conform in all respects to the laws, rules and usages of the Order now in force, or which may hereafter be adopted by the same, and that the general law of the Conclave on the subject of suicide provides "that no benefit shall be paid to the beneficiary or beneficiaries of any member committing suicide within three years of admission to the Order, except (1) in the case of members who shall have been judicially declared insane; or (2) who shall have committed suicide while in delirium or some illness not attributable to intemperance, vicious or immoral conduct, or while under treatment for insanity; or (3) of a case where, in the opinion of the Supreme Medical Director, reasonable doubt may exist as to the mental responsibility of the suicide; provided, however, that where such suicide has completed three years of membership (although the Supreme Conclave has, by this act, been released from all claims represented by the Benefit Certificate), his beneficiary or beneficiaries shall, nevertheless, receive from the Supreme Conclave a sum of money in full discharge of all demands which he, she or they might otherwise have had upon the said Supreme Conclave, equal to an equitable proportion of the total benefit, such equity to be determined by the number of years the suicide was a member of the Order, as related to his expectancy of life when admitted." According to this proviso, the defendant offered to the plaintiffs the sum of \$260.76, which the plaintiffs refused to accept. The plaintiffs filed assignments of insufficiency to the said affidavit of defence, and asked that judgment be entered, alleging, chiefly, that the defendant has not stated that section 261 of the general laws referred to in the affidavit of defence was passed and in full force and effect at the time Gilpin Reynolds became a member of the Order, and that there is no provision against suicide in the certificate nor anywhere else in the general laws.

On a motion for judgment for want of a sufficient affidavit of defence, the affidavit is to be taken as absolutely true, and upon the facts, if properly stated, as conclusive. It therefore follows that, as this affidavit of defence contains the allegation that the defendant "agreed to conform in all respects to the laws, rules and usages of the Order now in force, or which may hereafter be adopted by the same," and that, at some time, either before or after he joined the Order, section 261 became a general law of the Conclave, and that the insured came to his death by suicide, if he had the power to bind himself to conform to all such laws, rules and usages, and his beneficiaries, through him, were also bound thereby, and suicide is a defence to any portion of the claim, no judgment can now be entered in favor of the plaintiffs.

It has been held by our Supreme Court that, though no condition be inserted in an insurance policy, a man who commits suicide is guilty of such fraud upon the insurers of his life that his representatives cannot recover for that reason alone: *Hartman v. Keystone Ins. Co.*, 21 Pa. 466; *Bank of Oil City v. Guardian Mutual Life Ins. Co.*, 5 Bigelow Life Ins. and Accident Cases, 478. This rule does not apply absolutely to all self-killing, for if a man be insane when he commits the act, it is not an exercise of his own free will, and a liability still

Reynolds et al. v. The Supreme Conclave Improved Order of Heptasophs.

exists against the insurer. But in the first instance the presumption of sanity always prevails until the plaintiff has presented rebutting proof of insanity. Therefore, suicide in this case would, without more, and in the absence of all regulation, be a substantial element of defence.

But let us now turn to the provision contained in the general law. It is well settled that "where there is nothing in the original contract which, in terms or by implication, authorizes any change in its provisions or conditions, by-laws subsequently passed do not become a part of the contract:" Niblack on Benefit Societies and Accident Insurance, 273. But, in this case, there is express provision made for such change in the original contract. The certificate states that it is issued "upon the condition that the brother hereafter complies with the laws, rules and regulations now governing said Conclave and Benefit Fund, or that may, in the future, be enacted by the Supreme Conclave to govern said Conclave and Fund." This being the case, another principle applies. "While members are presumed to know, and to contract with reference to, existing by-laws only; while a society has no power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligations of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations—still, members may contract with societies with reference to laws of future enactment, and may agree to be bound and affected by future laws, as they are bound and affected by those then in existence; and they may consent that laws of future enactment shall enter into and form a part of their contracts, modifying or varying them. Where a contract of insurance is issued, conditioned that it shall be subject to such by-laws as may be enacted by the society, by-laws subsequently passed become a part of the contract. Where, for instance, the contract provided no forfeiture if the member should die by his own hand, but provided that any violation of the 'requirements of the law now in force or hereafter enacted, governing the Order or this class, shall render this certificate null and void,' and that the obligation of the society should depend upon the member's 'full compliance with all the laws of the Order now in force or that may hereafter be enacted;' where the certificate was accepted by the member in writing, 'subject to the laws of the Order now in force or which may hereafter be enacted by the Supreme Commandery,' it was held that, by force of these stipulations and provisions, a by-law enacted by the society after the certificate was issued and accepted, providing that a certificate of this class should be forfeited if the member, whether sane or insane, should take his own life, entered into and formed a part of the certificate, avoiding it in the event that the member, whether sane or insane, should take his own life. A person accepting, directly or by assignment from the assured member, a certificate in a mutual benefit society, declaring that its constitution and by-laws are a part of the contract, is bound by them."

There is a fundamental distinction between philanthropic beneficial associations which issue benefit certificates to their members and life insurance companies. A contract of insurance is purely a business venture, and the design and purpose of such a company and the dominant and characteristic feature of its contract, are the granting of an indemnity or security against loss for a stipulated consideration. But the design of what are known as benevolent societies is not to indemnify or secure against loss; but, from the contributions of members, to accumulate a fund to be used in their own aid or relief in the misfortunes of sickness, injury or death. Such societies have no capital stock. They yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance: *Com. v. Equitable Beneficial Ass'n*, 137 Pa. 412; *Dickinson v. A. O. W.*, 159 Pa. 258; *Lithgow v. Knights of Maccabees*, 165 Pa. 292; *Fischer v. American Legion of Honor*, 168 Pa. 279.

10 DIST. R.

Reynolds et al. v. The Supreme Conclave Improved Order of Heptasophs.

We do not, however, consider the general law of the Conclave, which has been referred to, of doubtful meaning. It must be interpreted in reference to the existing law of the land and the supposed hardships attempted to be corrected by it. As we have already stated, where no provisions to the contrary exist in the contract, suicide by one retaining his sound mind is a full defence to an action on the certificate. Section 261 provides that when any member commits suicide within three years of admission to the Order, no benefit shall be paid to his beneficiary, some exceptions being made, as set forth in said section. The proviso then followed and declared that when a membership of three years had been completed, in such case the beneficiary was entitled to receive a sum of money equal to an equitable proportion of the total benefit, such equity to be determined by the number of years the suicide was a member of the Order as related to his expectancy of life when admitted: The section is in mitigation of the rigors of the law as applicable to cases of suicide, and an extension rather than a restriction of the rights of the insured and his beneficiaries.

For these reasons, we are obliged to refuse to enter judgment, and we therefore discharge this rule. Rule discharged.

From George Ross Eshleman, Lancaster, Pa.

Barrett v. Smith.

Exemption—Time when claim must be made.

No fixed and unvarying rule can be laid down as to the time when the claim for exemption must be made. Generally, it should be made before the expense of advertising is incurred; but ignorance of the levy will excuse delay, and the rule has no application where there is a waiver of inquisition in the warrant of attorney confessing judgment and an immediate advertisement.

Appraisement—Filing—Rule of court.

A rule of court requiring the sheriff to file the appraisement before the return-day of the writ is inapplicable where a valid claim is made on or after the return-day.

Circumstances in case at bar held sufficient to excuse delay in presenting claim to exemption.

Exceptions to the appraisement of the debtor's exemption. C. P. Montgomery Co., Dec. T., 1900, No. 36.

William F. Dannehower, for exceptant; *Hillegass & Larzelere*, contra.

SWARTZ, P. J., Jan. 9, 1901.—The plaintiff issued her execution on Nov. 8, 1900. The writ was made returnable Dec. 3. The judgment was entered on a note with warrant of attorney confessing judgment. The debtor waived inquisition and condemnation of real estate.

The deputy sheriff levied on three tracts of land on Nov. 13 or 14. At the same time he took a description of the premises and made certain measurements at the barn. This building was the only improvement remaining on the land. The defendant lived at Pennsburg, four miles distant from the premises. The tracts were not occupied by any one, except that one Jonathan Binder had the use of the barn. The sheriff advertised the sale on the said Nov. 14 in two Norristown newspapers. These papers have no circulation in Pennsburg or in that vicinity. Three weekly papers are published at Pennsburg which do circulate in that community. Other newspapers, published at East Greenville, Schwenksville and Harleysville, find their way into this neighborhood. Norristown is thirty miles distant from Pennsburg. The sheriff's hand-bills were put up on Nov. 23, and one was posted on the barn. The sale was advertised for Dec. 5. Mr. Binder, who had the use of the barn, was present when the deputy sheriff made the measurements. He was not present when the bills were

Barrett v. Smith.

posted. The defendant was not notified of the levy, or of the proposed sale by the sheriff or by any one else, before Nov. 29, at 9 o'clock in the evening. He swears he had no knowledge of the *levy* or sale before that evening. The letter from the attorney of the plaintiff speaks of a levy, but gives no intimation that the property is advertised for sale; and the defendant declares that his first knowledge of a *sale* was received on Saturday, Dec. 1. The letter from plaintiff's counsel, just mentioned, was posted on Nov. 28, and delivered to the defendant about 9 o'clock on the evening of the 29th. On Saturday, Dec. 1, the defendant saw his counsel and requested him to make a claim for the exemption. On Monday, Dec. 3, counsel filed the claim with the sheriff. On Dec. 4 the sheriff had the appraisement made. The appraisers found that the three tracts of land were worth less than \$300. The sheriff then declined to go on with the sale. He made return of the writ to the court, setting forth his proceedings in full, and also returned the appraisement itself.

The question raised by the exceptions is whether the claim for the debtor's exemption was filed in time. We think a statement of the facts, as above set out, answers the inquiry in the affirmative. The defendant received his first notice on the evening of the 29th—Thursday—and on the following Saturday took steps to present his claim. Perhaps the circumstances were such that he ought to have known of the proposed sale before Nov. 29; but the fact that the writ, levy and advertisement were in the name of *Harry Smith*, when the defendant was always known by the name of *Henry Smith*, may have misled the community and kept the information from the defendant. The judgment was entered against *Henry Smith*.

In passing upon the question of due diligence on the part of the defendant, we must not forget the speed with which these proceedings were pushed along. If the levy was made on Nov. 14, then the sale was fixed to take place twenty-two days after the levy, and was advertised the same day the levy was made. The defendant could not well claim his exemption before the expense of advertising was incurred, for he did not meet the deputy sheriff, received no notice, was not an occupant of the premises, and received no information from the man who had the use of the barn. Every dollar of expense incurred by the sheriff was fixed before the defendant could have made his claim. The last expenditure was the posting of the bills on the 23rd. This was the only act which was calculated to bring home notice to the defendant. Binder was not a tenant, and had no use or interest in any one of the three tracts, save that he occupied the barn located on one of the lots.

Even if he is to be treated as a tenant whose duty it was to protect his landlord, still the fact remains that he did not notify the defendant; at least, the evidence is silent upon this point, and the defendant's testimony stands unimpeached. If the advertisements had been made as the law contemplates, no doubt the defendant's attention would have been attracted at an earlier day. Probable purchasers of real estate are usually found in the neighborhood of the premises or within a reasonable distance therefrom. The same is true as to the creditors of the defendant who may be interested in the property. One of the newspapers selected, if possible, should be chosen so as to meet these conditions. We called the sheriff's attention to this matter in a previous case. The sale was not delayed because of a late claim. An earlier claim would have dispensed with a sale. The effect would have been the same in either event, because the properties were worth less than \$300.

The exemption Act is a humane law, and as such is entitled to a liberal construction. If in this case we deprive the defendant of its benefits, we do so without any apparent neglect or wrong on his part. In allowing it, we do not disregard any right of the creditor.

10 DIST. R.

Barrett v. Smith.

We have recited the facts and circumstances fully in this case, because we are aware that by the rules ordinarily applied the claim came too late. No fixed and unvarying rule can be laid down as to the time when the claim must be made: *Moore v. McMorrow*, 5 Pa. Superior Ct. 562. All the circumstances must be considered before we can determine whether the sale was in fact delayed, or whether costs were incurred which, by reasonable diligence, the debtor could have avoided. Ignorance of the levy is one of the grounds which will justify a delay: *Diehl v. Holben*, 39 Pa. 213. The rule that a claim should be made before the expense of advertising is incurred has no application where there is a waiver of inquisition in the warrant of attorney confessing judgment and an immediate advertisement: *Moore v. McMorrow*, *supra*; and in a case of this kind the claim is in time, even if made after the expenses of advertisement are incurred: *Snyder v. Schmick*, 166 Pa. 429.

The late day upon which the execution was issued compelled the sheriff to avail himself of the provision of the law which allows him to sell within six days after the return-day. The failure to file the appraisement in court before the return-day of the writ, as is directed by our rule of court, cannot defeat the claim. The rule is inapplicable where a valid claim is made on or after the return-day.

And now, Jan. 9, 1901, the exceptions to the appraisement of the exemption are dismissed.

From Montgomery Evans, Norristown, Pa.

Commonwealth v. Weaver.

Criminal law—Milk adulteration—Prosecution must be at place of delivery in case of sale.

Where a dairyman residing in Washington county sells milk, daily or weekly, to a dealer in Allegheny county, with whom he had a contract, delivering the milk in cans at a railway station in Washington county to be shipped to the Allegheny dealer, the sale is complete upon the delivery to the railway company, and a summary conviction in Allegheny county for selling, exchanging or delivering adulterated milk will be reversed.

Appeal from summary conviction. Q. S. Allegheny Co., June Sess., 1901, No. 5.

William W. Smith, for Commonwealth; *M. C. Acheson*, for defendant.

SHAFER, J., July 6, 1901.—The defendant was charged before William A. Means, an alderman of the city of Pittsburgh, with unlawfully and willfully selling, exchanging or delivering, or having in his possession with intent to sell, etc., milk which had been adulterated by addition of other substances, contrary to the Act of Assembly approved May 16, 1901. The proof was, that Weaver is a farmer residing in Washington county; that he had a contract to sell a certain quantity of milk, daily or weekly, to a dealer in the city of Pittsburgh; that he did so by delivering milk in cans at a railway station in Washington county, to be shipped to the Pittsburgh dealer. The cans were not locked, and might be opened on the way by any person who had access to them. A specimen of milk was taken from one of the cans shipped by him on its arrival at the depot in Pittsburgh, and the evidence on the part of the Commonwealth was, that it contained formaline, added for the purpose of preserving the milk. The defendant denied that he put any such thing in the milk, or allowed it to be put in while in his possession.

The principal contention of the defendant, however, is that, whatever may be the fact as to the adulteration, the sale of the milk by him and the possession of

Commonwealth v. Weaver.

the milk by him, and every act done by him complained of in the charge, was done in the county of Washington, and that an alderman in the county of Allegheny has no jurisdiction of the case.

It seems to us, under the circumstances, which were admitted on both sides, as to the contract between the milk dealer in Pittsburgh and the defendant, the sale was a sale in Washington county and not in Pittsburgh; and therefore, without undertaking to decide which of the parties was telling the truth, or what the fact may be as to the presence or absence of formaline in the milk, or how it got there, we are of the opinion that the judgment must be reversed for the reason stated. The judgment of the alderman is therefore reversed, and restitution of the fine and costs awarded.

From Edwin L. Mattern, Pittsburgh, Pa.

Linn's Assigned Estate.

Attorney's commissions against assigned estate.

An attorney is entitled to an allowance for attorney's commissions, although, after judgment on his client's claim but before execution, the debtor made an assignment for the benefit of creditors.

Exceptions to auditor's report. C. P. Westmoreland Co., May T., 1899, No. 227.

Moorhead & Head, for exceptions; *Williams, Sloan & Griffith*, contra.

DOTY, P. J., June 29, 1901.—That plaintiff is entitled to attorney's commission on judgment No. 488, November Term, 1897, is, under the authorities, a plain proposition. The judgment was regularly entered by attorneys, and it included an attorney's commission amounting to \$50. The auditor disallows the attorney's commission because no demand had been made, and because it would be inequitable as to subsequent lien creditors. Neither reason is well founded. That subsequent creditors will be prejudiced is no answer, as the only question is, what is legally due under the contract?

If defendant had paid or tendered payment, the plaintiff would not be entitled, because no demand was made before judgment and execution. But defendant did not pay nor tender payment, but, instead, made an assignment for benefit of creditors. The contention is now made that in no case ought attorney's commission be allowed where there has been an assignment for benefit of creditors. We have doubts as to the wisdom of allowing attorney's commission in any case, as the policy occasions much contention. But the practice of allowing a reasonable compensation in the discretion of the court is established.

Execution is not essential to entitle the plaintiff to the commission. The test is, whether the attorney has been employed in good faith. If so, the commission follows, for the reason that the creditor's liability has attached: *Imler v. Imler*, 94 Pa. 375.

Surely, the services of an attorney are as necessary in case of assignment as to enter judgment and issue execution. A layman is less likely to be familiar with the former proceeding. In case of assignment, claims must be presented and unjust claims resisted. The creditor must see that the trust is faithfully administered and that only proper expenses are allowed. The necessity for an attorney is about as great as in a suit *in assumpsit*.

For these reasons, we think the plaintiff is entitled to allowance for attorney's commission.

From J. A. C. Ruffner, Greensburg, Pa.

Commonwealth ex rel. Welles v. Knorr, Sheriff.

Mandamus—Granting of peremptory writ—Act of June 8, 1893.

Where the facts are such that an alternative writ of mandamus should issue and there is no reason to expect that the return of the writ will bring to the attention of the court any new facts, while the awarding of such writ will be productive of useless delay, prejudicial to the relator, and the views of counsel representing all parties have been heard by the court, on the application for the writ, a peremptory writ of mandamus will be awarded under the Act of June 8, 1893, P. L. 845.

Sheriff's sales—Receipt of lien creditor on account of purchase-money—Sheriff's right to refuse to receive same—Act of April 20, 1846.

Under the Act of April 20, 1846, P. L. 411, a sheriff should accept the receipt of a lien creditor tendered to him as part of the purchase-money on a sheriff's sale. The question whether such creditor's lien had such priority as entitled him to receive anything on distribution of the fund, and so, whether it should entitle him to pay by such receipt, should properly be determined, under section 2 of the Act, on the sheriff's return of the writ.

The sheriff should also accept the receipt of a lien creditor claiming to be a part owner of the judgment under which the sale occurred, although the record does not show him to be such owner, when accompanied by a certificate of the attorney of the plaintiffs, who is also one of the plaintiff trustees, that the purchaser is the owner of so much of the judgment. The question whether the purchaser had such rights should be determined, under section 2 of the Act, on the sheriff's return of the writ.

Such a certificate is a proper certificate under the Act of April 20, 1846, § 1.

A judgment was obtained upon a mortgage given to trustees to secure the holders of bonds issued for the sum of \$100,000. At sheriff's sale thereon, the property was bought for \$21,025. The purchaser paid \$6226.50 in cash, and gave to the sheriff his receipt as a lien creditor for the balance, to wit, \$9561.01, by reason of his being the holder of \$84,900 of said bonds, his right to receive this credit being claimed by his production to the sheriff of a certificate of the attorney of the plaintiffs, who also was one of the plaintiff trustees, stating that he was such holder; and the balance of his receipt of \$5237.49 by reason of being the owner of two mechanics' liens against the property. The sheriff declined to accept such receipt of the purchaser, on the ground that the record failed to show that the purchaser had any interest in the judgment, and that the mechanics' lien claims were subsequent liens to the judgment, which the purchase price was insufficient to pay. *Held*, that the sheriff should have accepted the receipt as tendered, these questions more properly coming before the court on his return of the writ, under section 2 of the Act.

Application for mandamus. C. P. Columbia Co., Dec. T., 1901, No. 118.

C. H. Welles and G. M. Tustin, for mandamus; Grant Herring, contra.

LITTLE, P. J., Feb. 23, 1901.—Upon Feb. 20, 1901, after filing of the petition of Charles H. Welles, the relator, a motion was made for the awarding of a writ of peremptory mandamus. The facts stated in the petition show that the relator is entitled to the writ of mandamus. Should it be issued in the alternative form or made peremptory in the first instance?

The 2nd section of the Act, relating to mandamus, approved June 8, 1893, provides: "Any person desiring to obtain a writ of mandamus shall present his petition therefor, verified by affidavit, to the judge or judges of the proper court, either in session or at chambers, setting forth the facts upon which he relies for the relief sought, the act or duty whose performance he seeks, his interest in the result, the name of the person or body at whose hands performance is sought, demand or refusal to perform the act or duty, and that the petitioner is without other adequate and specific remedy at law. If such petition presents the substance of a case for mandamus, the court shall direct that such writ issue in the alternative form. Provided, however, that if the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be awarded in the first instance and directed to issue forthwith."

In the case of *Com. v. Borough*, 15 W. N. C. 508, decided in 1884, before the passage of the present Act relating to mandamus, Trunkey, J., in delivering the

Commonwealth ex rel. Welles v. Knorr, Sheriff.

opinion of the Supreme Court, said: "The ordinary practice is to direct an alternative mandamus where good cause, *prima facie*, appears, and this gives the parties an opportunity to do the act or show cause, at the return of the writ, why they should not."

"If the defendants have appeared to a rule or notice of an application for a mandamus and have been heard, and there is no controversy in respect to the facts, and the right of the relator is clear, a peremptory writ may, in the discretion of the court, be issued in the first instance:" 1 Brewster's Practice, § 1821.

It is held in the case of *Kell v. Rudy*, 1 Pa. Superior Ct. 507, that "under the Act of June 8, 1893, P. L. 345, only an alternative writ should issue, unless it is apparent on the face of the petition that no valid excuse for not performing the act can be given, and that the facts in the case showed that an alternative writ should have been issued."

It should be the policy of the law to favor the rights of purchasers at Orphans' Court, sheriff's or other sales made under the authority of law, and facilitate the prompt transmission of titles to such purchasers. If an alternative writ of mandamus be awarded, there is no reason to expect that the return of that writ will bring to the attention of the court any new facts, while the awarding of such writ will be productive of useless delay, prejudicial to this relator.

All of the facts are before the court. The views of counsel have been given, when the relator presented the petition for the writ to issue, and at that time the defendant, who is the sheriff, presented an application to amend the return of the writ of execution, about which this controversy arises, and to pay into court over \$6000 of the cash he had received from the relator.

The material facts are these: A judgment was obtained upon a mortgage, given by the Magee Carpet Works to C. C. Peacock and L. E. Waller, trustees, for the holders of the bonds, issued for the sum of \$100,000; the mortgaged premises were exposed to sale by Daniel Knorr, sheriff, by virtue of a writ of *alias lev. facias* regularly issued and the property was struck down to Charles H. Welles for the sum of \$21,025 as the purchaser; the purchaser presented to the sheriff the proper certificate of liens as prescribed by the 1st section of the Act of April 20, 1846; he paid the sheriff in cash \$6226.50; he also claimed the privileges of a lien creditor becoming a purchaser at sheriff's sale under said Act, and as such entitled to receive the sum of \$14,798.50 to apply on the same on account of his bid; \$1679.68 of which said sum of \$14,798.50 was by reason of his becoming the assignee and owner of a judgment on a mechanic's lien against the defendant in the execution, in which George Slate's Sons were plaintiffs; \$3557.81 of which was by reason of being the owner of the Charles V. Cresson Co. mechanic's lien; and \$9561.01 of which was by reason of his being the owner of \$88,900 of the bonds secured by the defendant's mortgage, upon which judgment was obtained, and upon which the present writ of execution was issued. The certificate of liens shows that the purchaser is the owner of the judgment standing in the name of George Slate's Sons, and the mechanic's lien in the name of Cresson Co.

The purchaser presented to the sheriff a certificate of L. E. Waller, of counsel for the plaintiffs in the judgment of L. E. Waller and C. C. Peacock, trustees, certifying to the fact that Mr. Welles is the holder of the \$88,900 of the bonds secured by the mortgage upon which the judgment was recovered; and it was by reason of this certificate of L. E. Waller, he being also one of the plaintiffs in the judgment and execution, as trustee, that the purchaser claimed the right to receipt for the sum of \$9561.01. The sheriff declined to accept the receipt of the purchaser. After rule granted upon the sheriff to return his writ of execution, he made return, after the usual recitals, that he sold the property to Charles

Commonwealth ex rel. Welles v. Knorr, Sheriff.

H. Welles, of Scranton, for the sum of \$21,025, he being the highest bidder and the best bidder, and that the highest and best price bidden for the same; and I do further return that I have received from him, the said Charles H. Welles, the above-named purchaser, his draft on account of said purchase-money of \$6228.50, and that the remainder of the said purchase-money remains unpaid; wherefore, the said property remains unsold.

The petition of the sheriff to amend his return and for leave to pay money into court, filed Feb. 20, 1901, savors more of a statement of his reasons for declining to accept the receipt of the purchaser than a further statement of the facts. The argument is this: The \$100,000 mortgage given to L. E. Waller and C. C. Peacock is declared to be a first lien on the premises, being entered Jan. 27, 1896, and the records fail to show that the purchaser has any interest in the judgment obtained upon the mortgage; that the George Slate's Sons claim and the Cresson Co. claim, of which the purchaser is the present owner appearing by the records, have their origin as liens in January and March, 1897; and that, inasmuch as the property purchased only brought \$21,025, there was nothing applicable to the claims of the purchaser.

In the disposition which we will make of this matter, it is unnecessary to say anything in reference to this reason assigned, except to remark that if the sheriff had accepted the receipt tendered to him by the purchaser, and presented his return to court in the manner provided by the Act of April 20, 1846, it is difficult to see what, if any, possible risk that officer was assuming; because of the 2nd section of the Act, if the right of Mr. Welles, the purchaser, was questioned, and it should ultimately be determined that Mr. Welles was not entitled to receive any or all the money receipted for by him, the Act specifically points out the method to be pursued.

We are of the opinion that the sheriff should have accepted the receipt of Mr. Welles in the sum of \$14,798.50, as tendered to him at the time he received the balance of the sum for which the property was struck down. Whether or not the mortgage was the first lien upon the premises sold, whether or not Mr. Welles was entitled to receive anything upon distribution by reason of his being the owner of the two mechanics' liens mentioned, and if he was, how much, were questions which could more appropriately be heard and determined, upon his right being disputed, when the return would be read in open court.

After consideration of the statement of facts set forth in the petition of the relator and of the return of the sheriff, and the exhibits thereto attached as part thereof, and the other papers filed in the case, together with the statements contained in the application for leave to amend sheriff's return, and the subject of the petition having been commented upon in open court by counsel representing the different parties interested, and believing that the awarding of an alternative mandamus would conserve no good purpose, it is now, Feb. 23, 1901, adjudged and ordered that the certificate dated Feb. 9, 1901, signed L. E. Waller, of counsel for plaintiff, showing that \$88,900 of the bonds secured by the mortgage on which the judgment was recovered in the case of L. E. Waller and C. C. Peacock, Trustees, v. The Magee Carpet Works, No. 118, December Term, 1900, be detached from the sheriff's return and be filed among the records of the said case, and that the prothonotary record the same in full upon the proper docket, and enter upon the docket these words and figures: "88,900 of this judgment is marked for the use of Charles H. Welles, see paper filed," making reference to the certificate above mentioned; that clerk also make the same memoranda as in quotation marks above upon the certificate of liens, by him heretofore furnished and now attached to the writ of execution; that a writ of peremptory mandamus be issued, commanding the defendant to accept the receipt of Charles

Commonwealth ex rel. Welles v. Knorr, Sheriff.

H. Welles, the relator, and fully referred to in the petition, and make return of sale of the premises described in accordance with the facts as stated in the petition. The writ to issue forthwith, and made returnable on the first Monday of March, 1901.

From William Chrisman, Bloomsburg, Pa.

McKee's Estate.

Collateral inheritance tax—Clear residue—Debts barred by statute of limitations.

In calculating the "clear residue" subject to collateral inheritance tax, debts justly due, although barred by the statute of limitations, where neither creditors, legatees nor devisees desire to interpose such plea, are to be deducted from the gross assets of the estate.

Appeal from collateral appraisalment. O. C. Crawford Co., Sept. T., 1900, No. 18.

B. B. Pickett, Jr., for appellant; *F. P. Ray*, for Commonwealth.

THOMAS, P. J., July 1, 1901.—It is maintained in this case that the appraiser committed error in failing to allow as a credit certain unsealed notes against which the statute of limitations might be pleaded with effect by the proper parties, but which it is alleged are valid unpaid debts against which none of the creditors, legatees or devisees desire to interpose such plea. The real contention is as to whether the Commonwealth has such standing as will permit it to raise this question.

The law takes into its custody the estates of all decedents and administers them for the benefit of creditors, heirs, legatees and devisees, and delivers the residue to the distributees entitled thereto, and by virtue of the Act of May 8, 1887, P. L. 79, a portion of that residue which is to be distributed to collateral kindred must be paid to the Commonwealth.

We are of opinion that this operates only upon the residue left for distribution after all just, as well as legally enforceable, debts of the decedent are paid, provided the estate is made to pay the same. The creditors could interpose the statute of limitations were the estate insolvent, and the legatees may do so; but if they are willing to permit the estate to be distributed in such a way as to meet all just debts, although they might have the power to defeat some of them, we do not believe that the Commonwealth has such standing as will permit it to compel the avoidance of such a just payment.

Of course, were this done for the purpose of depriving the Commonwealth of its rights, it would be a fraud of which advantage might be taken; but so long as the estate is honestly administered for the purpose of meeting just and *bona fide* claims, even though some may have been barred by the statute of limitations, we are of opinion that the Commonwealth may not interpose, and is entitled to look only to the residue after such debts have been met without fraud as to its rights. It is true that all of these claims are held by devisees, but that does not change the legal rights of the parties.

If the estate is not administered as it is alleged is the purpose of all interested parties who are also parties to the appeal, the Commonwealth will have rights which may be enforced hereafter.

The collateral inheritance tax is payable by the devisees, and the life-estate and the interests of each devisee should have been appraised separately. But, as the claims will exhaust the entire estate, the form of the appraisalment, under our view of the law of the case, becomes immaterial.

And now, to wit, July 1, 1901, the appeal is sustained, and the appraisalment as made is vacated and set aside, without prejudice.

From Otto Kohler, Meadville, Pa.

Norristown Borough v. Philadelphia and Reading Railway Company et al.

Railroads—Streets—Grade crossings.

A railroad should show a great, if not an imperious, necessity for a grade crossing in a borough.

Where the only reason assigned for a proposed new track which would cross a street at grade is the saving of a slight expense, its construction will be enjoined. Hence, where a railroad is proceeding to lay a track to form a "Y," which crosses a borough street at grade, for the purpose of doing away with a turntable, when the only advantage of the track over the turntable is, that the track is cheaper than the repairs necessary to the turntable, the court will enjoin its construction.

Motion for preliminary injunction. C. P. Montgomery Co., March T., 1901, No. 1.

I. P. Knipe, for plaintiff; *James Boyd*, for defendants.

SWARTZ, P. J., and WEAND, J., April 2, 1901.—The Stony Creek Railroad extends from Norristown to the borough of Lansdale, where it connects with the North Pennsylvania Railroad. At Norristown, by means of the Junction road, it connects with the Philadelphia, Germantown and Norristown Railroad, thus forming a continuous line from Philadelphia to Lansdale. All the roads mentioned are operated by the Philadelphia and Reading Railway Company. For facility in turning their engines, there is erected on the land of the Stony Creek Railroad Company a turntable, which has been in continuous use for upwards of thirty years.

Markley street, in the borough of Norristown, was laid out by commissioners appointed by an Act of the General Assembly in 1853, and was marked as such on the general borough plan. It was to be opened as the necessities of the case required. As laid out on the plan, it extends from Washington street northeasterly until it intersects and becomes part of Swede street, but is not opened its full length. By an order of court, Markley street was directed to be opened for public use from Airy street to Swede street. The borough authorities, in pursuance of the order of court, have opened and graded Markley street from Marshall street northeastwardly a distance of 170 feet, and have it partly opened an additional distance of several hundred feet, and propose its immediate opening to Elm street. From that point it is actually opened to Beech street, a short distance southwesterly from its intersection with Swede street.

The passenger station of the Stony Creek Railroad Company is located at Markley and Main streets. The road eastward then crosses Marshall street at grade, and beyond Marshall street, about 900 feet distant, are located the turntable and engine-house. There are at least twenty-four trains from Philadelphia whose terminus is at this engine-house, and also four from Lansdale. At least twenty-six engines are required to be turned each day in order to make a return trip. Markley street, between Marshall and Elm streets, being a distance of two blocks, is located southeast of the line of the railroad, and runs parallel to it a distance of 800 feet from Marshall street and about 80 feet distant from the railroad. The Merchants' Ice Company is located at the east corner of Marshall and Markley streets, and has switch connections with the railroad, crossing Markley street at grade. The Adam Scheidt Brewing Company is located east of Markley street, and also has a switch connection with the railroad, crossing Markley street at grade.

The defendant, the Philadelphia and Reading Railway Company, acting by authority of the Stony Creek Railroad Company, now proposes to build a track commencing at a point on their line opposite their turntable to connect with

Norristown Borough v. Philadelphia and Reading Railway Company et al.

the siding of the Adam Scheidt Brewing Company. This track will cross Markley street at grade, at a point distant about 150 feet from the grade crossing of the brewing company siding, thus making three grade crossings of this street within a distance of 550 feet. The proposed track will form, with the brewing company siding and the main tracks of the Stony Creek Company, a completed "Y." The object of this additional track is to enable the defendants to turn their engines and to dispense with the turntable, which, it is claimed, is in a dilapidated condition, needing immediate repairs. By using the "Y" as a means to turn the engines it will be necessary to cross Markley street at grade at least fifty-two times daily, and in one-half of these crossings the engine will move backward.

The borough of Norristown, by this bill, complains that the action of defendants is (1) without authority of law; (2) that the proposed grade crossing will interfere with the full opening of Markley street, and unnecessarily obstruct public travel thereon, and is for the mere convenience and economy of the railroad company, and not for the use or convenience of any manufacturing or other industrial establishments.

Markley street, as laid out and partially opened, is of the width of 66 feet, and by reason of its location and easy grades promises to become one of the leading thoroughfares of the borough. In the vicinity of the point in question the town is built up and improved, and travel upon this street, when opened, will unquestionably be great.

In the increasing demand for the abolition of grade crossings and the very decided expressions of opinion on this subject by the Supreme Court, the defendant company should show a great, if not an imperious, necessity for their action. If grade crossings in the country are objectionable, more so are those in the heart of a town; and whilst the necessities of trade may require sidings to accommodate manufactories and other industrial enterprises, no such reason can be urged when the only object is to save a slight expenditure of money by the railroad company. When called upon to justify their action, we have the testimony of the highest officers of the railroad company that, while a turntable is feasible and will answer all their purposes, the only reason that can be assigned for the proposed new track is, that it will save expense.

In support of this fact, we refer to the testimony of Mr. Voorhees, First Vice-President of the defendant companies, who, when asked: "Q. Why is a 'Y' used instead of a new turntable?" "A. From motives of economy" (page 8). "Q. Is there any other reason why a turntable would not answer the same purpose here except that of economy?" "A. No, sir" (page 9). And on page 11 he said, "The location was determined first purely as a matter of economy."

This testimony was corroborated by the testimony of the chief engineer, Mr. Hunter, who was asked: "Q. Is there any engineering reason why the present location of the turntable should not be the site of a larger or better one, as may be necessary to accommodate your traffic?" "A. There is no engineering reason." "Q. It is perfectly feasible, isn't it?" "A. It is feasible, but it is objectionable." "Q. For what reason?" "A. Because it costs much more money" (page 20).

This, therefore, establishes the fact that the action of the defendant company is based upon a mere saving of expense. It is not denied that a turntable will answer the purpose intended, and, therefore, before the expense can become a factor governing the case, the amount may be important; but when questioned as to what this expense will be, we find from the testimony of the engineer that the probable cost of improving the turntable over and above the "Y" construction will be \$4000. According to the plaintiff's testimony, the increased cost will be less than \$2000.

10 DIST. R.

Norristown Borough v. Philadelphia and Reading Railway Company et al.

The recital of these facts and the admissions of the officers of the defendant company show conclusively that the court ought not to tolerate a grade crossing under these circumstances.

And now, April 2, 1901, it is ordered, adjudged and decreed that a preliminary injunction until final hearing be awarded, restraining the defendants, their agents, contractors and employees, from constructing a grade crossing over Markley street, in the borough of Norristown, for the purpose of establishing a "Y" to take the place of their existing turntable, plaintiffs first to give security in the sum of \$1000.

From Montgomery Evans, Norristown, Pa.

Pittsburgh v. Pittsburgh, Carnegie & Western R. R. Co. et al.

Riparian rights—Wharves—Control of city—Municipal laws.

Under the power given by the Acts of April 15, 1851, P. L. 708, and April 19, 1858, P. L. 386, the city of Pittsburgh has control and authority over the Monongahela wharf, located between high and low water lines of the Monongahela river.

Riparian rights—Wharves—Streets and highways.

Such a wharf is a highway under control of the city, subject only to the rights of those navigating the river and the powers of the United States with respect to the banks of a navigable stream.

Railroads—Municipal authority over streets—Right of railroads to cross streets without municipal consent—Act of April 4, 1868, and Constitution, art. iii, sec. 7—Municipal law.

The defendant, a railroad corporation, organized under the Act of April 4, 1868, P. L. 62, with one of its termini in the city of Pittsburgh, sought to build a pier upon the Monongahela wharf, for the purpose of bridging the Monongahela river at that point, the bridge being authorized by an Act of Congress and the location of the pier, etc., approved by the Secretary of War. Prior thereto, one of the constituent companies of the defendant had built a pier there with the permission of the United States, it being within the harbor lines, and under an ordinance of the city of Pittsburgh, which, however, had expired by reason of a failure to complete the bridge within a specified time. The defendant corporation proceeded to remove this pier and rebuild at a point a little further down the river, without any permit from the city or any assent to its construction and occupation of the said wharf. Held, on bill filed by city for injunction, that the wharf was a street within the meaning of the Act of 1868, and that the defendant railroad company, under the Act of 1868, and since the Constitution of 1873 (art. III, § 7,) became effective, had the right, where one of its termini was a city, to cross any of the streets thereof where such crossing was necessary, in order that it might reach that part of the city to which it must go to fulfill the purpose of its incorporation effectively, and municipal consent was not a prerequisite, though the city might regulate the manner of crossing.

Motion for preliminary injunction. C. P. No. 3, Allegheny Co., Nov. T., 1901, No. 45.

James C. Gray, assistant city solicitor, and W. W. Smith, assistant city solicitor, for plaintiff.

A. M. Neepor and W. W. Ford, for defendants.

McCLUNG, J., Aug. 28, 1901.—The plaintiff in this case is the city of Pittsburgh and the defendants are The Pittsburgh, Carnegie and Western Railroad Company and Arthur McMullen.

McMullen is simply the contractor whom the other defendant has employed to do the work which plaintiff seeks to enjoin. His rights, then, are simply and only those of the other defendant, and therefore the case may be discussed as if the railroad company were the only defendant.

Pittsburgh v. Pittsburgh, Carnegie and Western Railroad Company et al.

By the Act of April 15, 1851, P. L. 708, the city was given control and authority over the Monongahela wharf, which extends from Grant street down the Monongahela river to its junction with the Allegheny, with the privilege of imposing and collecting tolls, and in 1858 (P. L. 336) an Act was passed, providing (section 5) "that all riparian rights now vested in the State, lying between high water lines and the rivers within the aforesaid district (including the Monongahela wharf), shall, from thenceforth thereafter, be vested in the several corporations within whose limits the same now is or hereafter shall lie."

This Act provided for the appointment of commissioners, who fixed high and low water lines (*inter alia*) along said wharf.

The city took possession of this wharf, and, more than fourteen years ago, paved it, at the point with which we have to deal, down to low water line. The distance here between high and low water line is 227 feet.

The controversy in this case is over a pier located on this wharf a short distance below the mouth of Ferry street, which the defendants propose to tear down and rebuild, the new pier to be partly upon the site of the one now there, but to be somewhat larger, and to extend a few feet further down the Monongahela river. Both sites are wholly on the paved wharf. The sites of these piers are also within the harbor lines established by the United States government.

The defendant company was formed by the consolidation of the Washington County Railroad Company and the Pittsburgh and Mansfield Railroad Company July 17, 1901. The Pittsburgh and Mansfield Company, originally incorporated in 1894, was reorganized Aug. 24, 1898.

The defendant company is incorporated under the Act of 1868, as were its constituent companies, all of the charters having been obtained in or since 1894. They together authorized the building of a railroad from Pittsburgh to the State line, where it is intersected by Cross creek.

The defendant company is authorized by the Act of Congress to bridge the Monongahela river at the point where the pier is located, provided it completes said bridge by March 2, 1904, and the location of the pier, etc., has been approved by the Secretary of War. The existence of the old pier is explained by the fact that the Pittsburgh and Mansfield Company obtained the consent of the United States government to the building of said pier and of a bridge, but a slight shift has been made, and hence the approval of the new plans and the proposed rebuilding of the pier. The city of Pittsburgh assented to the building of the first pier, but the time within which, under the ordinance, the bridge was to have been completed has expired.

The city of Pittsburgh asks us to enjoin the work on the pier because it is located on a highway of the city, and the city has not assented to its occupation by the railroad company.

The wharf is, we think, a street of the city of Pittsburgh within the meaning of Act of 1868, to which we shall particularly refer hereafter. It is undoubtedly a highway under the control of the city, subject only to the rights of those navigating the river and the powers of the United States government with respect to the banks of a navigable stream.

As its first answer to plaintiff's case, defendant says that it (or its predecessor to whose rights it has succeeded) was authorized by the Act of Congress to build this bridge and locate this pier, and that the power and control of Congress in the premises is exclusive and paramount to that of the State of Pennsylvania and that of the city of Pittsburgh, because "Congress can lawfully confer upon a private corporation the capacity to occupy navigable waters within a State, in order to construct a bridge over such waters for the purpose of inter-State commerce, without the consent and notwithstanding the protest of the State:"

10 DIST. R.

Pittsburgh v. Pittsburgh, Carnegie and Western Railroad Company et al.

Decker v. Baltimore, &c., R. R. Co., 30 Fed. Repr. 723; and "all navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and though the title to the shore and submerged soil is in the various States and the individual owners, it is subject to a servitude in respect to navigation created in favor of the Federal government by the Constitution:" Gibson v. United States, 166 U. S. 289.

We are in entire accord with the law as here laid down, but in the present case the United States government is not, either directly or indirectly, constructing a bridge for the purpose of inter-State commerce, nor is she doing anything to regulate or improve the navigation of the Monongahela river which calls for the occupation of the wharf. She is simply authorizing the building of a bridge by a Pennsylvania corporation, which is constructing a road wholly on Pennsylvania soil, and certifying that this pier is not such an obstruction to the navigation of the river that she will forbid its erection. In other words, she does not either authorize or direct the erection of the pier for any purpose of her own.

The defendant company's right to occupy the wharf as against the city of Pittsburgh depends, therefore, upon the powers granted to the parties by the laws of the State of Pennsylvania.

As we have said, we regard this wharf, for the purpose of the case, as a highway or street of the city of Pittsburgh. Defendant here is simply *crossing* a street of the city.

Plaintiff contends that the city has the absolute right to prevent this crossing, and that, under the Act of 1868, defendant can neither occupy longitudinally nor cross any street or alley of the city without the city's consent.

We are not considering the question as to whether or not the city has any proprietary right in the land of this wharf which would entitle it to damages for a taking. If there is such right defendant must give proper bond. But we are dealing now with another question. Can the city *absolutely forbid this crossing*?

There is no allegation that the pier is not properly located, nor that it does unnecessary injury to the wharf. The evidence, so far as we have any, is the other way. The matter of location, size, etc., is under the direction of the United States authorities, and the present pier has their approval.

The rights of the parties which we are now to pass upon are determined by the construction put upon the General Railroad Act of 1868, and the portions of the Constitution which relate to railroad companies.

The Constitution provides, art. III, § 7: "The General Assembly shall not pass any local or special law . . . creating corporations or amending, renewing or extending the charters thereof, (or) granting to any corporation, association or individual any special or exclusive privilege or immunity, or to any incorporated association or individual the right to law down a railroad track."

And art. XVII, § 1 (railroads): ". . . any association or corporation organized for the purpose shall have the right to construct and operate a railroad *between any points within the State*, and to connect at the State line with railroads of other States."

This makes necessary a general law for the incorporation of railroad companies, if any are to be incorporated. The general Act of 1868 was in force at the time, and the defendant company was, since the adoption of the Constitution, incorporated under it.

The Act of 1868 has in it this provision: "This Act shall not be construed . . . to authorize any corporation formed under the Act to enter upon and occupy any street, lane or alley in any incorporated city of this Commonwealth without consent of such city having been first obtained."

Pittsburgh v. Pittsburgh, Carnegie and Western Railroad Company et al.

The defendant company having been incorporated since the new Constitution, when we are inquiring as to its powers, we write into its charter the constitutional provision already quoted, and then also write into it the quoted portion of the Act of 1868, *if it does not conflict with the Constitution, or in so far as it does not so conflict.*

Does the Act of 1868 forbid the *crossing*, as well as the longitudinal occupation, of the streets of a city when it says "shall not enter upon and occupy?" If it does *not*, then we can put the whole clause in, and we have nothing which would sustain plaintiff's case. If, however, the meaning is broader and extends to occupation merely for the purpose of crossing, then we are of opinion that, in so far as it forbids mere crossing, the proviso of this Act would, if given force, defeat the purpose of the quoted section of the Constitution, and hence must give way.

What is meant by the power given by the Constitution to construct and operate a railroad "between any points within the State?" "Between," of course, means "from" and "to." "The object of construction as applied to a written constitution, is to give effect to the intent of the people in adopting it:" Cooley's Constitutional Limitations, 55.

In this case, there can be no doubt about the intent, and that intent can be best arrived at by giving to the language its natural and common sense meaning. Every one who knows anything at all about this clause of the Constitution, knows that the general purpose was to encourage competition between railroad companies, and the particular intent was to take away the power of the legislature to smother competition by discriminating between different companies.

The only places that there can be competition as between railroad companies are places where there is business enough to justify the existence of more than one company. This, of course, includes the cities of the Commonwealth. In fact, these are the points to which railroads must run if we are to have competition. No important road doing a general business would be built within the State if it could not reach any of its cities.

To reach a city with a railroad means to go into that city. "To" means into, and "from" means from any part of: *Com. v. Erie & N. E. R. R. Co.*, 27 Pa. 339; *Western Penna. R. R. Co.'s Appeal*, 99 Pa. 155; *Hazlehurst, Rec., v. Freeman*, 52 Georgia, 245, and many other cases.

Says Paxson, J., in *Penna. R. R. Co. v. Marchant*, 119 Pa. 541, "The necessities of a railroad company and the character of its business *compel* it to seek the heart of a city."

The commonest kind of common sense teaches us that when the Constitution undertook to take away from the legislature the power to discriminate in favor of one and against another company, it did not intend to leave with it the power to say that one company could go where it could do the business of cities, but others must be content with the business of rural districts. Nor to say (what is the same thing) that one might come *into* a city, where it could get the business, whilst the other must stop at the city line, where it could certainly not get even a respectable share of that business. What the legislature cannot do directly, it, of course, cannot do indirectly through the municipal corporation.

When, by the Constitution, a railroad company is given the right to build a road into the city, it is given, by implication, the powers necessary to the enjoyment of that right. This is a familiar principle that is universally recognized. A railroad cannot be built into a city without *crossing* some highways. At least, this is the *prima facie* conclusion, and holds until the contrary is shown, and we have as yet nothing to the contrary in the present case.

Pittsburgh v. Pittsburgh, Carnegie and Western Railroad Company et al.

"A general grant to construct a railroad between certain termini, without prescribing its exact course or line, was considered to authorize the *crossing* of public highways, because this was necessary in order to execute the grant, but was not regarded as *prima facie* conferring the power to occupy highways longitudinally:" Dillon on Municipal Corporations, § 707 (560); Springfield v. Connecticut River R. R. Co., 4 Cushing, 63; Clinton v. Cedar Rapids, &c., R. R. Co., 24 Iowa, 455; Com. v. Erie & N. E. R. R. Co., 27 Pa. 389.

Says Shaw, C. J., in Springfield v. Railroad Co., *supra*: "The grant of a right is by reasonable construction a grant of power to do all acts necessary to its enjoyment." The same effect, see opinions of Hare and Mitchell, JJ., in Duncan v. Penna. R. R. Co., 94 Pa. 435.

We do not hold that the Act of 1868 is affected by the new Constitution, in so far as it forbids the occupation of streets longitudinally without the consent of the municipal authorities; at least, not until the company shows affirmatively the necessity to so occupy. Nor do we hold that the right to cross is beyond the power of regulation. Neither of these cases is before us. We have simply the matter of the absolute right to forbid *crossing*. The right to cross is by implication from necessity. It is therefore limited by the necessity, and hence may be regulated.

The question involved in this case has not been passed upon by the Supreme Court, nor do we know *any* case finally decided in *any* court of the State that is irreconcilable with our conclusion.

There are decisions or discussions which seem to at least question the right to cross as well as the right to occupy longitudinally. We have great respect for their authors, but cannot fall in with their reasoning. The opinions seem to be based largely upon the assumption that the provision of the Act of 1868 in question must necessarily stand as a whole. This, we think, we have shown is not correct. Besides, some of these decisions seem to have proceeded upon the assumption (and were somewhat influenced by it) that a railroad company may occupy a street at grade without being liable for damages done to abutting property. The contrary is now well settled by the cases of Penna. R. R. Co. v. Duncan, 111 Pa. 352, Pittsburgh Junction R. R. Co. v. McCutcheon, 18 W. N. C. 527, and Penna. Schuylkill Valley R. R. Co. v. Walsh, 124 Pa. 544.

The last two cases make it plain that the damages recoverable are the net reduction in value of the property, and that this is to be determined on the assumption that the road, when constructed, will be used in the ordinary way, and engines and cars run on it, and not on the assumption that nothing will be done beyond construction. In fact, when we compare these cases with Penna. R. R. Co. v. Lippincott, 116 Pa. 472, and Penna. R. R. Co. v. Marchant, 119 Pa. 541, we are led to the conclusion that a property-owner is much less likely to be injured without remedy by a railroad constructed on a public street than by one constructed on the property of the company. This, however, is aside from the question immediately before us.

Our conclusion is, that a railroad company incorporated under the Act of 1868 since the Constitution of 1873 went into effect, where one of its termini is a city, whilst it is liable for all injury to property, cannot be *prevented* by the city from *crossing* a street, where such crossing is *necessary*, in order that it may reach that part of the city to which it must go to do its work effectively. We decline to grant the preliminary injunction prayed for.

And now, to wit, Aug. 28, 1901, the motion for a preliminary injunction in this case is refused.

From Edwin L. Mattern, Pittsburgh, Pa.

McCurdy v. Linesville Borough.

Roads—Sidewalks—Change of grade—Time when injury accrues—Act of May 24, 1878—Power of borough authorities over entire road.

The Act of May 24, 1878, P. L. 129, provides for damages done by any change or alteration of a borough street or within its limits, and applies to changes from the natural or original grade as well as to changes from a previously constructed or established one.

It is the duty and within the power of the borough authorities to grade the entire street, including that part of it occupied by sidewalks.

Damages arising from a grading of a part of a street accrue at the time the actual change takes place on the ground.

Hence, where the roadway of a street in a borough was graded to its present grade on or about 1878, and the sidewalk was not cut down from its original grade until 1899, when the borough authorities cut it down to conform to the roadway, *held*, that the then owner was entitled to damages for the injury so inflicted.

Exceptions to report of viewers. C. P. Crawford Co., Feb. T., 1900, No. 18.

Frank P. Ray, for plaintiff.

J. J. Henderson and *A. M. Fenner*, for defendant.

THOMAS, P. J., Jan. 14, 1901.—The street, concerning the change of grade of which is here in question, was opened many years ago, and the roadway thereof was, about the year 1878, graded to or about its present grade.

Plaintiff acquired title to the property in question about ten years ago, and, in the autumn of 1899, the borough authorities graded or cut down that portion of the street in front of her premises now occupied by a sidewalk a considerable distance and to a grade corresponding to the grade of the roadway or nearly so. It seems that this was the first cutting or grading from the original grade of that part of the street used for the sidewalk, and no sidewalk had been constructed in front of these premises prior to this time. It also appears that no change of grade of the roadway was made at the time.

The proceedings were instituted under the Act of May 24, 1878, P. L. 129, and the real question for our determination is as to whether plaintiff is entitled to damages by reason of the grading or altering the grade of that portion of the street now occupied by the sidewalk only, which change alone has taken place since her ownership of the property, and also as to whether she has proceeded under the proper Act to recover the same.

Upon argument, it was contended, on the part of the defendant, that the Act of 1878 did not provide for damages for the "establishment" of a grade, but only for a change of grade; and that if this cutting away for a sidewalk could be treated as a grading at all, it was the original establishment of a grade as to that portion of the street.

We think it quite clear that the Act of 1878 provides for damages done by any alteration of the street, and applies to changes from the natural or original grade as well as to changes from a previously constructed or established one: *Hendricks's Appeal*, 103 Pa. 358; *New Brighton Borough v. United Presbyterian Church*, 96 Pa. 331.

It was also urged, upon argument, that the grade of the traveled portion of the street determines its grade, and that having been established in this case before plaintiff became the owner of the property in question, she cannot recover damages for the injury she alleges she suffered by reason of having the side of the street cut to said grade after she became the owner.

It is the duty and within the powers of the borough authorities to grade the entire street, including that part of it occupied by sidewalks: *Philadelphia v. Weaver*, 14 Pa. Superior Ct. 293; *Steelton Borough v. Booser*, 162 Pa. 630. And the damages inflicted by such work accrue at the time the actual change takes
10 Dist. R.

McCurdy v. Linesville Borough.

place on the ground: Jones v. Bangor Borough, 144 Pa. 638; New Brighton Borough v. Piersol, 107 Pa. 280.

It might well be that the cutting of the roadway proper inflicted no damages whatever upon the property, but that the cutting down of that portion occupied by the sidewalk did, in which case the right to damages would not arise until the damaging change took place.

It is quite clear that the provisions of the Act do not limit damages to the changing of the grades or lines of, or to the altering or enlarging of the roadway, but refers to such changes or alterations within the limits of the street: Power v. Ridgway Borough, 149 Pa. 317; New Brighton Borough v. Piersol, 107 Pa. 280.

And now, Jan. 14, 1901, the exceptions in this case are hereby dismissed.

From Otto Kohler, Meadville, Pa.

Stough's Estate.

Decedent's estate—Practice, O. C.—Liability of legatees and distributees to refund after distribution.

Legatees and distributees who have been paid their legacies or distributive shares upon an award of the Orphans' Court will be ordered by that court to refund such proportion of their respective awards as may be necessary to satisfy the claim of a creditor, which has been sustained by the Supreme Court reversing the lower court, although the appeal was not a *supersedeas*.

On an appeal, which was so taken as not to be a *supersedeas*, from a decree of the Orphans' Court dismissing exceptions to an auditor's report, rejecting the claim of L. S., the decree was reversed, the claim of L. S. sustained to the amount of \$3384.69, and the Supreme Court directed the Orphans' Court to "ascertain the rights of the parties and enforce same by the proper decree" (Stough's Estate, 196 Pa. 358); pending the appeal, the estate was distributed to the next of kin under the award of the Orphans' Court; on petition of L. S., held, that the court would make an order upon the distributees to pay into court such proportion of their shares as might be necessary to satisfy the claim.

Petition of Lydia Stough for an order on Barbara Wolf et al. to pay money into court, etc. O. C. Erie Co., Sept. T., 1898, No. 29.

Frank Gunnison and H. C. Yard, for petitioner; L. E. Torrey, contra.

WALLING, P. J., Jan. 28, 1901.—By the decision of the Supreme Court, Lydia Stough has established her claim as a creditor of the estate of said George Stough, deceased, to the amount of \$3384.69, which includes interest to Jan. 5, 1899. Her appeal to the Supreme Court was not so taken as to be a *supersedeas*, and while it was pending the administrator of said estate distributed the funds in his hands to the next of kin of said deceased, according to the auditor's report, which report had been confirmed by this court. It appears that the money so paid out by the administrator constituted practically the entire balance of the personal estate of the deceased. By that distribution the next of kin have received money that should have gone to pay the debt of Lydia Stough. The rights of next of kin, or heirs-at-law, are to have what is left after payment of debts. Debts must be paid before legacies. The authorities cited for petitioner tend to show that a creditor whose claim has been overlooked in the distribution of an estate may, in a court of equity, compel the legatees to pay his claim out of legacies received by them in such distribution. That principle would seem to apply here.

As the payments in question were made by the administrator and not by petitioner, the fact that they were voluntary may not be important.

As the money paid to respondents formed part of decedent's estate, I see no good reason why an action at law should be resorted to to recover it back.

Stough's Estate.

My first impression was that the Supreme Court, and not this court, should order a restitution of the funds in question; but the Supreme Court have refused to make such order, and have directed this court "to ascertain the rights of the parties and enforce same by a proper decree." In my opinion, the rights of the parties require that the respondents, Barbara Wolf, Peter Stough, William Stough and Mary Buseck, each pay into court for distribution to Lydia Stough, out of the funds received by them from said administrator, the one-seventh part of her claim as above stated; and that respondents, J. L. Rubner, W. J. Rubner, B. L. Rubner and Lydia A. Hamill, should each pay into court for the same purpose the one twenty-eighth part of said claim. I have examined and verified the accounts as stated in the petition and find them correct. I do not think that Lydia Stough should be paid interest from Jan. 5, 1899, to the date of presenting her petition in this case, to wit, July 9, 1900. Under the decision of the Supreme Court (see Stough's Estate, 196 Pa. 358), the respondents should pay the costs of the audit (five-sevenths of which have already been paid by them), and also pay the costs in the Supreme Court.

From Joseph M. Force, Erie, Pa.

 Walles's Estate.

Guardian and ward—Gross negligence—Attachment.

Gross negligence by a guardian in failing to secure a fund belonging to the estate of his ward is not *per se* ground for an attachment against him upon his failure to obey an order to pay, where he never actually got possession of the fund, was guilty of no fraud or misconduct showing moral turpitude, and is without means, and therefore unable to obey the order.

Facts held sufficient to establish gross negligence considered.

Rule to show cause why an attachment should not issue against Robert C. Bair, guardian of said Walles, for failure to pay over balance on his account. O. C. York Co.

For the proceedings on the citation to file an account, see Walles's Estate, 14 York Legal Record, 51.

J. W. Brown, for rule; *R. C. Bair*, contra.

STEWART, J., July 23, 1901.—This proceeding is ripe for an attachment. The guardian, after a citation served on him, filed an account which has now become absolute, showing a balance due his ward. An order was granted by the court on the guardian, Jan. 22, 1901, to pay over this balance, and the guardian accepted service of the same.

The guardian did not pay in accordance with the order, but filed an answer, in which he reiterates the same facts in reference to the ward's estate, which he set up in response to the citation for an account and also to a previous rule for an attachment. These facts are not disputed or denied.

Matthew E. Walles, the ward, is a son of Mary C. Walles, who was a daughter of George Urey, late of Lower Chanceford township, deceased. George Urey died prior to 1879, and in the partition of his real estate Mary C. Walles was entitled to a share. The real estate was sold and purchased by John Bair, who was the father of the guardian. Before the purchase-money of the real estate was paid Mary C. Walles died, and Henry Walles, her husband and administrator, loaned her share of the purchase-money to John Bair. Robert C. Bair was appointed guardian of this and other children, and John Bair, who was then considered amply responsible, became the surety on Robert C. Bair's guardian bond. John Bair never paid over this money to his son, Robert C. Bair, but settled with the other children as they arrived at age.

In January, 1892, John Bair, having become financially embarrassed, made 10 Dist. R.

Wallis's Estate.

an assignment for the benefit of creditors on the 18th of that month, and appointed Samuel M. Fulton his assignee. He also, during his lifetime, made his will, in which he appointed Samuel M. Fulton his executor.

No part of this trust fund ever actually reached the hands of the guardian. If, therefore, the attachment shall be made absolute in this case, it must be upon the ground of gross negligence in the guardian in failing to secure and collect the fund.

No effort was made to collect the money from John Bair until immediately before the assignment. On Jan. 16, 1892, two days before the assignment, John Bair executed and delivered to Robert C. Bair, guardian, a judgment note to secure this fund. This judgment was not entered, and it does not appear that any effort was made to have it entered prior to the execution of the assignment. One day intervened between the day of the giving of the judgment and the execution of the assignment, and it was evidently given in anticipation of that event. Not having been entered as a lien before the execution of the assignment, the opportunity to make the money for the ward by that means was lost.

No further effort was made by the guardian, so far as appears by his answers, to collect this money out of the assigned estate, unless it be that he made demands upon the assignee, who disregarded them, except that he brought a suit to No. 3, April Term, 1897, in the Court of Common Pleas, on the judgment note, and filed a statement in that suit, and there the matter rests.

It is not averred or contended that he has at any time resorted to any legal means to compel the assignee to settle up the assigned estate and make a distribution, although he avers that he believes the assigned estate will pay in full, or nearly in full, all the claims against it, including the claim of this ward. He further avers that the estate of said John Bair is entirely real estate, amounting to nearly 1500 acres of farm and timber land, situate in York and Lancaster counties. There is no averment that any order of sale has ever been applied for or granted to sell this assigned real estate, nor that he has ever begun any proceedings to compel the assignee to perform his trust duties and settle up the assigned estate and pay the creditors. There seems to have been an absolute inertia on the part of both the guardian and the assignee in reference to this assigned estate, perhaps the reason for which may be found in the fact that the guardian is the son and the assignee the son-in-law of the assignor. Their interests are in conflict with those of the creditors and with those of his ward.

This conduct on the part of the guardian becomes dangerously near being gross negligence, for the commission of which the guardian becomes liable for the fund. In *Royer's Appeal*, 11 Pa. 36, Mr. Justice Coulter, speaking of the conduct of a guardian to whom had been delivered a judgment note to secure the ward's money, says: "Why did he not enter up the judgment note when he was warned by Thompson that his condition was perilous and that he wished to do justice to the minors?" Here, it may as well be said, why did the guardian not enter up the judgment? He certainly knew when he received it that it was given to protect the interests of these minors, and that his father was preparing for a failure. In the same case the same learned judge says: "A fiduciary relation requires vigilance as well as honesty. A dead and sluggish calm—a supine negligence—is full of peril to the minor; it is often as fatal as positive dishonesty. The guardian might have secured and collected the money by the means put into his hands. All that was necessary for him to do was discreetly to use them. That he did not do, and, therefore, he ought to account to the minors.

It is a fact well known to the court, although it does not appear in the guardian's answer, that the guardian was engaged with his father, or in his father's

business, up to the time of the assignment. He was, therefore, in position to know his father's financial condition. Yet, notwithstanding this, he does not appear to have made any effort to secure this fund from the time when he was entitled to it, in 1879, until the time of the failure, in 1892—a period of thirteen years.

"When a guardian lends the money of his ward on mere personal security and loses it, he is responsible, no matter how cautiously he may have acted. In principle and reason the case is the same when money is left in the hands of a debtor on similar security for an unreasonable time, during which it might easily be collected or better security taken for it. I do not mean to say that a guardian is bound to sue all debtors of his ward immediately. But he is utterly inexcusable if he suffers a large debt to remain unsecured year after year, when it might be put beyond reach of accidents by an hour's attention. Certainly it cannot be denied that the guardian makes himself liable if he looks on in supine negligence while the debtor is gradually sinking in his circumstances for four years before he becomes insolvent:" Chief Justice Black, in *Wills's Appeal*, 22 Pa. 325. See *Long's Estate*, 6 Watts, 46.

It is said that all that is required of a trustee is common skill, common prudence and common caution: *Neff's Appeal*, 57 Pa. 91. But do the circumstances here show common prudence and caution? Had the note been given to any other creditor on the eve of, and doubtless with the knowledge of, the contemplated assignment, would he not have had it entered the same day, or the next day at the latest? It has not been shown that this could not have been done, and John Bair at the time of the giving of the note was a resident of the county, within twenty-two or twenty-three miles of the court-house, and the guardian resided with him.

Negligence is the want of care according to circumstances. The failure to exercise ordinary care results in ordinary negligence. Failure in the performance of a high or exacting duty results in gross negligence. A guardian who sees his ward's money in peril, I should say, was under obligations to exert all his energies to save it, and if he had it in his power to protect his ward by such energetic action and failed to make any effort, he would be guilty of gross negligence. If the property, if sold now, will pay all, or nearly all, the debts, an entry of the judgment before the assignment would have saved the ward's money.

So there does not seem to be any question as to the guardian's liability for this fund; the only question is whether he should be attached, where the loss of the money is occasioned through gross negligence.

The guardian avers his willingness to pay, but says that he is without means, and therefore unable to pay. He says all the property he has, if any, is tied up in his father's assigned estate.

After a very careful and thorough examination of all the cases, I have been unable to find a single case in which a guardian or other trustee has been attached through the trustee's gross negligence alone, and where the money had never been actually received by him. In all the cases where attachments have been allowed, there has been embezzlement, conversion of the ward's money, or other fraud or misconduct, showing moral turpitude. No such thing appears in this case, and therefore none of the cases apply. I am unwilling to break the ice and extend this harsh remedy. I think it only proper, however, to say that it is the duty of the guardian to begin at once and by all lawful means to compel a prompt and speedy settlement of the assigned estate of John Bair, so that this ward may receive what is justly due him.

The rule for an attachment is refused, at the cost of the respondent.

From Richard E. Cochran, York, Pa.

Hershey & Bro. v. Mylin.

Magistrates' judgments—Defects on record—Presumptions—Certiorari.

Where a magistrate had jurisdiction over the person as well as the subject-matter at a hearing, every presumption is in favor of the regularity of his proceedings, and merely formal errors will be disregarded.

Where the transcript does not set forth that any witness was sworn, it will be presumed that proper evidence of some nature was given or admissions made to sustain the claim, judgment not having been by default.

A magistrate's judgment will not be reversed on *certiorari* because the record fails to show that the judgment was given publicly; that will be presumed; nor, because it fails to show when it was given, as it will be presumed to have been given on the day of the hearing.

Certiorari. C. P. Lancaster Co., Sept. T., 1900, No. 5.

J. W. Brown, for *certiorari*; George A. Lane, contra.

LIVINGSTON, P. J., March 2, 1901.—The transcript of the docket of John Weaver, Esq., as filed, shows that in this case of A. Hershey & Bro. v. M. K. Mylin, before him, no summons issued. There was a voluntary appearance. "Amicable action, July 30, 1900, parties appear; Amos Hershey for A. Hershey & Bro., plaintiff, and M. K. Mylin, defendant, and agree that an action be entered upon the docket, with the same effect as if a summons had been issued and served. Plaintiff claims balance on book account from Jan. 6, 1892, to Dec 17, 1895, of \$249.40. Defendant claims the benefit of statute of limitations, and admits the claim of plaintiff for all charges from January, 1894. Defendant also claims set-off of sale bills of \$34.05, and cash paid on certain bill of \$22.89. Plaintiff claims interest. Interest allowed plaintiff from Jan. 1, 1894, to Jan. 1, 1899. Defendant allowed benefit of statute of limitations on this claim; also set-off of \$22.89 allowed. After hearing and giving defendant benefit of all claims allowed and giving plaintiff benefit of five years' interest, judgment was given for plaintiff and against defendant of \$126.84, with costs of suit. Defendant offered to settle with plaintiff for \$40. Plaintiff refused. Aug. 7, 1900, gave transcript of docket to defendant."

The proceedings of the justice were entered and filed on Aug. 20, 1900, to September Term, 1900, No. 5.

The exceptions were filed Sept. 24, 1900, as follows: "1. The transcript of the justice does not show that any witness or witnesses were sworn to prove plaintiff's claim. 2. The transcript of the justice does not show that judgment was publicly entered for plaintiff and against defendant. 3. The transcript of the justice does not show when the judgment was entered."

Proceedings of justices reviewed on *certiorari* are treated with much liberality, and every presumption is made in their favor consistent with the record. The record here shows that the parties voluntarily appeared before the justice and agreed and directed the justice to enter an amicable action, which was to have the same effect as if a summons had been issued and served. They then proceeded to the trial of their case.

The plaintiff presented his claim, and the defendant admitted that part of it which was not barred by the statute of limitations, and for which the justice gave judgment with interest. They were both present. The record shows what the claim was, and that it was within the jurisdiction of the court of the justice. The record also shows that there was a hearing, and the presumption is that there was proper evidence given of some nature, or admissions made by the parties, to satisfy the judgment of the justice of its availability. And the justice having had jurisdiction of the persons, as well as the subject-matter, every presumption is in favor of the regularity of the proceedings: 2 Leg. Rec., 350;

Hershey & Bro. v. Mylin.

Borough of South Bethlehem v. Connolly, 3 Montg. 142; Rohrer v. Musselman, 6 Lanc. Bar, 50; Com. v. Bard, 10 Lanc. Bar, 75.

Where the record does not show that the judgment was given by default, it will not be reversed merely because it does not show that evidence was heard at the hearing: Ott v. Snyder, 3 Northamp. 113.

A statement that judgment was given after investigation of plaintiff's claim was held to be equivalent to a statement that proof was made: Hartman v. Kottcamp's Exec'rs, 2 York, 215.

A justice's judgment will not be reversed on *certiorari* because the record fails to show that the judgment was given publicly; that will be presumed: Parkes v. Diehm, 5 Pa. C. C. Reps. 146; Hartman v. Kottcamp's Exec'rs, 2 York, 215.

On the hearing of a *certiorari* to a justice, merely formal errors will be disregarded. The transcript of the justice shows when the judgment was given, to wit, July 30, 1900: Stewart v. Thompson, 2 Ash. 120.

The record shows that on that date the parties appeared, that all the proceedings took place on that day, and judgment was then given for the plaintiff in presence of the defendant.

Finding nothing to warrant the court in sustaining any of the exceptions, the exceptions are now dismissed, and the proceedings of the justice are sustained.

From George Ross Kahleman, Lancaster, Pa.

McManus v. Philadelphia.

Municipalities—Contract—Clause in contract providing that dispute should be referred for final decision—What dispute is within clause.

A dispute between a contractor, who had contracted with the city of Philadelphia to erect a retaining wall and reconstruct the slopes of a reservoir, and the city, as to the payment for the work done, the contractor claiming, and the city denying, that he had not been paid for all the work for which he was legitimately entitled to be paid under the contract, and that the city had ordered him to do extra work, is one which is proper to refer to the chief of the water bureau for a final decision, when one clause of the contract provides "that no allowance shall be made to the contractor for any work as extra work, unless the contractor is directed in writing by the engineer to do such extra work at a price satisfactory to the director;" and another clause provides: "Throughout this specification the term 'the director' refers to the director of the department of public works, and the term 'the engineer' refers to the chief of the bureau of water or his authorized assistants. All disputes between the city and the contractor, or between one contractor and another, whether under this specification alone or under this and others, shall be referred to the engineer, and his decision shall be final and conclusive."

Exceptions of the city of Philadelphia to the report of the referee. C. P. No. 1, Phila. Co., Dec. T., 1898, No. 548.

F. B. Bracken and John J. Clark, for plaintiff.

John L. Kinsey, city solicitor, for defendant.

BIDDLE, P. J., Sept. 16, 1901.—The plaintiff, in August, 1898, contracted with the defendant to erect a retaining wall and reconstruct the slopes at the Queen Lane Reservoir. The reconstruction of the slopes involved their being filled in with new material so as to flatten the angles of their descent. The plans upon which plaintiff had bid and upon which he worked showed the amount of fill to be added to the old embankment for the purpose of flattening the angle of its slope, and also a portion of excavation into the old slope to a depth of two feet horizontally with the top of the embankment and extending varying distances down the slope. Under these plans the plaintiff then began work. Mr. Ely, the engineer then in charge on behalf of the city, having interpreted the specifications to mean that the contractor was entitled to be paid merely for the fill

10 DIST. R.

McManus v. Philadelphia.

added to the old embankment, confined himself to a measurement of such fill and made no measurement of the amount excavated by the contractor from the original bank. Upon these estimates the contractor was paid. Subsequently the contractor wrote to the chief of the water bureau, John C. Trautwine, about payment for material taken by him from the old slope, and, under the orders of Mr. Trautwine, he was paid for an amount of earthwork excavation equal to that shown upon the plans upon which he had bid.

The contractor still contended, however, that he had not been paid for all the work for which he was legitimately entitled to be paid under the contract. He further claimed that, by reason of the bad condition of the material in the old embankment, he was obliged to take much more of it out than would have otherwise been necessary and replace it with good material. He alleged that this was done under the orders of the engineer of the city, Mr. Ely.

The statement that any such excavation had been rendered necessary by the poor condition of the old embankment, and that the engineer in charge had ordered the work claimed by plaintiff to be done, were all denied by the city.

This new contention was referred to the chief of the bureau, Mr. Trautwine, by virtue of the following clause in the specifications: "Throughout this specification the term 'the director' refers to the director of the department of public works, and the term 'the engineer' refers to the chief of the bureau of water or his authorized assistants. All disputes between the city and the contractor, or between one contractor and another, whether under this specification alone or under this and others, shall be referred to the engineer, and his decision shall be final and conclusive."

The contractor contended that he was entitled to be paid for earthwork, a grand total of 76,883 26-27ths cubic yards, at 57 cents a cubic yard, and the city engineers maintaining that the amount of 50,356 cubic yards, the total for which the contractor had already been paid, was all for which the contractor could justly claim.

Mr. Trautwine proceeded to make a careful examination of the entire matter, hearing both sides of the controversy in full. As a result of this reference, Mr. Trautwine decided that the plaintiff had received all that he was entitled to under the testimony submitted and the specifications in the contract.

The question now brought before the referee is the identical one adversely decided against the plaintiff, and it is contended on behalf of the city that Mr. Trautwine's decision is final and conclusive. If this be so, it is, of course, unnecessary to consider the reasoning of the learned referee, or to decide whether his view or that of the chief of the water department is correct.

The law is clear is admitted on all sides, and so reported by the referee in the following words: "Where a contract for the construction of work contains a stipulation that all questions in dispute arising thereunder shall be submitted to a person therein named for final decision, that is a bar to a common law action therefor; that when the referee's award is certain and final upon its face, no irregularity appearing and no corruption or misbehavior of the arbitrator shown, it is conclusive upon the parties, upon the matter directly in issue, as if it were a judgment." This, adds the referee, is fully established and enforced by these and kindred decisions: *Reynolds v. Caldwell*, 51 Pa. 298; *Hostetter v. Pittsburgh*, 107 Pa. 419; *Brown v. Decker*, 142 Pa. 640; and *Bowman v. Stewart*, 165 Pa. 394.

In this case no irregularity, no corruption or misbehavior on the part of Mr. Trautwine was either alleged or proven. The referee, however, decided that this was not such a dispute as is contemplated or provided for by section 60, and took cognizance of and considered the whole subject and found in favor of the plaintiff.

The contract seems to have been very carefully drawn to avoid all disputes as much as possible. Section 54 provides "that no allowance shall be made to the contractor for any work as extra work, unless the contractor is directed in writing by the engineer to do such extra work at a price satisfactory to the director." This eliminated from consideration the prolific disputes generally endeavored to be supported by verbal testimony.

It was also agreed that the total amount to be expended for the work to be done shall in no event exceed the sum of \$71,200. The amount of money, therefore, which the plaintiff could recover in any event was positively fixed. To the payment of that amount the city does not object. This leaves practically to be decided, by the chief of the water bureau, whether the work was done at all; if so, by whose order; and if under the contract, where is the provision which authorizes it. We fail to see, under the 60th section of the contract, why a dispute of this character does not fairly fall within its provisions.

We therefore find that the decision of the chief of the bureau is final and conclusive upon the plaintiff, and bars his right to recover in this action.

The exceptions to the report of the referee are sustained.

Pinner v. Widhson et ux.

Gifts inter vivos—Implied trusts.

A gift *inter vivos* made by a person *sui juris*, with a full understanding of the nature of the transaction, without fraud or duress, is irrevocable.

The plaintiff, who had for years accumulated her savings for the benefit of her daughter, one of the defendants, entered into a contract to purchase certain real estate, and directed the attorney retained by her to have the conveyance made to her daughter, and, on delivery of the deed by the vendor to the attorney, gave her the money so accumulated to enable her to pay the purchase-money. The deed to the daughter was delivered by the vendor to the plaintiff's attorney, and, after being recorded, delivered by him to the plaintiff, with a full explanation of the transaction. The daughter afterwards married, and her mother, becoming estranged from her, filed a bill in equity praying for an injunction, restraining her from conveying or encumbering the property, and a decree declaring the deed void and directing a conveyance to herself, upon the ground that her attorney had disobeyed her instructions in having the deed made to the daughter, defendant, instead of the plaintiff as trustee for the defendant, and that, as she had advanced the purchase-money, an implied trust arose therefrom for her benefit. *Held*, that the averment that the attorney had disobeyed his instructions was not sustained by the proofs, and that the bill could not be maintained.

Bill for injunction and to establish a trust in certain real estate. C. P. No. 3, Phila. Co., Dec. T., 1900, No. 436, in Equity.

George Bradford Carr and Nimrod Woolery, for plaintiff.

Thomas A. and Walter T. Fahy, for defendants.

MCCARTHY, J., Sept. 27, 1901.—This cause was tried on June 14 and June 18, 1901, before me, sitting as chancellor. All the parties to the suit were present at the trial; they were also represented by counsel. Evidence was given in open court on behalf of both plaintiff and defendants. After the hearing of the evidence the case was fully argued by counsel.

Abstract of the pleadings.

The bill sets forth that the plaintiff, in 1892, purchased at the Philadelphia Exchange premises No. 426 Vine street, for the price of \$2150, "money that she had worked for and saved;" that the plaintiff cannot read or write; that she employed an attorney, handed over to him the said price, \$2150, and instructed him to make out a deed in her name in trust for Catharine Bennett, her child by a former marriage, unmarried at the time of the execution of the deed; that the attorney, without the knowledge and consent of the plaintiff and against

Pinner v. Widhson et ux.

her instructions, made the deed out to Catharine Bennett; that after Catharine Bennett married Arvid K. Widhson, plaintiff discovered that the deed was made out to Catharine Bennett, and at once requested her daughter to convey the property to plaintiff; that her daughter declined to do this, but made and delivered to plaintiff a will, dated Oct. 8, 1894, which plaintiff has ever since had in her possession; that said will recites the deed conveying No. 426 Vine street to the testatrix in fee, and that the purchase-money therefor was furnished and paid by testatrix's mother, and that the property has since been held by testatrix in trust for her mother, and therefore directs the executor of the will to convey the premises by deed to her mother, Bridget Pinner, her heirs and assigns forever, and to transfer to her all policies of insurance on said premises; that plaintiff's daughter had no means other than the sum of \$500, which plaintiff had put into bank to her credit, which sum was used in part payment for the said property; that plaintiff since the said will was made has lived in the house with her daughter and her daughter's husband, doing her own housekeeping and cooking; that the daughter and the daughter's husband have attempted to raise money on the property, and have had physicians examine into plaintiff's mental condition for the purpose of proving her insane, and have circulated stories that she is not in her right mind, which is wholly untrue; that plaintiff is paralyzed on one side, but is in perfect mental health; that the daughter and daughter's husband have entered into a conspiracy to get rid of plaintiff, eject her from the house and to cheat and defraud her and deprive her of her property, and, in pursuance thereof, the daughter has made a will of very recent date, leaving the whole of the said property to the daughter's husband, ignoring the rights of plaintiff, and thereby cheating and defrauding plaintiff out of all rights in the said property.

The prayers are for an injunction to restrain the defendant from conveying or encumbering the said premises; for a decree declaring the deed now standing in the name of Catharine Bennett to be void; for a conveyance by the defendants to the plaintiff of the said property, and further relief.

The defendants have answered separately. Arvid K. Widhson avers that he has no knowledge of the averments set forth in the first five paragraphs of the bill, and prays for proof of the same; he admits that complainant, his wife and himself have lived in the same house since October, 1894; he denies that he has ever attempted to raise money on the property, and denies that physicians who came to the house to examine into the mental condition of the plaintiff did so at his or his wife's suggestion, but avers that the examination was at the request of plaintiff's own husband, who believed that she had become mentally deranged since being afflicted with paralysis; he denies that he has circulated reports concerning plaintiff's mental condition, or that he ever entered into any conspiracy to cheat or defraud the complainant or eject her from the house; he admits the making by his wife of a will devising him the property for life, with remainder to their children, and prays that the bill, so far as he is concerned, be dismissed with costs.

The separate answer of Catharine Widhson, formerly Catharine Bennett, admits the purchase of the property for the price named in the bill, but denies that the purchase-money was money earned and saved by plaintiff, and denies that plaintiff cannot read, averring that she reads daily newspapers and books, and has been able to do so since defendant's childhood. She denies that the purchase-money was handed to plaintiff's attorney, and avers that it was handed to defendant by plaintiff in the office of The Commonwealth Title Insurance and Trust Company. She denies that plaintiff instructed her attorney to prepare a deed to plaintiff in trust for this defendant; she denies that plaintiff was ignorant of the contents and purport of the deed conveying the property to

defendant in fee, and avers that plaintiff was aware of its contents when it was executed, and that it was not until after defendant had married that there was any trouble concerning it; she admits that plaintiff requested that the property should be conveyed to her, which defendant refused and still refuses to do; she admits the making of the will in which the property was devised to plaintiff, but avers that when she signed the will she was in a very nervous and delicate condition, and was induced to sign it because of plaintiff's promise to cease the incessant abuse to which she had subjected defendant; she admits that she had no money in her own name other than \$500, deposited to her credit in the Philadelphia Saving Fund, but avers that she was informed by plaintiff that the balance of the purchase-money was deposited in the same institution in trust for defendant, and further avers that the plaintiff drew out the money so deposited and gave it to the defendant, who then paid over the whole of the purchase-money to the grantors; she admits that the plaintiff and defendant have lived in the same house since the will mentioned was made, and that she has made efforts to raise money on the property to repair it and make it more comfortable for both plaintiff and herself; she admits that physicians have come to the house to examine into plaintiff's mental condition; denies that this was done at her suggestion or that of her husband, and avers that it was done at the request of the plaintiff's own husband; she denies that she has circulated reports that complainant is of unsound mind; admits that by a recent will she has devised the property in question to her husband for life, with remainder to her children, and denies absolutely that she and her husband ever entered into any conspiracy, or had any intention of ejecting complainant from the house, but avers that she has always treated her mother with the greatest respect and consideration, and she prays that the bill, as to herself, may be dismissed with costs.

Findings of fact.

The following facts are clearly established by the bill, answers and proofs in the cause, namely:

1. The plaintiff, Bridget Pinner, has been twice married. Her first husband was named Bennett. In 1870 a daughter was born to Mr. and Mrs. Bennett. This daughter received the name of Kate or Catharine, and she is one of the defendants in the present suit. The relations between the mother and daughter were amicable, and so continued until after the marriage of the daughter, which occurred in 1894. In the words of the daughter, her mother "was always a good, kind mother and bought me everything I wanted, and I never wanted for anything that was in her power."

2. On April 5, 1876, Bridget Bennett began making deposits to her own credit in the Philadelphia Saving Fund Society, and continued them until July 20, 1891, when, with accumulated interest, they amounted to the sum of \$1069.65, which sum was, upon that date, withdrawn and the account closed. With the money so withdrawn, another account appears to have been forthwith opened in the Philadelphia Saving Fund Society, in the name of Bridget Pinner in trust for Catharine Bennett.

3. On April 28, 1884, Bridget Bennett began making deposits in the Philadelphia Saving Fund Society to the credit of her daughter. The account stood in the name of Kate Bennett. These deposits continued until May 19, 1892, when, together with interest accrued, they amounted to the sum of \$605.55, which sum, on that date, was withdrawn in cash and the account closed.

4. In the early part of April, 1892, premises No. 428 Vine street, in the city of Philadelphia, were offered for sale at the Philadelphia Exchange by The Commonwealth Title Insurance and Trust Company, executors of George Graysline, deceased, and knocked down to Bridget Pinner for the price of \$2150.

Pinner v. Widhson et ux.

5. On April 7, 1892, two days after the sale, Bridget Pinner retained Thomas A. Fahy, Esq., a reputable member of the Philadelphia Bar, to represent her in consummating the purchase of the property. They had no previous acquaintance with each other. In response to inquiries from Mr. Fahy, she informed him that her name was Bridget Pinner; that she was married; that she had just purchased a house, No. 428 Vine street, at public sale; that she wanted the deed for it made out in the name of her daughter, Katie or Catharine Bennett, and that the money she was buying the house with "is mine and my daughter's; we earned it." Mr. Fahy then made the following entry in his diary: "Mrs. Bridget Pinner, No. 231 Wood street, bought house No. 428 Vine street; wants deed made out to her daughter, Catharine Bennett; Charles H. Masson, 329 North Sixth street, has the deeds." After the entry was made, it was read over to Mrs. Pinner. The deed of conveyance for the property was prepared at The Commonwealth Title Insurance and Trust Company's office in accordance with instructions received from Mr. Fahy. It was executed on May 19, 1892. Settlement took place on that date in the office of the trust company. There were present the plaintiff, Bridget Pinner; her daughter, Catharine Bennett; Mr. Fahy, and Mr. Kay, representing the trust company. This was the first occasion upon which Mr. Fahy had ever met Catharine Bennett. The two women had previously on that day withdrawn the moneys on deposit with the Philadelphia Saving Fund Society, Catharine Bennett having drawn out \$505.55, standing in her name as heretofore found, and Bridget Pinner having withdrawn the sum standing in the name of Bridget Pinner in trust for Catharine Bennett, the exact amount not being disclosed by the evidence, but being something in excess of \$1000. These two sums not amounting together to the full consideration money for the conveyance, Bridget Pinner had previously borrowed a sum of money sufficient to make good the deficiency. The moneys which were in the possession of Bridget Pinner were handed over by her to Catharine Bennett. Catharine Bennett having then in her possession the full amount of the consideration money, handed it to Mr. Fahy, who paid it over to Mr. Kay, and the deed was thereupon delivered by Mr. Kay, acting for the trust company. Mr. Fahy read aloud to both of the women the caption of the deed, which is in the following words: "This indenture, made the 19th day of May, in the year of our Lord one thousand eight hundred and ninety-two, between The Commonwealth Title Insurance and Trust Company, executors of the last will and testament of George Graysline, late of the city and county of Philadelphia and State of Pennsylvania, deceased, of the one part, and Catharine Bennett, of the city of Philadelphia, county and State aforesaid, of the other part." Afterward, both mother and daughter looked at the deed. When their examination of it was ended, Mr. Fahy handed the instrument back to Mr. Kay that it might be placed on record. After the deed had been recorded, Mr. Fahy obtained it, and when Bridget Pinner came to his office, he delivered it. Before doing so, however, he again read over to her the caption of the deed, also the endorsements upon it, and then he placed it in an envelope, which he sealed and handed to Mrs. Pinner. Mr. Fahy's fees and charges were all defrayed by Mrs. Pinner. Catharine Bennett never paid him anything for any of his services in connection with this matter.

6. The allegation of the bill that the plaintiff instructed her attorney to make out a deed to her and in her name in trust for Catharine Bennett, and that the attorney, without her knowledge and consent and against her express directions, made the deed out to and in the name of Catharine Bennett, is wholly unsupported except by the plaintiff's own testimony, and a careful consideration of the evidence satisfies me that there was no mistake whatever made in the

drafting of the deed. Mr. Fahy acted with exemplary care to secure definite instructions for his own guidance, and took every proper precaution to prevent his client from misunderstanding the nature of the transaction. It is perfectly clear that the mother, who had already given to this daughter outright \$500, and who had set aside and ear-marked over a \$1000 more as a trust fund for the benefit of the daughter, intended, with the daughter's consent, to transmute these moneys into a house, which was to be the daughter's property; and, in order the more effectually to secure that result, she made a free gift to her daughter of the money which was needed to make up, with the saving fund deposits, the price of the house, so that the daughter and not herself might be the actual purchaser of the property. There was no purpose to create a trust nor to couple the gift with any conditions.

7. Nor is there any room for doubt that Bridget Pinner thoroughly understood the nature of the transaction. The original memorandum of her instructions to her attorney, in which the deed was expressly directed to be made to her daughter, was read over to her without objection. The caption of the deed, showing that the conveyance was to her daughter, was read aloud to her at the time of the settlement. She, herself, then and there examined the deed. The allegation of the bill that she can neither read nor write was proven, not only by her daughter's testimony, but also by her own admission on the witness-stand, to be untrue. She is fully able to read printing, and admits that she can read writing sufficiently to distinguish the addresses of letters. Returning from the settlement, her attention was called by counsel, jestingly, to the fact that her daughter was now the owner of the house, and she made some facetious remarks based upon that knowledge. After the recording, her attorney, with creditable caution, again read over to her the caption of the deed and the endorsement of it. Finally, it was delivered into her own hands, and has ever since been in her custody or control. At no time during this transaction did she express in any way the slightest dissatisfaction nor indicate in any way that she was not thoroughly informed and entirely satisfied.

The bill merely avers that the attorney disregarded his instructions, without any statement as to why he did so, whether as the result of a mistake or otherwise, and it does not charge him with any fraud or conspiracy; but the plaintiff has made such accusations on the witness-stand and elsewhere, and it would not be proper to let these charges pass wholly without remark. It is, however, sufficient to say that there is not a single fact or circumstance in the case that affords ground for the vague suspicion of this aged, paralytic woman or that casts the slightest shadow upon the integrity of Mr. Fahy.

8. Possession of the purchased premises, No. 426 Vine street, was given prior to the settlement for the purchase, namely, on May 1, 1892, on which date Bridget Pinner, the mother, John Pinner, her husband, and Catharine Bennett, the daughter, entered into occupancy of the house, where they have ever since resided and are now residing. Toward the close of the year 1893, or the beginning of the year 1894, Bridget Pinner had a severe stroke of paralysis, which affected her entire left side. Her illness confined her to her bed for four months. While she was in this condition, namely, on Jan. 24, 1894, Catharine Bennett married Arvid K. Widhson, who is the other party defendant in this action. Mr. Widhson took up his residence with the Pinner family at No. 426 Vine street, where he has ever since resided and still resides.

9. After Catharine's marriage, Mrs. Pinner's demeanor to her daughter changed. In the language of the latter: "After my marriage she turned on me, and it nearly broke my heart; and I cried every day; and my first little one was born, and it died; and I can conscientiously say it died of a broken heart, as it sobbed the way I did until its death." The mother insisted upon having

the property conveyed to herself, and pursued her daughter with daily abuse, until Catharine Widhson was driven to consult a conveyancer, to ascertain if some instrument could not be prepared to satisfy her mother and obtain peace for herself. The gentleman whom she consulted was called as a witness, and the substance of his testimony is, that when Mrs. Widhson consulted him she was pregnant and seemed to be very nervous and apprehensive. She informed him that "her mother was at her every day, morning, noon and night, almost, to transfer this property to her," and that it was in deference to that wish, and to obtain peace, that she wished to transfer the property, so that, in the event of her death, her mother would have it. He informed her that, being a married woman, she could not devise the property to the detriment of her husband's interest in it, and suggested the making of a deed by her husband and herself. "She said, no; she did not want to do that, because her husband would not sign a deed. Well, I told her that she could not sign away his rights either. We got further into the question, and I asked her where the money came from that purchased it; and she said some of it was hers and some of it was another fund held by her mother, in trust for her, I think she said. 'Well,' I said, 'if it is a matter of trust funds, we may reconvey the trust.' Then I suggested that a will be drawn up in the shape of a declaration of trust. That was the only way I saw of divesting the curtesy of her husband. She assented to it. I drew the will from the notes I read to her, and there it is." The paper thus referred to is dated Oct. 8, 1894, signed "Catharine A. Whidson," the last name being misspelled, and contains, among other provisions, the following: "By deed bearing date the 19th day of May, 1892, the premises wherein I now reside, situate and known as No. 426 Vine street, were conveyed to me by The Commonwealth Title Insurance and Trust Company, executors of the last will and testament of George Graysline, deceased, in fee; as the purchase-money therefor was furnished and paid by my mother, Bridget Pinner, and the property since held by me *in trust* for her, therefore, I order, direct and empower my executor, hereinafter named, to grant and convey the said premises, by a good and sufficient deed, unto my said mother, Bridget Pinner, her heirs and assigns forever, and to assign and transfer unto her all policies of insurance now covering said premises." The paper was delivered to Bridget Pinner by her daughter and has since remained in the mother's possession.

10. While the declarations contained in this instrument seem at first sight to afford confirmation of the plaintiff's case, and are strongly relied upon by her counsel, consideration of the circumstances attendant upon the preparation and execution of the paper shows that it has no such evidential value. The language is not that of Catharine Widhson but of the conveyancer, who, in his desire to accomplish for his client a purpose which he knew to be forbidden by the law, seized upon the idea that a trust might be declared to exist as a reason for the devise of the property, and, to make this declaration as strong as possible, added the clause in reference to the furnishing of the purchase-money, although he was well aware, from the information he had received and which he repeated, under oath, upon the witness-stand, that this statement was, in point of fact, not true. On the other hand, the persecutions and abuse to which Mrs. Widhson was subjected, from which the signing of this instrument appeared to be the only means of escape, coupled with her mental and physical state at the time, amounted to such a condition of duress as to render these declarations worthless as evidence of the facts which they profess to set forth.

11. Mrs. Pinner was not satisfied with the will which her daughter had executed and delivered to her, but desired an immediate conveyance to herself of the property, and consulted the same conveyancer, who informed her that

DISTRICT REPORTS.

Pinner v. Widhson et ux.

he could not do as she desired. In his own language, "I told her there was no way by which I could fix it that she could get it now."

12. On Sept. 24, 1900, Mrs. Widhson made a second will, in which she devised the whole of the premises in question to her husband for life, with remainder to her children. Upon learning of the existence of this will, the plaintiff began the present proceedings.

Finding of law.

By the execution and delivery to her of the deed dated May 19, 1892, Catharine Bennett became the owner in fee simple of the premises No. 426 Vine street, free of any trust. The plaintiff has not shown that she has any right of property, legal or equitable, in the said premises, and therefore her bill is without foundation in law or equity, and must be dismissed with costs.

McCann v. Old Wayne Mutual Life Insurance Company.

Insurance company—Foreign corporation—Services of summons—Act of June 20, 1883.

Under the Act of June 20, 1883, P. L. 184, service of summons on a foreign insurance company doing business in this State, where no service can be had in the county whence the process issues, can be had on one of three persons: (1) On the agent designated for the purpose by the company; (2) on the person designated by the insurance commissioner; (3) on the insurance commissioner himself.

Quere: Where a foreign insurance company doing business in this State has failed to file the written stipulation provided by the Act of June 20, 1883, agreeing that service of process may be made in the manner provided therein, can service be made upon the insurance commissioner in harmony with the spirit and intent of the Act, although not under its express provisions?

Insurance commissioner—Deputy—Service of process on—Sheriff's return—Acts of April 4, 1873, and June 20, 1883.

The Act of April 4, 1873, § 2, P. L. 20, permits the deputy insurance commissioner to perform all the duties of the commissioner during his absence or inability, and service of summons under Act of June 20, 1883, P. L. 184, may in such case be made on him, but the sheriff's return should show the commissioner's absence or inability, to justify the service on the deputy. Hence, where an action of *assumpsit* was brought in this jurisdiction against a foreign insurance corporation, and the sheriff made return as follows, "Served within summons personally on Samuel W. McCulloch, Deputy Insurance Commissioner, by giving to him a true and attested copy and making contents known," and subsequently amended it "so as to show that the defendant company is doing business in the State of Indiana, and has no agent in the State of Pennsylvania upon whom process can be served," the service was set aside.

Rule to strike off service of summons. C. P. Lackawanna Co., May T., 1899, No. 710.

Charles R. Pitcher, for plaintiff; Vosburg & Dawson, for defendant.

EDWARDS, P. J., May 6, 1901.—The defendant assigns two reasons to show that the service of the summons in this case should be stricken off or set aside: 1. The defendant company is a corporation created by the State of Indiana, and is not known to have done any business in Pennsylvania. It has not filed with the insurance commissioner in Harrisburg any written stipulation, agreeing that legal process affecting the company may be served on a specified agent, or on the insurance commissioner, or on a person designated by him. 2. The summons was served upon the deputy insurance commissioner.

We do not see how the first reason assigned can be considered by us as the record now appears before us. The declaration avers that the policy was delivered and the premium paid at Scranton, Pennsylvania. It is true that the policy states that the contract, for all purposes, shall be deemed to have been made in the State of Indiana. Nevertheless, this clause may be completely

McCann v. Old Wayne Mutual Life Insurance Company.

nullified if, as a matter of fact, the company has an agency, is effecting insurance, collecting premiums and delivering policies in Pennsylvania. A company that does this is doing business in Pennsylvania, and if it has not designated an agent upon whom service of process may be made, the service may be made in the manner designated by the Act of Assembly. The question of the constitutionality of the Act of June 20, 1883, P. L. 134, amending the Act of April 4, 1873, P. L. 20, was raised by counsel, but we find that this question is conclusively settled in *Kennedy v. Agricultural Insurance Co.*, 165 Pa. 179.

There is more merit in the second reason advanced for setting aside the service of the summons. The return on the summons is: "Served within summons personally on Samuel W. McCulloch, Deputy Insurance Commissioner, by giving to him a true and attested copy and making contents known." Is such a service good? Does it comply with the law? Counsel for plaintiff, in his brief, says that there was an amendment to the return, by agreement of the parties, that the deputy was a proper person upon whom process could be served, and refers us to the files. There must be a misapprehension as to this agreement, because, upon reference to it, we find that the sheriff's return is amended "so as to show that the defendant company is doing business in the State of Indiana, and has no agent in the State of Pennsylvania upon whom process can be served." This amendment is made a part of the return. It will be seen at once that the question of service on the deputy is not mentioned. On examination of the amendatory Act of 1883, we find that service of a summons on a foreign insurance company may be made, according to the circumstances, on one of three persons, where no service can be had in the county whence the process issues: (1) On the agent designated for the purpose by the company; (2) on the party designated by the insurance commissioner; or (3) on the insurance commissioner himself. The authority for such service is based upon a "written stipulation" filed by the insurance company with the insurance commissioner, agreeing that service of process may be made in the manner specified. It is further provided by the Act, in directing the method of service, that if no agent for service has been appointed by the company, the process may be served upon the agent named by the insurance commissioner, and in default of his naming such agent, then service may be made on the commissioner. It may be contended with some degree of plausibility that the power to affect foreign insurance companies by the service of process in the manner provided by the Act is derived wholly from the "written stipulation" filed by the company in the insurance department, and that where there is no such agreement on the part of the company on file, the Act does not apply. The Act of Assembly does not provide in express terms that where a foreign insurance company is doing or attempting to do business in Pennsylvania, and has failed to file the written stipulation provided in the Act, service of process may be made upon the insurance commissioner. To be complete, the Act should contain such a provision. Yet we are not now prepared to say that such a service is not good and is not in harmony with the spirit and full intent of the Act of Assembly. We are prepared to set aside the service of the summons in this case, because the process was served upon the deputy insurance commissioner and not on the commissioner himself. The Act of April 4, 1873, P. L. 20, in section 2, permits the insurance commissioner to appoint one of his clerks as his deputy, "who shall perform the duties attached by law to the office of principal during the absence or inability of his principal." We know of no reason why, when the insurance commissioner is absent or is unable to perform the duties of his office on account of sickness or from any other cause, the process could not be served upon his deputy. We believe that the Act contemplates this, but the return should show the absence or inability referred to,

DISTRICT REPORTS.

McCann v. Old Wayne Mutual Life Insurance Company.

in order to justify the service. The same question is discussed in the case of *Reynolds v. The Order of Heptasophs*, 9 District Reps. 622. This is a well considered case, and we believe it states the law correctly.

Now, therefore, May 6, 1901, the rule in this case is made absolute and the service of the summons is set aside.

From William A. Wilcox, Scranton, Pa.

Lewistown Borough v. The Juniata and Susquehanna Telephone Company et al.

Telephone companies—Boroughs—Eminent domain—Subject to ordinance—Restrictions in ordinance—Act of June 25, 1885—Assignment of franchises—Act of April 17, 1876.

Under the Act of June 25, 1885, P. L. 164, telephone companies have the right of eminent domain, but, before the right can be exercised in boroughs, they must secure permission from the authorities thereof to erect poles or run wires on the same in the streets, lanes or alleys. Upon granting permission, the authorities may impose such conditions and regulations upon its enjoyment as they may deem necessary.

An ordinance, with the conditions and regulations attached to it, granting permission to a telephone company to erect its poles, &c., and its acceptance, constitute a contract between the borough and the telephone company, the terms of which neither can violate.

Under Act of April 17, 1876, P. L. 30, a telephone company may assign its franchises and property to another company.

Hence, where a borough attaches to an ordinance, granting the right to erect and maintain poles in its streets, etc., the conditions that the company should file a bond of \$2000 for the faithful fulfillment of the provisions, &c., of the ordinance, and that the location of the lines of poles should be under the supervision of the street committee, *held*,

That the acceptance, approval and filing by the borough officers, without objection, of a bond which limited the liability of the surety to one year, was a waiver of all objection to the bond.

That the company could only locate its poles where that committee directed.

That the rights and franchises, etc., acquired by virtue of such an ordinance were assignable to another corporation.

Bill, answer and proofs. C. P. Mifflin Co., Aug. T., 1901, No. 2, in Equity.

William W. Uttley and R. C. Elder, for plaintiff.

A. W. Potter and Charles P. Ulrich, for defendants.

BAILEY, P. J., July 5, 1901.—This is a bill in equity to restrain the defendants from erecting poles and stringing wires on any of the streets, &c., of the plaintiff borough, and to compel the defendant company to remove all poles and wires already erected by it within said borough. A preliminary injunction was granted June 12, 1901. The case coming on for hearing of the motion to continue that injunction, it was agreed between the parties by their counsel that the hearing should be treated as a final hearing for a perpetual injunction and decree.

The case is now before us for determination upon the bill, answer and proofs. Both parties have presented written requests for findings of fact and law, which are returned with this opinion and decree, to be filed by the prothonotary.

From the evidence we find the following facts:

1. The plaintiff, borough of Lewistown, is a municipal corporation, regularly incorporated under the laws of Pennsylvania, and is in the county of Mifflin in the State of Pennsylvania.

2. The defendant, The Juniata and Susquehanna Telephone Company, was chartered Nov. 26, 1900, under the Act of April 29, 1874, P. L. 73, and its supplements, and was authorized by its charter to purchase, erect, construct, maintain

10 DIST. R.

Lewistown Borough v. The Juniata and Susquehanna Telephone Company et al.

and operate a line of telephones within said county of Mifflin and other counties. Frank L. Wolf and Jackson O'Niel, the other defendants, are its superintendent and foreman respectively.

3. The Juniata and Susquehanna Telephone Company, on Dec. 17, 1900, purchased from the Spring Telephone Company all its rights, franchises and property, real and personal, and proceeded to enlarge, extend and operate the line of telephones then in operation and owned by said Spring Telephone Company in said borough of Lewistown.

4. The Spring Telephone Company was duly incorporated May 9, 1899, under said Act of April 29, 1874, and its supplements, and was authorized by its charter to construct, maintain and operate telephone lines in said county of Mifflin and in other counties of the State.

5. On Aug. 7, 1899, the town council of the borough of Lewistown, by an ordinance, which was duly approved by the chief burgess and published, granted permission (under certain conditions and regulations) to the Spring Telephone Company to erect and maintain lines of poles in the streets, lanes and alleys of said borough. The telephone company was required to file with the borough clerk a written acceptance of the conditions imposed by said ordinance before it should go into effect, and before proceeding to erect any of its system was required to file in the office of said clerk a bond in the sum of \$2000, with surety to be approved, conditioned for the faithful fulfillment of the provisions and stipulations prescribed in said ordinance, &c.

6. The location of the lines of poles in said borough was to be under the supervision of the street committee.

7. The Spring Telephone Company, on or about Nov. 6, 1899, filed with the secretary of council a written acceptance of the provisions of said ordinance and a bond in the sum of \$2000, conditioned as required by said ordinance. By the terms of the bond, it was only to be valid for one year from its date. It was dated Oct. 23, 1899, and was approved by the chief burgess. It has not been renewed nor has any other bond been given.

8. The Spring Telephone Company proceeded to erect in said borough of Lewistown a telephone line, which was in operation at the time of its conveyance to the defendant company.

9. On Dec. 10, 1900, the town council, by motion, amended the title of the ordinance of Aug. 7, 1899, so as to read: "The Juniata and Susquehanna Telephone Company," instead of the Penn Telephone Company, the Spring Telephone Company and The Juniata Telephone Company, and on Jan. 7, 1901, the town council required the defendant company "to accept the ordinance (of Aug. 7, 1899), officially, and file a bond as required by ordinance." The telephone company did thereafter forward a written acceptance of the conditions of said ordinance, but has not filed a bond.

10. On May 6, 1901, the town council appointed committees from its members for the several wards "to locate the lines of poles for The Juniata and Susquehanna Telephone Company." The borough is divided into three wards. The committee for the south and west wards designated to the telephone company the location of the lines of poles in said wards, and they were located accordingly. The committee for the east ward directed that the line of poles from Dorcas to Main street should be located in an alley running immediately south of Market street and parallel with it. The telephone company declined to plant them in the alley, and insisted upon planting them on the south side of Market street, and, in defiance of the direction of the committee and a vigorous protest from the citizens, began the digging of holes along the edge of the pavements. A preliminary injunction was then issued to restrain it from proceeding.

Lewistown Borough v. The Juniata and Susquehanna Telephone Company et al.

11. Market street is one of the principal streets of the borough. Along its south side, between Dorcas and Main streets, quite a number of ornamental shade trees have been planted.

12. The Central Pennsylvania Telephone Company has erected its line of poles in the alley south of Market street. It has not the exclusive right in the alley, which can accommodate also the line of the defendant company. An alley of similar width, running immediately north of Market street, is occupied by lines of both companies without any great inconvenience to either company or the public. It is, therefore, not impracticable to place the defendants' lines in the alley south of Market street, where the committee directed. The company made no effort to ascertain whether or not it is impracticable.

13. The defendant company has since acquired the rights and franchises of the Spring Telephone Company, has erected 46 poles and strung 25 miles of wire, and has in operation about 100 telephones in the borough, at an expenditure of from \$5000 to \$7000. Said poles were located under direction of committees of the town council.

14. Although this was a hearing of the motion to continue the preliminary injunction, the parties, by agreement of their counsel, have made it a final hearing.

15. The value of the matter in controversy exceeds the sum of \$1500.

Conclusions of law.

1. Telephone companies have the right of eminent domain, but before the right can be exercised in boroughs they must make application to the municipal authorities for permission to erect poles or run wires on the same in the streets, lanes or alleys. Upon granting permission, the authorities may impose such conditions upon it and regulations for its enjoyment as they may deem necessary: Act of June 25, 1885, P. L. 164. The duty imposed upon the company to apply for permission implies the right of the municipality to grant or withhold it.

2. The ordinance of Aug. 7, 1899, and its acceptance, with the conditions and regulations attached to it, constitute a contract between the borough and the telephone company. The telephone company has no more right to violate its provisions than the borough. The company now complains that it is impracticable to locate its line as directed by the street committee. Whatever money it has expended upon its lines in the borough was spent with the knowledge of the condition of which it now complains. It has no reason to expect that the town council would not insist upon all the conditions being enforced upon which the permission was granted. The municipal authorities were not bound to grant unconditional permission; neither was the company bound to accept the ordinance with the conditions attached to it. Having accepted, it must be held to strict observance: *Allegheny City v. Millville, &c., Street Ry. Co.*, 159 Pa. 411; *Philadelphia v. Lombard and South Streets Passenger R. R. Co.*, 3 Grant, 403.

3. The condition that the lines of the poles should be located under the supervision of the street committee is reasonable. In fact, it would be unreasonable to expect that the municipal authorities would grant permission to a corporation to occupy and use its streets, lanes and alleys without reserving supervisory authority over the manner of their use.

4. The street committee had authority to refuse the defendant company privilege to locate and erect a line of poles on Market street, and they wisely exercised it, especially in view of the fact that there is an alley running parallel to said street and only a short distance from it. It does not do for the company to say that the location of its line in the alley would be more expensive than along the

Lewistown Borough v. The Juniata and Susquehanna Telephone Company et al.

street. It accepted and is enjoying the benefit of the ordinance, and must bear the burdens which accompany it. It may be more expensive to locate its line along the alley than along the street, but the general good of the town and the convenience and comfort of its citizens far outweigh the additional expense to the company. The municipal authorities have granted a valuable franchise without consideration and with no unreasonable conditions attached, and it should not complain that it has not been allowed to use the streets at its pleasure, in disregard of the conditions attached to its franchise.

5. Being, therefore, of the opinion that the defendant company must locate its line of poles under the supervision of the street committee and where it directs them to be located, the preliminary injunction heretofore granted must be made perpetual, so far as it enjoins the defendant company from locating its lines of poles contrary to the direction of the street committee. Should that committee refuse to designate any location, the defendant company would doubtlessly have a remedy, but that question is not now before us.

6. We cannot grant the mandatory injunction prayed for and compel the defendant company to remove all poles and wires which it has already erected in said borough. The Spring Telephone Company having complied with the conditions precedent to the ordinance of Aug. 7, 1899, taking effect, acquired the right to erect its poles and string its wires along the streets and alleys, subject, as to their location, to the supervision of the street committee. Its bond was delivered to the municipal officer, approved by the chief burgess and filed with the secretary of council without objection to the limitation of the liability of its surety to one year. If it was not in any respect in conformity to the requirements of the ordinance, it should not have been approved and retained; it should have been returned to the company for correction. Not having done so, it must be held to have waived all objection to it.

Under the 5th section of the Act of April 17, 1878, P. L. 30, that company had the authority to sell, and the defendant company had the right to purchase, its franchises and property. Therefore, by virtue of the deed from that company to the defendant company, dated Dec. 17, 1900, it acquired and became the owner of all the franchises and property of that company, and succeeded to its rights or franchise to construct its lines over and along the streets and alleys of the plaintiff borough, subject, of course, to the same conditions imposed when accepted by the Spring Telephone Company.

The defendant company at that time had not begun the construction of a telephone line, and could not, therefore, be said to be a competing line. After this conveyance, the town council, by motion, changed the title of the ordinance of Aug. 7, 1899, so that the defendant company might enjoy the permission granted by that ordinance to the Spring Telephone Company. The pole committee for the south and west wards gave it locations for its poles in those wards, and they were accordingly located. With the consent of the council and the encouragement of the citizens, it has erected a large number of poles, has strung upon them many miles of wire at a large expense of money, and is furnishing a large number of citizens with telephone service. Even if we were convinced that some irregularity existed in the mode by which the permission was granted, or that all the conditions had not been literally complied with, it would be inequitable to grant the mandatory injunction prayed for and compel the removal of the defendant's plant from the borough. We are, however, of the opinion that every condition precedent to the enjoyment of the franchise was substantially complied with to the satisfaction of the authorities. We, therefore, refuse the mandatory injunction. We think that the defendant company, before it proceeds further with the extension or construction of its lines in the borough, should furnish the bond required by the

Lewistown Borough v. The Juniata and Susquehanna Telephone Company et al.

ordinance in the sum and with the conditions therein set forth, and will so decree. In accordance with the foregoing opinion, we make the following

Decree.—Now, July 5, 1901, this case coming on to be heard on bill, answer and proofs submitted, and after hearing and upon consideration, it is ordered, adjudged and decreed that the preliminary injunction, granted on June 12, 1901, be made perpetual, and that The Juniata and Susquehanna Telephone Company, and its agents, employees and servants, be forever enjoined from digging holes, erecting poles and stringing wires on or over any of the streets, lanes, alleys, sidewalks and gutters of the borough of Lewistown, in the county of Mifflin, without the consent (as to the location of its lines) of the street committee; and it is further ordered, adjudged and decreed that the defendants, at their own cost and expense, fill the holes which it had dug along the south side of Market street, between Dorcas and Main streets, restore the pavements where it has disturbed them, repair the sewer which it broke, and in all respects restore the premises *in statu quo*, before it attempted to locate its line of poles on that street, so far as is now possible; and it is further ordered and decreed that the defendant company, before proceeding to extend its line in said borough, give bond, as required by the ordinance of Aug. 7, 1899, in the amount and with the conditions set out in said ordinance that such bond was to contain; and it is further ordered that defendant pay the costs (including the stenographer's fee).

From John A. McKee, Lewistown, Pa.

Trattner v. Forman & Barsh.

Practice—Service of bill in equity—Non-resident induced to come into jurisdiction.

Where a person by false representation induces the defendant to come into the county so that he may have an opportunity to serve his bill on him, the service is illegal and will be set aside.

Rule to show cause why the service of the bill in equity should not be set aside. C. P. York Co., April T., 1901, No. 2, in Equity.

J. St. Clair McCall, for rule; *Charles A. Hawkins*, contra.

STEWART, J., July 8, 1901.—The ground of this rule is the allegation that one of the defendants, Morris Barsh, was enticed, decoyed and lured into York county for the purpose of obtaining service of this bill upon him.

The defendants reside and do business in the city of Philadelphia, the plaintiff in the city of York. It is alleged in the petition for this rule that the property with reference to which this bill was filed was never in the county of York, but was located at the time of the purchase and division thereof between the said plaintiff and defendants, at Chesapeake City, in the State of Maryland, and this is not denied by answer to this rule.

The plaintiff and the defendants had on several occasions purchased stocks of merchandise together from persons desiring to quit or retire from business. These stocks they divided, and, as I understand the evidence in support of and against this rule, the complainant was paid a commission of 3 per cent. on the portion of goods taken by the defendants. It is contended in behalf of the complainant that he was not paid his commissions in full on the Pensel stock of goods purchased at Chesapeake City, and this is vigorously denied by the defendants. It seems that the complainant had made demands on the defendants for these commissions alleged to be due and threatened suit.

About the beginning of January, 1901, the complainant had prepared and printed his bill in this case. This was done, according to testimony, between
10 DIST. R.

Trattner v. Forman & Barsh.

Jan. 1 and 9, and he held it ready for service. On Jan. 16 he telegraphed the defendants in these words: "Stock for sale; come at once to York; answer." The defendant, Morris Barsh, wired, in reply, that he could not come, but would send his brother. He sent, however, another Morris Barsh, a cousin of the defendant. This young man left Philadelphia on the early morning train of the 19th at 4.25, which put him into York at 7.50. He went to No. 333 South Duke street to a store kept by Henry Trattner, in which the plaintiff was interested. He explained his business and inquired for the plaintiff, and was informed that the plaintiff was out but would return. He remained about town for several hours, and returned to No. 333 South Duke street once or twice, with a view to ascertain the whereabouts of the plaintiff. He returned home some time during the day without having been able to meet the complainant. The complainant undertakes to excuse his failure to meet the agent of the defendants by saying there was a stock of goods at Muncy, Pa., which were to be sold the next day, and that this is the stock referred to in his telegram, and that he desired the defendant to meet him at York and go with him to see these goods. The complainant's conduct in reference to this occasion shows an extraordinary neglect of his engagement with the defendant made by telegraph, and in pursuance of which they sent on a man at expense to meet the complainant. So far, it appears he made no effort to meet or find the agent of the defendants, but, if his testimony is true, he went off on the 10.20 train to Muncy at a time when the defendants' agent was looking for him in York, and might reasonably have been expected by the complainant. Besides, the fact that he telegraphed the defendant to meet him at York instead of Muncy, where the goods were, or at Williamsport, where they were to be sold, is significant.

On Jan. 31 the defendant received another telegram from the complainant, reading: "Come to Fort Loudon to-morrow; train leaves Harrisburg 7.50 A. M." The defendant, in pursuance of this telegram, went to Fort Loudon and examined a stock of goods which the complainant had for sale, but he failed to buy on account of disagreement as to price. The defendant then left and went to Mercersburg. From there he telephoned back to the complainant, and the result of that conversation was that he came back to Fort Loudon prepared to purchase the goods, but the complainant then contended that the hats and caps were not included in the sale, and the defendant that they were, and hence they again disagreed.

The complainant then told the defendant that he knew of a stock of goods along the Western Maryland Railroad, and that if he would accompany him they would go back and look at those. He did not say whose they were, nor where located. The complainant and the defendant, Morris Barsh, came on to Carlisle and spent the night there, and the next day, being Sunday, they arrived at York. The complainant and the defendant, Morris Barsh, arranged to meet in order to take the 9.00 train on the Western Maryland Railroad on Monday morning. They appointed as a meeting place the store of Jacob Feder, a half-brother of the complainant, on North George street. The defendant was there according to appointment. The complainant was busy and excited, hurrying up the sheriff's office to have a deputy serve the bill. So excited was the complainant and in so much of a hurry that he ran the deputy and himself most of the way from the sheriff's office down to the place of meeting, and there pointed out the defendant. It is evident that the complainant had no intention of going to look for any stock of goods along the Western Maryland Railroad, his purpose being simply to entice and decoy the defendant into the county so that he might procure the service of his bill. The defendant testified that it struck 9 o'clock before the arrival of the deputy sheriff and the complainant at Feder's store, and as soon as the complainant pointed out the defendant, he immediately

DISTRICT REPORTS.

Trattner v. Forman & Barsh.

passed into the store and said nothing more about the stock of goods along the Western Maryland Railroad.

In connection with the complainant's conduct in the whole matter, his declaration, under oath, as to his purpose in getting the defendant here, is important and material. He was asked by his counsel the following questions: "Q. State whether or not you brought or attempted to bring either of the members of the firm of Forman & Barsh into this county for the purpose of serving the bill upon them? A. I intended to bring them here for business, and the first chance I got to serve the papers on them. Q. State whether or not you ever at any time lured Mr. Barsh or brought him into the county, or suggested his coming here, for the purpose of serving the bill in equity upon him? A. Not for that purpose alone."

These two answers, taken together, are capable of but a single construction, and that is, that the complainant did intend to induce the defendant to come into the county so that he might have an opportunity to serve his bill, and that that was his main purpose. That a service procured in this manner is illegal is too plain to necessitate the citation of authorities. However, a reference to 19 Encyclopædia of Pleading and Practice, 666, and cases cited in note No. 2, under Pennsylvania authorities, may be interesting. Also the case of *Hevener v. Heist*, 9 Phila. 274; *Sloan and Wife v. Green*, 7 W. N. C. 408. The case of *Fearl v. Hanna*, 129 Pa. 588, cited by counsel for the complainant, is not in point, and does not change the rule.

Inasmuch as no exception was taken to the ruling of the court on that question, the point, therefore, was not before the court for decision.

In view of these findings and legal conclusions, it is necessary to set aside the service of this bill.

And now, July 8, 1901, the service of the bill is set aside, at the cost of the complainant.

From Richard E. Cochran York, Pa.

Larocco's Estate.

Decedent's estate—Distribution—Widow's exemption—Non-resident widow.

The widow's exemption is a humane provision to relieve the distress of residents. Hence, a widow who is a resident of Italy, and who has never been here, is not entitled to an exemption as against domestic creditors.

Petition for rehearing. O. C. Allegheny Co., May T., 1901, No. 23.

Stone & Potter, for accountant; *D. B. Maxwell*, for widow.

HAWKINS, P. J., July 24, 1901.—The widow's exemption is a humane provision of the law, which was intended to relieve the distress of residents following death (*Sweeny v. Hunter*, 145 Pa. 363), and has therefore no application to the present case. It does not appear that the decedent had become a citizen. The widow is admittedly a resident of Italy, and, so far as appears, has never been here. The court knows nothing of her environment and what her needs are; that is a matter of purely local concern, in which the public here is not interested; but the public here is concerned in the burial of her deceased husband and the payment of domestic creditors.

The amount of the funeral expenses seems, at first blush, large, but the arrangements were made by decedent's friends, and the parties employed had a right to rely on their judgment in the matter.

In this view a rehearing would be useless, and the petition must be dismissed.

From Edwin L. Mattern, Pittsburgh, Pa.

Kennedy v. Heebner.

Equity practice—Costs—Judicial discretion.

Costs in equity are within the discretion of the court.

When, therefore, the averments of a bill in equity are responsively denied by the answer, and, at the hearing, the uncorroborated testimony of the plaintiff is not only flatly contradicted by the defendant and a disinterested witness, but inconsistent with collateral and incidental facts and circumstances which tend to convince the mind of a chancellor that, at the institution of the suit, he must have known that the averments of his bill were untrue, the costs of the proceeding should be imposed upon him upon its dismissal.

Facts and circumstances considered which tended to show that the bill was not filed in good faith.

Findings of fact and law. C. P. No. 3, Phila. Co., Dec. T., 1900, No. 518, in Equity.

Joseph A. Slattery and Joseph Savidge, for plaintiff.

Ellis Ames Ballard, for defendant.

MCCARTHY, J., Oct. 5, 1901.—This cause was tried before me, sitting as chancellor, on June 11 and June 12, 1901. The plaintiff and the defendant were both present in court and were both represented by counsel. Evidence was given in open court on behalf of both the parties to the action. After hearing the evidence, the case was fully argued by counsel. The defendant presented requests for findings of fact, which are hereto attached in order that the same shall be filed by the prothonotary as part of the record in this case.

Brief statement of the case as shown by the pleadings.

The plaintiff avers that, together with two associates, he was the owner of 8090 shares of the capital stock of a corporation owning certain patents and applications for patents, and he and his associates were also owners of certain other applications for patents of their invention; that the said owners entered into an arrangement with defendant, in pursuance of which they transferred the said shares and the title to the said applications for patents to defendant, and he undertook to organize a new corporation to develop the said inventions, agreeing to transfer to the plaintiff and his associates 49 per centum of the capital stock of the new company; that, afterward, defendant represented that the agreement as to the stock could not be carried out and a new arrangement was agreed upon, the terms of which were that the capital stock of the new company should be divided into 10,000 shares of the par value of \$50 each; that the plaintiff's associates should each receive 500 shares, the plaintiff 1000 shares and the defendant 2000 shares; that thereupon defendant agreed to make an equal division with plaintiff of their personal holdings of stock, so that he would transfer to the plaintiff 500 shares out of defendant's holding, and he also promised to pay the plaintiff \$10,000 to reimburse him for part of his expenses in developing said inventions; that the company was afterwards organized and 1000 shares of stock issued on account of plaintiff and 2000 shares to defendant; that defendant has not assigned the 500 shares of stock to plaintiff nor paid him \$10,000, according to his agreement, but, after demand made, refused and still refuses to make such transfer and payment; that, at a meeting of the new company, plaintiff again demanded the said sum of the defendant, and an arrangement was proposed and assented to, in pursuance of which defendant transferred to plaintiff 200 shares of the common stock of the new company as collateral security for the \$10,000 due plaintiff, to be returned to defendant when the debt was discharged; that plaintiff has since tendered the said 2000 shares to defendant, who refused to accept them, and plaintiff now holds them, subject to defendant's order; that, since plaintiff's demand, defendant has

Kennedy v. Heebner.

admitted to several persons that he owes plaintiff said sum of \$10,000, and is holding 500 shares of the said stock for plaintiff's benefit; that the stock cannot be purchased in the open market and has no present market value, but is of great and indeterminable value. Plaintiff prays for an injunction to restrain defendant from disposing of the 500 shares of stock and for an order to transfer them to the plaintiff; for an order on defendant to pay plaintiff \$10,000, with interest, and for further relief.

The defendant admits the original arrangement for the formation of a company as averred by plaintiff, but alleges that it was entirely abrogated by the subsequent arrangement. He denies that the terms of the new arrangement were as stated by plaintiff; that he had any agreement with plaintiff, whereby the latter was to get 500 additional shares of stock; that he ever promised to pay plaintiff \$10,000, as alleged, or any other sum; that he ever gave plaintiff any of said stock as collateral security; that plaintiff ever tendered him any of said stock claimed to be held as collateral security; that he has ever admitted to any one that he owes the plaintiff the said sum of \$10,000, or that he is holding 500 shares of said stock for the benefit of plaintiff; that the stock cannot be purchased in open market or that it is of indeterminable value. Defendant avers that, at the time of the formation of the company under the new arrangement, plaintiff asked that the company should pay him \$9750 in cash to reimburse him for money claimed to have been expended by him prior to that time in developing the patents; that this request was refused, but defendant offered to give him 200 shares of defendant's common stock instead of the \$9750, which offer plaintiff accepted; that plaintiff, on receipt of the said 200 shares of stock, transferred 100 shares back again to defendant in settlement of an agreement formerly made to transfer to defendant one-tenth of plaintiff's interest in the company; that the defendant knows of several transactions for the sale and purchase of the said stock, and that the parties holding all the preferred stock and a large part of the common stock are ready to sell their holdings for the amount they have invested in the enterprise.

From the foregoing statement it appears that the main questions to be determined in this case are the three following ones, viz.: Whether defendant promised plaintiff to pay him \$10,000 in cash or not? Whether the 200 shares of stock transferred by defendant to plaintiff were transferred as collateral security or not? And whether defendant undertook to make the plaintiff's holding of stock equal in amount to his own holding or not?

Findings of fact.

The following facts are fully established by the evidence heard at the trial:

1. Prior to Nov. 18, 1897, the plaintiff, with two associates, named Ashley and Pocock, owned two applications for letters-patent, and also 5100 shares of the capital stock of the Guarantor Electric Company, a corporation which owned certain patents and applications for patents. On that day the plaintiff and his associates assigned to defendant one-half interest in the two first-mentioned applications and all of the said shares of stock, and entered into an arrangement with him, the terms of which are set out in two instruments of writing, true copies of which are attached to the bill filed in this cause and marked Exhibit "A" and Exhibit "B" respectively. The defendant thereby agreed, if satisfied, after examination, of the validity, novelty and utility of the inventions, to organize a corporation such as would best develop them, and to transfer to plaintiff and his associates "49 per cent. of the capital stock of the said corporation;" the organization of the company to be effected on or before July 1, 1898. The time limitation proving too short, it was extended to Jan. 1, 1899, by a subsequent agreement in writing, dated June 24, 1898, a true copy of which is

10 DIST. R.

attached to the bill, marked Exhibit "C." Subsequently, the plaintiff assigned to defendant 2990 additional shares of the Guarantor Electric Company, making a total assignment to defendant of 8090 shares.

2. On July 5, 1898, by an instrument of writing bearing that date, reciting the assignments by plaintiff and others to defendant of the inventions and capital stock mentioned in the previous finding, the plaintiff, in consideration of \$3000 paid him by defendant, sold and assigned to the defendant "the one-tenth part of all my right, title and interest in and to the said contracts and patents hereinbefore recited," and any property he might thereafter acquire by the fulfillment of said contracts.

3. In November, 1898, defendant informed plaintiff that he had interested certain parties in their mutual enterprise, and that he was prepared to form a corporation, but could not do so upon the terms set out in the existing agreements. Between that time and the close of December, 1898, when the new company was organized, a number of interviews were had by and between the parties interested, and the terms of a new arrangement were finally settled, with the full concurrence of the plaintiff, as follows: The capital stock to be \$500,000, divided into 2000 shares of preferred and 8000 shares of common stock, each share having the par value of \$50, the preferred stock to be sold for cash subscriptions only; one share of common stock to be given as a bonus for each share of preferred stock subscribed for; the remaining 6000 shares of common stock to be used for the purchase of the inventions. The plaintiff also demanded that the company should pay him \$9750 in cash, which sum he claimed he had expended during some years past in developing the inventions. The intending subscribers refused to agree that this payment should be made. The plaintiff insisted upon it and withheld his assent to the arrangement. Finally, at a meeting held early in January, 1899, the defendant, on the suggestion of his counsel, who was also a subscriber, offered to give the plaintiff 200 shares of common stock out of defendant's personal holding instead of the said sum of \$9750. The plaintiff accepted this offer, and thereafter withdrew his opposition to the arrangement. The plaintiff also, at the same time, agreed to give back to the defendant 100 of the said 200 shares of common stock in satisfaction of his aforesaid agreement of July 5, 1898, *vide* second finding of fact, *supra*.

The testimony leaves no room for doubt that the 200 shares of stock were given to the plaintiff and accepted by him in lieu and satisfaction of his demand that the company should pay him \$9750. The plaintiff's testimony that defendant assumed the debt and gave him the stock as collateral to secure its future payment, apart from its inherent improbability, is not only contradicted by the testimony of the defendant and Mr. Brown, who were the other actors in the transaction, but also by the plaintiff's own contemporaneous act in using a part of the same stock to pay his debt to the defendant. This act points clearly to the plaintiff's belief at that very time that he was the owner of the stock; for, assuredly, if he then believed himself merely the holder of it in pledge for another and that he was not the owner, he would never have thought of using it to pay his own debt.

The argument of plaintiff's counsel that plaintiff would not have accepted in settlement common stock, which was "practically worthless," is without weight, as it rests on assumptions easily seen to be untrue. Whatever opinion counsel may entertain of this stock, the plaintiff does not even now regard it as worthless, for he avers in his bill that it is of great value, and supports this declaration by an oath. Nor is it to be believed that at the time of the transaction he considered it as valueless, for he was willing to accept other shares of the same common stock in payment for the very valuable patents he was selling, and he was able to make use of 100 shares of the very stock he received, to discharge

his obligation assumed in consideration of \$3000 to transfer to defendant one-tenth of his interest in the enterprise, from which it may be inferred that the stock was then practically worth to him not less than \$30 per share. Nor is it according to common experience that men are willing to accept as security for the future payment of a debt something of less value than they would accept in its present discharge. On the contrary, if payment is to be deferred, the creditor always and most rationally demands that his collateral shall be of such a nature as to afford the highest possible security and of a value much in excess of the indebtedness itself.

After a very careful consideration of the whole testimony and of the arguments of counsel, I find the facts to be that the defendant did not assume to pay plaintiff the said sum of \$9750, and that the said stock was not transferred as a collateral security for the payment of that sum, but that the said 200 shares of common stock were transferred by defendant to plaintiff, and accepted by plaintiff as a full satisfaction of plaintiff's claim, to be reimbursed out of the treasury of the new company for his former expenditures in developing the inventions.

4. In December, 1898, the new company was incorporated by the name of the Electric Power Development Company. At a meeting of the directors, held Dec. 29, 1898, a proposition of the Guarantor Electric Company to sell certain patents and applications for patents for \$150,000 in common stock and \$500 in cash, and a proposition of defendant to sell certain patents and applications for patents for \$250,000 in common stock, were both accepted by the directors. On Jan. 10, 1899, two receipts were issued by the treasurer of the new company, one to the Guarantor Electric Company for 3000 shares of stock, and one to defendant for 5000 shares, both of which, the respective amounts of stock called for having afterward been issued in lieu thereof, were subsequently surrendered to the company and canceled. On Jan. 13, 1899, the plaintiff, Pocock, Ashley and the defendant executed a paper bearing that date, a true copy of which is appended to the answer, marked *Respondent's Exhibit No. 1*. By this instrument, the parties thereto, describing themselves as owners, legal and equitable, of the 5000 shares of stock represented by the second treasurer's receipt above mentioned, and averring that the same was issued in full payment for the patents and applications for patents held by defendant under the terms of the agreements of Nov. 18, 1897, and their renewals, authorized the treasurer of the new company to issue the 5000 shares of stock to certain named persons in certain specified amounts; and further stipulated that "the receipt of the parties therein named shall be a good and sufficient acquittance and release to the said Samuel Y. Heebner of any interest that we or either of us may have in the said stock by virtue of the two certain agreements of Nov. 18, 1897, and renewals thereof aforesaid.

5. After a careful review and consideration of all the evidence, I fail to find in it any support of the plaintiff's claim that at the time the terms of the new incorporation were agreed to defendant promised to equalize their personal holdings. The allegation made in the bill, and repeated by the plaintiff on the witness-stand, is clearly that the promise was made at the time of the new arrangement, and was one of the inducements leading plaintiff to assent thereto. This is positively denied by the answer, and is shown to be erroneous by the plaintiff's own letter to defendant of Dec. 9, 1899, written in reply to the request that he should reduce his claim to writing, which letter begins with the affirmation, "if you will kindly note the proportions of stock issued to me and to you, and then refer to our agreement of Nov. 18, 1897, there can be no misunderstanding." Whatever understandings rested upon the agreements of Nov. 18, 1897, were finally disposed of by the paper of Jan. 13, 1899. See fourth 10 Dist. R.

Kennedy v. Heebner.

finding of fact, *supra*. There is nothing to show that the defendant made any promise, at or about the time the new company was formed, to equalize his holdings with plaintiff's holdings. The testimony as to the alleged admissions subsequently made by him is too vague and uncertain to afford any light as to the time or nature of the promise, even supposing the defendant's remarks to have related at all to a definite agreement on his part, or to past undertakings instead of future intentions.

6. The stock of the Electric Power Developing Company is not upon the list of any stock exchange. It has no market value and cannot be purchased in open market. The transactions testified to on the trial were all between parties interested in the enterprise, and afford no just criterion for determining the true value of the stock.

Finding of law.

1. The plaintiff has failed to prove the promises and agreements of the defendant upon which his case rests, as set out in the bill filed in this cause; on the contrary, the weight of the evidence heard on the trial is against the truth of the facts material to establish the alleged undertakings of defendant.

In conclusion, after a thorough consideration of the proofs, I am satisfied that the plaintiff has received from the defendant and from the corporation promoted by defendant all that he was entitled to receive, and that the defendant has kept and performed all of his undertakings with the plaintiff, and am of opinion that the bill should be dismissed, with costs.

A decree proper for the decision of the case in accordance with the foregoing findings has been prepared and will be filed in the cause forthwith, in accordance with the rules of equity practice.

Commonwealth v. Leonard.

Criminal law—Statutory rape—Chastity of girl—Evidence.

Testimony, showing that the girl upon whom the alleged rape was committed was in the daily and nightly habit of having young men in her mother's house as company up to 12 and 2 o'clock at night, as well as during the day; that they had been there, and were drinking if not carousing; that most of the time she was there alone in the house with these young men, and that her mother was employed at a hotel and was away as late as 12 o'clock at night, and her father was never about, or rarely so; that she visited a boarding-house next door frequently, and inquired for a married man who boarded there, and that she went up-stairs to his room and remained there for considerable periods at a time; if believed, casts grave suspicions on her character for chastity, and is sufficient to raise a reasonable doubt on that subject, and ought to acquit the defendant of the charge of statutory rape.

Criminal law—Sentence—Revocation or alteration of—Power of court.

The court can alter or revoke a sentence, and order a new trial after sentence, at any time during the term at which the sentence was passed.

Criminal law—New trial—When granted for evidence not offered although previously known.

The fact that the testimony in support of a motion for a new trial has not been brought within the rules governing the granting of new trials on the ground of after-discovered evidence, will not prevent the court from ordering a new trial, when such evidence, although perhaps known to the defendant before the trial, goes to the merits of the case and ought to produce an acquittal, and where the defendant had no counsel in advance of his trial, was a stranger in the city, and confined to the county jail without the advice of counsel and without the assistance of any one to prepare his defence.

Motion and rule for new trial. Q. S. York Co., April Sess., 1901, No. 68.

John G. Miller, for rule; W. B. Gemmill, district-attorney, contra.

STEWART, J., July 8, 1901.—The defendant, John Leonard, was indicted, charged with the crime of statutory rape and the offence of fornication and

bastardy. A true bill of indictment was found and returned by the grand jury on April 18, 1901, and the defendant was called for trial and tried on April 20, 1901, and was convicted of both charges and immediately sentenced.

The defendant is a resident of the city of Baltimore, Maryland. He was confined in the county jail up to and at the time of his conviction and his sentence, and when called for trial he had no counsel, and counsel was appointed for him by the court. The jury was being called, or about to be called, before the defendant knew who was to defend him. There was but meagre opportunity for consultation with his counsel, and no time after the appointment of his counsel for the preparation of his defence.

The only person who interested themselves at all in his defence was his mother, who came to York to see him on the day the bill was found, and who, without doing anything in his behalf, returned home to Baltimore, believing that the charges against him could not be sustained. It was on Saturday morning, the last day of the week of court, when the defendant was called for trial, and at such time things are done expeditiously. The defendant was sentenced on the charge of statutory rape to two years imprisonment in the Eastern Penitentiary, and to pay a fine of \$5 and cost of prosecution, and on the other charge, of fornication and bastardy, the usual sentence was imposed.

On Tuesday, April 23, a motion for a new trial was filed, and on April 29 the sentence was revoked and rule granted to show cause why a new trial should not be allowed.

The material grounds for this motion are : 1. That the girl upon whom it was alleged the crime of statutory rape had been committed was not of good repute for chastity. 2. An *alibi* at the time of the alleged commission of the statutory rape.

At the trial the defendant stoutly denied his presence in the city of York at the time the child was begotten. No witnesses were called in his defence, so that the case went to the jury on his naked denial, and very naturally the verdict went against him.

The child, as shown by the testimony at the trial, was born about Dec. 21 or 23, 1900, and consequently, according to the course of nature, must have been begotten about the same time in the month of March preceding.

The defendant has taken testimony under this rule in support of both propositions. As to the first, he has called three witnesses, who, if believed by the jury, would show that the girl was not a person of good repute for chastity : Jacob Hake, Sarah Hake, his wife, and Mrs. Lizzie Berkstresser, all testified to facts which are entirely inconsistent with the girl's chastity.

It was shown by the testimony of these witnesses that during the months of February, March and April, Emma Mitzel, the girl upon whom the alleged rape was committed, was in the daily and nightly habit of having young men in her mother's house as company up to 12 and 2 o'clock at night, as well as during the day. That they had been there, and were drinking, if not carousing. That most of the time she was there alone in the house with these young men, and that her mother was employed at a hotel and was away as late as 12 o'clock at night, and her father was never about or rarely so. It is further shown that she visited a boarding-house next door frequently, and inquired for a married man who boarded there, and that she went up-stairs to his room and remained there for considerable periods at a time. This testimony, if believed, notwithstanding her youth, casts grave suspicions upon the character of Emma Mitzel for chastity, and is sufficient, if believed, to raise a reasonable doubt on that subject, which ought to acquit the defendant of this charge.

As to the *alibi*, the defendant testified that he did not come to York until the middle of May. He admitted having had connection with this girl after he
10 Dist. R.

came here, but such connection, if had only after the middle of May, is not at all likely to have resulted in her pregnancy. The defendant has called seven witnesses, his mother, sister, and several others, who seem to have been intimate with his mother's family, in which he resided, in Baltimore, who testified pointedly to the defendant's presence in Baltimore during the entire months of March and April, and up until May 10 or 12. This testimony is of the most direct and positive character, and is sustained by corroborating facts fixing the time in favor of the defendant.

This testimony, if admitted and believed, would necessarily work an acquittal of the defendant of the charge of rape. It is contended, however, on behalf of the Commonwealth, that the court has no power to grant a new trial after the sentence of the defendant. It will be observed that there were only three days elapsed between the sentence and the filing of the motion for a new trial, and that the sentence was revoked within a week after the filing of this motion. It was all done within the term which has not even yet elapsed.

The right of the court to order, direct, modify or revoke a judgment during the term at which it was entered requires no citation of authorities to support it, and this rule, it seems to me, is as applicable to criminal sentences as to those on the civil side of the court. The strongest case on the subject is, perhaps, that of *Com. v. Mayloy*, 57 Pa. 291, which recognizes the right to revoke or alter a sentence within the term, and decides that it may not be done after. The same doctrine is recognized in *Schoeppe v. Com.*, 65 Pa. 51, and also *Lance v. Bonnell*, 105 Pa. 46.

In *Thompson on Trials*, vol. 2, § 2740, it is said: "In exceptional cases the motion for a new trial has been allowed when filed after sentence has been passed upon the accused, but during the trial term:" *Smith v. State*, 64 Ga. 439; upon good reason being shown: *State v. Robinson*, 20 W. Va. 713. And in the Supreme Judicial Court of Massachusetts, it has been held that the court may grant a new trial in a capital case after sentence of death has been passed and a warrant issued for its execution: *Com. v. McElhaney*, 111 Mass. 439. In *Rex v. Atkinson*, 5 Term Reps. 437 n., it is said by Lord Mansfield, "If the court conceives a doubt that justice is not done, it is never too late to grant a new trial, but not on application of the party." And in *King v. Holt*, 5 Term Reps. 446, Grose, Justice, said, "Though the rule be settled that after the first four days the defendant cannot move for a new trial, whenever the court has seen of themselves, or it has appeared to them, on the suggestion of counsel, the defendant has been improperly convicted, they always have interposed to prevent judgment from being passed on an innocent man."

This seems to be ample and complete authority for the court's action in revoking the sentence and granting this rule.

It is contended, however, that the testimony in support of the motion has not been brought within the rules governing the granting of new trials on the ground of after-discovered evidence. It may be that this evidence was known to the defendant before his trial, and that by reasonable diligence on his part it could have been secured. It is material, although it may be cumulative or corroborative. It thus goes to the merits, and does not rest on a merely technical defence, and it is such as ought to produce in another trial an opposite result on its merits.

If the defendant had had counsel in advance of his trial to prepare his case fully, these rules with reference to after-discovered evidence would have been applied with full force. But the defendant was a stranger in this city, confined in the county jail without the advice of counsel and without the assistance of any one to prepare his defence, and hence was unable to meet the charge of the Commonwealth by the evidence which he now produces in his behalf.

Commonwealth v. Leonard.

Under such circumstances, these rules regulating the introduction of after-discovered evidence in support of a new trial must yield to the cause of justice.

This court would cease to be a place wherein justice is judicially administered if, on account of these technical rules of evidence, we closed our eyes to the merits of this defence, and, because the defendant was tried and sentenced, we should fail to give him an opportunity to present his defence to another jury.

And now, July 8, the rule for a new trial is made absolute.

From Richard E. Cochran, York, Pa.

Compulsory Attendance Law.

Constitutional law—Time when statutes takes effect—Compulsory Attendance Law—Act of July 11, 1901.

In the construction of statutes, the invariable rule is that every law goes into effect upon its approval, unless it is provided otherwise in the Act itself, or it is impossible of enforcement by reason of the provisions contained therein. Hence, as the Compulsory Attendance Law of July 11, 1901, is silent on the question of when it goes into effect, it takes effect on the day of its approval, to wit, July 11, 1901.

Constitutional law—Statutes—Enforcing all provisions of the same at the date of approval—Allowing for lack of knowledge on the part of those affected by the Act.

It is not necessary that all the provisions of an Act be enforced as of the date when it was approved. Persons affected thereby are not required to do impossibilities. Hence, the proviso of the Act of July 11, 1901, which authorizes school boards at their June meetings to reduce the period of compulsory attendance to not less than seventy per centum of the school term, need not be enforced during the present school year.

In the enforcement of a law, where the individual rights of citizens are involved, it is proper for those in authority to make allowance for delinquencies that may happen by reason of a lack of knowledge on the part of those affected by its provisions.

Attorney-General's Department. Letter to Hon. John Q. Stewart, Deputy Superintendent of Public Instruction.

ELKIN, Att'y-Gen., Sept. 11, 1901.—I am in receipt of your communications of recent date, enclosing some letters addressed to your department from persons representing school boards in different parts of the State, asking when the new Compulsory Attendance Law went into effect.

The Act in question was approved on July 11, 1901, and, inasmuch as the Acts of May 16, 1895, and of July 12, 1897, in reference to the same subject-matter, were repealed in express terms by this Act, it necessarily follows that the only law on the question of compulsory attendance of children in the common schools of our State is contained in the Act of July 11, 1901. In the construction of statutes, the invariable rule is that every law goes into effect upon its approval, unless it is provided otherwise in the Act itself, or it is impossible of enforcement by reason of the provisions contained therein. The new law is silent on the question of when it goes into effect, and it therefore becomes necessary to apply the general rule of construction and say that the Compulsory Attendance Law went into effect on the day of its approval, to wit, July 11, 1901.

It does not follow, however, that all of the provisions of the Act in question must be enforced as of the date when it was approved. In the construction of statutes, the courts will not require persons affected thereby to do impossible things, and, therefore, that proviso of said Act which authorizes school boards at their June meetings to reduce the period of compulsory attendance to not less than 70 per centum of the school term, cannot be enforced during the present school year. The school year begins on the first Monday of June, and the new Compulsory Attendance Law was not approved until July 11 following, which makes it absolutely impossible for school boards to comply with that provision

10 DIST. R.

Compulsory Attendance Law.

of the law during the present school year. The other provisions of the Act can be enforced without reference to the proviso above mentioned, and I can see no good reason why they should not be so enforced.

In the enforcement of a law, where the individual rights of citizens are involved, it is proper for those in authority to make allowance for delinquencies that may happen by reason of a lack of knowledge on the part of those affected by its provisions. The new law has been in force since the date of its approval, but most of our people are not yet familiar with its provisions, and I deem it the part of wisdom that you should take cognizance of this fact in the enforcement of the law during the first school year. Some months will elapse before the boards of school directors, and the people generally, become acquainted with all the requirements of the new law. It is my opinion that this law is in full force and effect, but I take the liberty of suggesting that, in its practical enforcement during the ensuing school year, due allowance should be made for any derelictions on the part of school boards or the people in the observance of its provisions by reason of unfamiliarity with its requirements.

From Guy H. Davies, Harrisburg, Pa.

Muir v. The Preferred Accident Insurance Co. of New York.

Removal of causes—Time for filing petition—Time cannot be extended by agreement or order—United States Statute of Aug. 13, 1888, ch. 866.

Although a petition for removal of a cause from the State to the Federal court, under the Act of Aug. 13, 1888, ch. 866, 25 Stat. at Large, 423, averred that the time to appear and plead, before which time the statute required the application to be made, had not arrived, still, if the record showed that the time had elapsed, the court will notice it and refuse the application; and when such an order has been made and bond filed, if, before the record is removed, the court's attention is called to the fact, the order will be rescinded.

In an action of *assumpsit* the petition for removal must be filed before the time has elapsed within which the defendant is required to file his affidavit of defence.

Under this Federal statute, neither an agreement of parties nor an order of the State court, extending the time to file an affidavit of defence in actions of *assumpsit*, or to plead in actions of trespass, beyond the time fixed by statute or rule of court, will operate to extend the time to file a petition for removal.

Act of May 26, 1887, P. L. 271—Time for taking judgment for want of an affidavit of defence.

Where a statement has been filed and served on the defendant less than fifteen days before the return-day, the plaintiff is not required to file and serve another statement on or after the return-day, but may take judgment fifteen days after the return-day, if no affidavit of defence be filed.

Petition to rescind order removing suit from Court of Common Pleas to the United States Circuit Court. C. P. Delaware Co., Dec. T., 1900, No. 264.

A. D. MacDade and W. B. Broomall, for petitioner; E. H. Hall, contra.

JOHNSON, P. J., March 29, 1901.—By a statute of the United States it is provided: "That any suit of a civil nature which may be pending in any State court (the defendant being a non-resident of the State) may be removed to the Circuit Court of the United States; but to entitle the defendant to such removal, he must file his petition in the State court before the time which, by the laws of the State court, he would be required to answer or plead to the declaration or complaint."

On March 18, 1901, the defendant presented to the court its petition, as follows: "The petition of The Preferred Accident Insurance Company of New York respectfully represents: 'That your petitioner is the defendant in the

Muir v. The Preferred Accident Insurance Company of New York.

above cause, and is and was, at the time of the commencement of this suit, a corporation duly organized and existing under the laws of the State of New York, and of no other State or Territory, and was, at the time of the commencement of this suit, a citizen of the State of New York and resident therein, and not a citizen of the State of Pennsylvania nor a resident therein. And Emma R. Muir, the plaintiff in this suit, is and was, at the time of the commencement of this suit, a citizen of the State of Pennsylvania and a resident therein. The matter in dispute in the above cause exceeds, exclusive of interest and costs, the sum or value of \$2000, to wit, the sum of \$11,000, said suit being brought by said plaintiff to recover said sum of \$11,000 upon a certain policy of insurance issued by your petitioner. That the time has not arrived at which, under the laws of the State of Pennsylvania and the rules of this court, the said defendant is required to plead or answer to the statement filed in said cause. Your petitioner desires to remove the said cause from this court to the Circuit Court of the United States for the Eastern District of Pennsylvania, being the district within which said plaintiff resides, and offers herewith its bond, with good and sufficient surety, to wit, in the sum of \$500, conditioned as provided in the Act of Congress in such case made and provided, and prays your honorable court for an order allowing it to remove the said cause and to proceed no further in said suit. And it will ever pray, etc.'"

The court thereupon made the following order: Petition allowed and bond directed to be filed in the sum of \$500, with the Media Title and Trust Company surety, and on March 18, 1901, the bond was filed.

On March 25, 1901, and before the record was removed to the United States court, and while still in the custody of this court, the plaintiff presented her petition, setting forth, *inter alia*: "That, under the laws relating to the removal of causes from State courts to national courts, an application for the removal of a cause cannot be entertained or allowed except at or before the time the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff. The time within which the said defendant had the right, under the law, to remove the said cause had fully expired. Your petitioner, therefore, respectfully representing that the said order allowing the removal of the said cause was improvidently made, contrary to law, and injurious to the rights of your petitioner, prays the court to have the said allowance rescinded."

The petition for removal on its face sets forth sufficient cause, and counsel for defendant insists that this being so, and the order having been made, this court has no further jurisdiction over the matter. I am not inclined to take this view of it, but am of the opinion that though the petition does set forth that the time to plead or answer has not arrived, still if the record on its face shows that the time in which the defendant must plead or answer has elapsed, the court will take notice of it and refuse the application, and when such an order is made and bond filed, if, before the record is removed, the court's attention is called to this fact, the order will be rescinded. This being so, the question then is, had the time elapsed in which the defendant was required to answer?

The writ was issued Feb. 14, 1901. Returnable Feb. 25, 1901. A statement of plaintiff's claim was filed on the day the writ was issued, and, with the writ, was served on the defendant on Feb. 18, 1901. On Feb. 23, 1901, the plaintiff signed an agreement as follows: "Feb. 23, 1901, it is agreed that the time for the filing of an affidavit of defence by the defendant to the above-stated suit shall be extended for twenty days from and after Feb. 25, 1901."

It is contended by counsel for defendant that the time in which they were required to answer had not by law arrived on March 16, when the petition was filed, and if it had, the agreement giving them until March 17 to file an affidavit

10 DIST. R.

Muir v. The Preferred Accident Insurance Company of New York.

of defence extended the time in which they had the right to file their petition to that date.

First, as to the effect of the stipulation or agreement extending the time in which the defendant might file an affidavit of defence. Desty's Federal Procedure, paragraph 108, referring to "extension of time," says: "Under the Act of 1888 (the Act under which this application is made) an extension of time by the parties to plead beyond the time expressly provided by State statute or rule of court does not extend the time for filing a petition for removal," and that "an order of the State court extending the time to plead beyond the time fixed by the statute or rule of court does not operate to extend the time to file a petition for removal, and this is so, even though the order be made upon a stipulation of the parties extending the time to plead." It thus appears that the filing of the stipulation or agreement extending the time in which they might file an affidavit of defence will not help the defendant, if, prior to March 16, 1901, they were under the law of the State required to answer. Were they? Had the time arrived (but for the stipulation) in which the defendants must file an affidavit of defence, or let judgment be entered against them?

The return-day was Feb. 25; the writ and statement was served Feb. 18. When was the plaintiff entitled to judgment for want of an affidavit of defence?

Section 4 of the Act of Assembly of May 25, 1887, P. L. 271, known as the "Procedure Act," provides that (section 4, page 272, P. L. 1887) "the plaintiff shall be at liberty, in each of said actions, to serve a copy of his statement on the defendants. If such service be made not less than fifteen days before the return-day of the writ, it shall be the duty of the defendant in the action of *assumpsit* to file an affidavit of defence on or before the return-day." And section 6 of the same Act: "If the plaintiff shall neglect to serve his statement at least fifteen days before the return-day of the writ, he may file it on or at any time after the return-day, and in the action of *assumpsit*, unless the defendant shall file a sufficient affidavit of defence within fifteen days after notice that the said statement has been filed, the plaintiff may move for judgment for want thereof."

Although the Act has been in force nearly fourteen years, this question has never been before this court, though often the subject of discussion among members of the bar. My construction of it is that where a statement has been filed and served on the defendant less than fifteen days before the return-day, the plaintiff is not required to again file and serve another statement on or after the return-day, but may take judgment fifteen days after the return-day, if no affidavit of defence be filed.

The return-day was on Feb. 25; the fifteen days expired on March 12. The plaintiff would have been entitled to judgment on March 13 (but for the stipulation). But as the stipulation does not have the effect of extending the time in which the petition for removal must be filed (having been filed March 16), it was too late.

Order for removal rescinded.

From W. Roger Fronefield, Media, Pa.

EDITOR'S NOTE.—It has been held that section 6 of the Act of May 25, 1887, P. L. 271, was not intended to leave a hiatus of fourteen days before the return-day, during which plaintiff's progress was suspended, but that its intent and substantial requirement were the allowance of fifteen days' time to the defendant in which to make his affidavit, with service of copy before the return-day or notice of filing after it, and that judgment could be taken fifteen days after service of a copy of the statement, although the return-day had intervened: *Weigley v. Teal*, 125 Pa. 498; *Newbold v. Pennock*, 154 Pa. 591; *Tobyhanna and Lehigh Lumber Co. v. Home Ins. Co.*, 167 Pa. 231; *North v. Yorke*, 174 Pa. 349.

Commonwealth ex rel. O'Shea v. O'Shea.

Lunacy—Fees of counsel—When taxable—Costs—Practice, C. P.

Where a proceeding in lunacy finds the respondent is of sound mind, he cannot be compelled to pay the relator's counsel fees.

Rule on respondent to show cause why he should not pay costs of proceedings *de lunatico inquirendo*, including counsel fees for relator. C. P. No. 2, Allegheny Co., Oct. T., 1900, No. 139.

Watterson & Reed, for petitioners.

Marron & McGirr and *John D. Watson*, opposed.

FRAZER, P. J., April 1, 1901.—Proceedings were instituted in this court by the relator, Maurice F. O'Shea, to have his uncle, Francis J. O'Shea, the respondent, declared a lunatic. The case was referred to a commissioner and jury, who found "that Francis J. O'Shea is not, at the time of the taking of this inquisition, a lunatic; and we further find that the proceedings in this case were not without probable cause at the time they were instituted." Subsequent to the filing of the report of the commissioner, this rule was taken on respondent to show cause why he should not pay the costs of the proceedings, including relator's counsel fees, amounting to \$100. The respondent has paid the court costs, including the commissioner's fee and the fees of the witnesses, so far as taxed, but denies liability for services rendered by counsel for relator. The fee charged is not unreasonable. The only question, therefore, is whether or not it can be directed to be paid as costs. The 2nd section of the Act of April 16, 1849, P. L. 663, making it the duty of the court out of which the commission issues "to decide and direct who shall pay all cost attendant upon the issuing and execution by said commission, or to apportion said costs and the payment of them among the parties interested in such proportions as the justice of the case may require, and to order and decree payment accordingly." This, we take it, refers to what are generally known as "court costs," and, in our opinion, is not intended to include expenses of any other description. In this State it has been held that counsel fees are allowable to the attorney of the opposite party only when expressly stipulated for: *De Coursey v. Johnston*, 134 Pa. 333; and it has also been held that such fees are not recoverable as costs of the cause: *Winton's Appeal*, 87 Pa. 77, and *Tarr's Estate*, 10 Pa. Superior Ct. 558. In the latter case it is said: "Without an Act of Assembly empowering it, the courts cannot create a fee bill; and it would be an assumption of legislative functions to allow, as between party and party, charges to which no statute has ever given the character of costs." It is true that in some cases compensation is allowed for the service of attorneys, when those services have been rendered for the benefit and enhancement of a common fund, or for the common benefit of all the parties to the controversy. In those cases the compensation is described as an "allowance" and not as costs. These proceedings, however, do not come within that class. If the respondent had been found to be a lunatic and had become a ward of this court, and his estate, under those circumstances, being *in custodia legis*, we would have no doubt as to our right to make a reasonable allowance out of the estate for counsel fees; but as this court has never had custody of either person or estate of respondent, to make an order requiring him to pay the counsel fees of the relator in these proceedings would be an attempt on our part to exercise a power which we do not possess.

As to our right to "decide and direct" who shall pay the court costs, there can be no doubt. We are not, however, called upon to determine that question in this case, as the respondent has admitted his liability therefor and voluntarily paid them. Rule discharged.

From Edwin L. Mattern, Pittsburgh, Pa.

10 DIST. R.

Road in Lower Towamensing Township.

Road law—Private road—Jurisdictional facts—Words—"Plantation"—"Lands"—"Field"—Act of June 13, 1836.

A petition for a private road from the petitioner's "land" does not give the court jurisdiction to appoint viewers under the Act of June 13, 1836, § 11, P. L. 556, which authorizes their appointment to view a road from the petitioner's "dwelling or plantation."

This defect in the petition is not aided by the word "field" inscribed in the draft attached to the report of the viewers.

The words "lands" and "fields" are not equivalent to "plantation" as used by the Act of June 13, 1836, § 11, P. L. 556.

Road law—Private road—Location of termini—Certainty.

The termini of a road are located with sufficient certainty if one terminus is precisely located and the other can be located from it.

Seal of court—Necessity to a writ.

The seal of the court issuing a writ is what gives the writ authenticity; its absence is a defect and not a mere informality, and a writ unsealed by the court is void. Hence, where the order of view had attached to it the seal of the Court of Common Pleas and not the seal of the Court of Quarter Sessions, which issued it, *held*, that the order was void.

Road law—Private roads—Practice—Notice to landowner.

When it is proposed to open a private road through the land of another, the record must show that "personal" notice was given to the owner. Hence, where the report of the viewers showed only that "written" notice was given to him, *held*, that the report was fatally defective.

Exceptions to report of viewers laying out a private road in Lower Towamensing Township. Q. S. Carbon Co., Oct. Sess., 1899, No. 37.

Joseph Gouger, a property-owner, filed, *inter alia*, the following exceptions:

1. The petition does not ask for nor does the report show that the road petitioned for is from the dwelling-house or plantation of the petitioner to a highway or place of necessary public resort, or to a private way leading to a highway.
2. The petition and report of viewers founded thereon do not definitely indicate the termini of the road.
3. There was no authority given to the viewers to make a view or report, the alleged order not having the seal of the Court of Quarter Sessions affixed to it.
4. The report does not show that personal notice was given to the owners of land through which the road passes of the time and place of view.

Craig & Loose, for exceptions; *Freyman, Heydt & Nothstein*, contra.

CRAIG, P. J., Nov. 1, 1900.—The first exception, it seems to us, must be sustained. By the Act of June 13, 1836, P. L. 556, the court has jurisdiction to appoint viewers to view a private road where the petition is for a road from the dwelling or plantation of the petitioner. It has no jurisdiction if this be not the case. The petition in this case is for a private road to lead from the petitioner's lands to a public road. *Lands*, according to their condition and extent, may or may not comprehend a plantation. But certainly uncultivated lands cannot be described as a plantation. We cannot for the purposes of jurisdiction surmise that the land mentioned in the petition is a plantation, "a place," as defined by Webster, "planted; land brought under cultivation; ground occupied by trees and vegetables, which have been planted;" or, as defined by the Standard Dictionary, "any place that is planted. A farm where staples are cultivated on a large scale." In Bouvier (Rawle's ed.), we find this definition: "In its ordinary use, it is nearly synonymous with farms, and includes all the land forming the parcel or parcels under cultivation as one farm, or even what is worked by one set of hands." Nor is the petition aided by the report of the viewers, because the termini therein are the same as in the petition.

Road in Lower Towamensing Township.

Even the draft attached to the report of viewers mentions no dwelling-house or plantation as the place of beginning. It simply has two lines plotted at right angles where the road begins, with the inscription between the lines: "Lewis Smith's field." Now, a field is not a plantation in its ordinary sense. Specifically, it is any part of a farm inclosed or set apart from the rest for special use: Century Dic. So that the report of viewers and draft attached do not help the matter to that degree of certainty required for jurisdiction. According to our view, the petition lacks in jurisdictional statement. The beginning is not set out with that reasonable certainty required by law. We had occasion to rule upon this same point in Monroe county: In re Private Road in Tunkhannock Township. And, in sustaining the exception, we think we are following the rulings of the courts: Sandy Lick Creek Road, 51 Pa. 94; Keeling's Road, 59 Pa. 358; Kilbuck Private Road, 77 Pa. 39; Calhoon's Road, 8 Pa. C. C. Reps. 222; Trickett's Road Law, 305, 725. And such is the practice according to the form books: Richards's Pa. Form Book, 1144; Dunlap's Forms, 958 (5th ed.).

The second exception is not sustained. We think the termini are set out in the petition and in the report of viewers, and in the draft attached, with sufficient and reasonable certainty: Road in South Abington Township, 109 Pa. 118; Trickett's Road Law, 26. Taking the petition and report and draft together, there is no difficulty in identifying the road, nor for a surveyor to locate its whole line from the departure to ending with certainty. This is all the law requires. Surely the ending of the road is precisely located, and from this the other terminus can be located. This is deemed sufficient: Bean's Road, 35 Pa. 280; West Goshen Road, 7 Pa. C. C. Reps. 250; Kyle's Road, 4 Yeates, 514; Matthew Miller's Road, 9 S. & R. 35; Roche's Road, 10 Pa. Superior Ct. 87; Derry Township Road, 11 Pa. Superior Ct. 232; Trickett's Road Law, 33.

The third exception must be sustained. At the argument it was conceded that when the order of view was issued, it had attached to it the seal of the Court of Common Pleas, and that the seal of the Court of Quarter Sessions was not attached until after the report of viewers was filed and until after the exceptions were on record. Therefore, whilst the order was in the hands of the viewers and until after the report was filed, the order had the seal of the wrong court attached. In our opinion, this amounted to the same thing as if no seal at all had been attached. By whom the Quarter Sessions seal was attached does not appear. But there was no application to court to amend the order or writ in this regard, if it were amendable. Even if the lack of seal were amendable, we think it now too late to move in the matter. By the 44th section of the Act of 1834, P. L. 350, the Court of Quarter Sessions is required to have a seal for its use. All orders and process of the court must be authenticated by its seal: *Benjamin v. Armstrong*, 2 S. & R. 392; *Com. v. Snowden*, 1 Brews. 218. A writ is defined to be "a precept in writing, couched in the form of a letter, running in the name of the king, president or State, issuing from a court of justice and sealed with its seal, addressed to the sheriff or other officer of the law; or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding, or as incidental to its progress, and requiring the performance of a specific act, or giving authority and commission to have it done." *Black's Law Dic.*; *Burrill's Law Dic.*; *Bouvier's Law Dic.* (Rawle's ed.). In *Bryson's Road*, 2 P. & W. 207, it is decided that the seal on an order of viewers is what gives the writ authenticity, and that its absence is a defect and not a mere informality. We have not been referred to, nor have we been able to find, any other decision of our Supreme Court on this point. But, taking this to be the law, we are obliged to hold that this order of view is not amendable. The process of the Court of Quarter Sessions is by law to be under seal, and its absence is not a mere matter of form, but of substance. 10 DIST. R.

Road in Lower Towamensing Township.

stance. In England, writs not properly sealed are held to be void. And this ruling has been followed by the United States Supreme Court and by many of our States and Territories. So, also, by many of our State courts it is held that the absence of a seal to process is only voidable: *Alderson on Jud. Writs and Process*, §§ 33, 34. In *Insurance Co. v. Hallock et al.*, 6 Wallace, 556, it is squarely decided by the United States Supreme Court that process, issuing from a court, which by law authenticates such process with its seal, is void if issued without a seal. We are, therefore, obliged to hold that the order of view though signed by the proper clerk, yet having the wrong seal attached, is void.

The fourth exception must also be sustained. The report of viewers states that they gave written notice to the owner of the land along the route of the road more than ten days before the meeting. *Written notice* is not personal notice. It may be or may not be. Nor are we informed what the written notice contained. Where it is proposed to open a private road through the land of another, it is held to be imperative that the record must show that the landowner had personal notice of the time and place of the meeting of the viewers, and also of the time and place fixed for the assessment of damages. Allowing the utmost latitude to the language of the viewers, how can it be said that it shows personal notice to the landowner of the time and place fixed for the assessment of damages? Respecting this, we must hold the report fatally defective: *Private Road in Resdstone Township*, 112 Pa. 183; *Road in Plumcreek Township*, 110 Pa. 544; *Boyer's Road*, 37 Pa. 257; *Harbaugh's Road*, 8 Pa. C. C. Reps. 671; *Road in Plymouth Borough*, 5 Kulp, 115; *Trickett's Road Law*, 313. Nor is it sufficient to state in the report that the viewers failed to obtain written releases of damages from the landowners: *Private Road in Union Township*, 14 Pa. C. C. Reps. 436.

From Laird H. Barber, Mauch Chunk, Pa.

Brown v. McCroskey.

Mandamus—Basis of application.

To lay the basis for the application for a writ of mandamus, the law requires that the applicant establish a specific legal right as well as the want of a specific legal remedy.

Criminal law—Preliminary hearing before a magistrate—Right of accused to testify—Act of May 23, 1887.

The Act of May 23, 1887, P. L. 158, entitled "An Act relating to the competency of witnesses and the rules of evidence in civil and criminal cases," does not introduce a new method of procedure at the preliminary hearing before a committing magistrate, and does not entitle a person accused of a crime, as a matter of right, to have his witnesses heard at such hearing.

At common law, the prosecution was only bound to show that there was probable cause for believing that the accused was guilty of the offence charged, and it was entirely in the discretion of the committing magistrate whether to hear the witnesses of the accused or not. The Act of May 23, 1887, P. L. 158, has not altered this discretionary power.

Petition for a writ of mandamus. C. P. Perry Co., April T., 1901.

Baker & Markel, for petition.

James A. McKee, assistant district-attorney, contra.

ATKINSON, P. J., June 27, 1901.—John C. Brown has applied, by petition, for a writ of mandamus against John A. McCroskey, J. P., and represents that the relator was arrested upon a charge of larceny and housebreaking, and that, at

the preliminary hearing before said justice, he refused to hear the testimony of the witnesses on behalf of the relator, and in default of bail the relator was committed to prison.

To lay the basis for the application for a writ of mandamus, the law requires that the applicant establish a specific legal right as well as the want of a specific legal remedy: *James v. Commissioners of Bucks County*, 13 Pa. 75.

The relator asserts that he had a legal right to have his witnesses heard before the justice at this hearing, and that, having been denied this right, he may properly apply for an appropriate legal remedy to enforce it.

But was he entitled to have his witnesses heard at this hearing? The duty of the magistrate is to see that the offence charged is an offence contrary to the statute or common law, and that the facts present a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the party charged: *Vaux's Decisions*, 94.

Probable cause for commitment must be made out, and this is done by showing good reason for believing that the alleged crime has been committed by the accused: 1 *Burr's Trial*, 11, cited in 1 *McKinney's Justice* (4th ed.), 249.

At common law, the prosecution was only bound to show that there was probable cause for believing that the accused was guilty of the offence charged. The hearing was not a trial before the committing magistrate. He might determine that probable cause was shown before all the witnesses for the prosecution were examined, and suspend the investigation at any point when he had reached this conclusion. He could, in his discretion, examine the witnesses for the prosecution and for the defendant also, and render his decision after all the witnesses were fully heard. He might discharge the accused if he did not believe that probable cause was shown, and such a discharge was not a bar to another prosecution for the same offence. If he did not discharge the accused, he might hold him to bail, if the offence was bailable, or commit him. But he was not obliged to hear his testimony nor the testimony of his witnesses.

It is claimed in this case that the Act of May 23, 1887, P. L. 158, introduced a new method of procedure at the preliminary hearing before a magistrate, and that a person accused of crime is entitled, as a matter of right, to have his witnesses heard at such a hearing by virtue of the provisions of this statute, unless the offence charged is triable exclusively in the Court of Oyer and Terminer.

The language of the first section of the statute lends color to this claim. But the purpose of the law was not to regulate criminal procedure before magistrates or elsewhere. It is entitled "An Act relating to the competency of witnesses and the rules of evidence in civil and criminal cases," etc. It declares when a person is competent to testify and when incompetent, but it goes no further. If it were held to regulate procedure in criminal cases, it would be in violation of section 3, art. III, of the constitution, which provides, that "no bill . . . shall be passed containing more than one subject, which shall be clearly expressed in its title."

We have carefully considered the cases of *Com. v. Sheriff*, 10 Pa. C. C. Reps. 341, and *Com. v. Hughes*, 1 District Reps. 596, in neither of which was the point now raised argued, and in which the statements of the law on this subject by the judges were *dicta* not essential to the decisions.

We prefer to adopt the reasoning of Judge Metzger in *Com. v. Wintersteen*, 6 District Reps. 641, where the very point was raised and argued by the exceptionally able counsel concerned in the cause, and was decided in a clear and convincing opinion by the learned judge who presided at the trial.

The conclusion is that the defendant was not deprived of any legal right by the refusal of Justice McCroskey to hear his witnesses, and the application for the writ of mandamus is refused.

From C. H. Smiley, New Bloomfield, Pa.

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.*National Guard—Corporate rights and corporate identity—Battalion of State Fencibles.*

No aggregation of parts of a thing less than the whole, however proportionately great, makes up the thing itself.

General Order No. 17, from the commander-in-chief of the National Guard, assigned four companies of the Battalion of State Fencibles, an organization composed of four companies of infantry, a commanding officer and staff, to the Sixth Regiment, another organization, without assigning the commanding officer and the staff and without indicating that the four companies were assigned as a battalion, *held*, that the identity of the four companies as the Battalion of State Fencibles was destroyed and their connection therewith severed, and by the order they became parts of the Sixth Regiment and ceased to have the right to use or occupy the battalion armory, except by permission of that organization.

Military code—Act of April 28, 1899.

Under the Act of April 28, 1899, P. L. 188, designated as "The Military Code of Pennsylvania," the 10th section of which provides that "nothing herein contained shall be construed as affecting the right of any troop of cavalry, battery of artillery, or company of infantry, organized prior to 1861, and since continuously maintained, to preserve their respective organizations, with their original vested or charter rights, privileges and immunities," members of a military organization whose identity will be destroyed by conforming to a general order from the commander-in-chief of the National Guard are justified in resigning from the companies affected by the order, to preserve the original organization intact and prevent its disruption.

The "Infantry Corps of State Fencibles" was formed in 1818 with one company of infantry, and was incorporated by that name on March 11, 1876, for the purpose, as expressed in its charter, "to aid and benefit its members and to secure their proficiency in the military science and for social enjoyments," with a membership composed of three classes; active, who were the members of the military body; contributing, who were not members of the military body, and honorary members. In 1878 the corps recruited three additional companies, and thereafter the military body was known as "The Infantry Battalion of State Fencibles." By mistake, the word "Battalion" was substituted for "Corps," in the name of the corporation itself, and so appears in its seal, in its printed charter and by-laws and in the bonds issued by it, and the identity of the corporation became so confounded that the officers of the military body under the designation of "Board of Officers of the State Fencibles Battalion" assumed to act as the corporate body and conduct its business. On June 16, 1888, city councils of Philadelphia authorized the leasing of the city armory to the "Infantry Battalion of State Fencibles, National Guard of Pennsylvania," and under this ordinance a lease was executed by the city of Philadelphia to the "Infantry Corps of State Fencibles, National Guard of Pennsylvania, a body corporate of the State of Pennsylvania."

Held, that the lessee intended by the ordinance was the incorporated civil body and not the unincorporated military body; that such corporation was possessed of the term of the lease, and that the right of the military body in affiliation with the corps to use the armory was wholly dependent upon the rights which its individual members had as active members of the corporation and not upon any trust relationship which they as a body sustained to the corporation.

Findings of fact and law. C. P. No. 3, Phila. Co., Dec. T., 1900, No. 918, in Equity.

Samuel F. Clevenger and Melick, Potter & Dechert, for plaintiffs.

Furth & Singer and George S. Graham, for defendants.

MCCARTHY, J., Oct. 11, 1901.—This cause was tried on June 13 and June 14, 1901, before me, sitting as chancellor. The parties, both plaintiffs and defendants, were represented by counsel. Evidence was given in open court on behalf of the plaintiffs. The defendants offered no testimony, and, after the hearing of plaintiffs' evidence, moved the court to dismiss the bill. The case was fully argued by counsel. The plaintiffs presented requests for findings both of fact and of law, which are hereto attached in order that the same may be filed by the prothonotary as part of the record in the case.

Abstract of the pleadings.

The bill, as amended at the trial by agreement of counsel, sets forth that plaintiffs are captains, commanding respectively four companies of the Sixth

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

Regiment, National Guard of Pennsylvania, and are complaining as well for themselves as in behalf of the other members of the said companies; that on June 16, 1883, the "Infantry Battalion of State Fencibles, National Guard of Pennsylvania" was, and has since continued to be, a military organization, consisting of four companies, which were not and are not incorporated as civil corporations, either separately or together as a battalion; that the "Infantry Corps of State Fencibles" on the said date was, and has since continued to be, a body corporate, of which the individuals named as defendants are officers; that on June 16, 1883, city councils passed an ordinance authorizing a lease of the city armory to the Infantry Battalion of State Fencibles, National Guard of Pennsylvania, with proviso that the building should not be used for other than military purposes; that the battalion named in the ordinance was composed of the four companies of which plaintiffs are the captains; that the major of the battalion, signing himself president, afterward executed a lease of the city armory, dated Oct. 1, 1884, which was intended for the use and benefit of the battalion; that the four companies, "for whose sole use and benefit said lease was made and is held by said corporation defendant," took immediate possession of the armory, and have been in continuous and uninterrupted possession to the present time for military purposes, detailed in the bill; that on May 1, 1900, by order of the Governor, the said four companies were assigned to the Sixth Regiment; their designations were changed, and they together formed the third battalion of said regiment; that the officers were not changed nor the organization of the companies affected; that three of the plaintiffs continued to act as captains under the same commissions as before; that the plaintiff, Mihlbauer, was elected and commissioned captain of Company K, Sixth Regiment, to fill the vacancy caused by the resignation of Captain Zeh; that the "Infantry Corps of State Fencibles" was incorporated by Court of Common Pleas No. 4, of this county, on Feb. 17, 1876; that it was not and has never been a part of the National Guard, nor a military organization, nor has it pursued any military purpose, nor used nor occupied the armory for any corporate purpose; that in executing the lease the corps took the same for the benefit of the battalion, and acquired no right to use the armory or to exclude the battalion from the use of any part of it; that on May 1, 1900, the corporation wrongfully excluded and still excludes from the armory the four companies constituting the third battalion, Sixth Regiment, being identically the same companies and organizations for whose use the lease was made, by replacing locks, locking up rooms, giving use of the drill floor to other persons and civil bodies, and refusing to the said four companies of the Sixth Regiment free ingress and egress to and from the rooms and building, and access to the arms and property stored therein; that the battalion was possessed of certain personal property which is in said armory, and the corporation defendant has wrongfully taken possession of the same, and holds and uses it in interference with the rights of the said four companies; that the corporation defendant has unlawfully assumed control of the moneys of the said four companies in the hands of the treasurer of the board of officers of the battalion, who was also treasurer of the said corporation, which moneys amount to \$700 and upwards.

The prayers are for injunctions to restrain defendants (1) from interfering with the sole use and possession of the armory "by Companies E, K, L and M of the Sixth Regiment;" (2) from withholding from said companies the sole custody and use of the personal property in the armory; and (3) from using the funds in the hands of the treasurer collected for the benefit of said four companies; for a decree that the lease is held in trust for the sole use and benefit of the said four companies of the Sixth Regiment; and for further relief.

The answer, as amended by agreement of counsel, among other things, denies
10 DIST. R.

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

that plaintiffs are acting in behalf of other members of the said four companies, and asks disclosure of the alleged additional plaintiffs; avers that the Infantry Corps State Fencibles was instituted in 1813, and has ever since been a part of the National Guard of Pennsylvania; that it was a single company until July 8, 1878, when it was authorized to recruit three additional companies, which it did, thereafter consisting of four companies, a major and a staff of officers; it admits the incorporation of the corps; that the individuals named as defendants are the officers of the corporation; that the ordinance of June 16, 1883, was passed and approved and the lease of the armory executed to the corps; avers that the lease was executed by the civil corporation with the undoubted intent of assuring the military battalion the conjoint use of the armory, and that it has been so conjointly used to the present time; that the armory is used not only by the four companies of Fencibles, but also for military purposes by the major and the field and staff officers, who, "together with the four companies and their officers, comprised the battalion;" that the corporation contained and contains many members not connected with the National Guard; that it assumed charge and control of the armory and contracted and paid the expenses of conducting it from date of possession to the present time; that by General Order No. 17, dated May 1, 1900, a copy of which is annexed to the answer, the four companies of the Fencibles were assigned as four companies respectively of the Sixth Regiment, and directed to report to its colonel; that defendant, Zeh, at that time captain of Company A, resigned, and the plaintiff, Mihlbauer, who was not a member of the Fencibles, was elected and commissioned captain of Company K, Sixth Regiment, and that he has neither a legal nor equitable right of suit herein; that General Order No. 17 is in direct contravention of the Act of April 23, 1899, § 10, P. L. 133, and, in consequence, Captain Zeh and a large number of the members of said four companies of the Fencibles tendered their resignations and refused to connect themselves with the Sixth Regiment, so that less than sixty officers and privates out of two hundred are acting with said transferred companies of the Sixth Regiment; it denies that the corporation never maintained a military organization, and avers that from its creation until May 1, 1900, it assisted in maintaining the battalion, and since November, 1900, it has organized and maintains another battalion, known as the Infantry Battalion State Fencibles, to perpetuate the organization instituted in 1813; it avers that the four companies down to the present time have occupied and used the armory for military purposes, and that all their property, arms and equipments are under their own control, and that they have not been interfered with in the use of the armory; that, in consequence of threats made to eject defendants from the armory and turn over its possession to the Sixth Regiment, the corporation defendant caused the old lock at the entrance to be replaced, and intrusted the new key to the superintendent of the armory, but the building has since, at all times, been and now is open for the use of plaintiffs precisely as they have used it heretofore; that the personal property at the armory was purchased by the corporation, and the use and enjoyment of it by said companies has not been interfered with by defendants; that the corporation borrowed money on April 14, 1897, to make improvements at the armory and issued eight bonds, of which five are outstanding, and for payment of which said personal property is pledged; that the sources of revenue of the corporation are dues of members unconnected with the National Guard, collections from citizens and moneys derived from the State and city by the battalion, all of which are paid over to the treasurer of the corporation and disbursed for the benefit of the battalion and maintenance of the armory; that the plaintiffs and their companies have not paid anything for the expenses of the armory since May 1, 1900, although regularly receiving an armory fund

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

from the city; and that on Dec. 6, 1800, plaintiffs, with the colonel and other officers of the Sixth Regiment, applied to city councils for a transfer of the lease of the armory to the Sixth Regiment on the same grounds as alleged in this proceeding, but the application was rejected.

From this abstract it appears that the main question for determination is, whether the four companies of the Sixth Regiment are entitled to the exclusive use and possession of the city armory or not—the solution of which depends upon that of the further questions; whether the said four companies constitute the Infantry Battalion of State Fencibles or not, and whether the present lessee of the armory holds the term in trust for the said four companies or not.

Findings of fact.

The following facts are established by the pleadings and the evidence heard at the trial:

1. In 1813 was formed a military body, named "The Infantry Corps, State Fencibles." It consisted of one company of infantry, commanded by a captain and other company officers.

2. On March 11, 1876, a charter was granted incorporating the "Infantry Corps of State Fencibles." The purposes of the corporation, as expressed in the charter, are "to aid and benefit its members and to secure their proficiency in the military science and for social enjoyments." The members of the corporation were, first and principally, active members, who were the members of the military body; secondly, contributing members, who were not members of the military body; and thirdly, honorary members.

3. In 1878, under authority from the Commonwealth, the corps recruited three additional companies, and thereafter was known as "The Infantry Battalion of State Fencibles." The organization then consisted of four companies of infantry, designated as "Company A," "Company B," "Company C" and "Company D," respectively, each company being commanded by its captain and other company officers, and the whole battalion being under command of a major and possessing a staff of officers, commissioned and non-commissioned.

4. At the time of or shortly after the formation of the battalion, a mistake arose as to the name of the corporation, which became inveterate and has been perpetuated to the present time. The word "Battalion" was substituted for "Corps" in the name of the corporation, which was thereafter known, as well to its members as to the community in general, by the erroneous designation of "Infantry Battalion of State Fencibles." This substitution appears in the seal of the corporation, in the book printed by the corporation and offered in evidence, containing a copy of the charter, in the by-laws printed in the same volume, in the bonds issued by the corporation, and in the bill and answer in this case as originally filed.

5. There was not only a confusion of the names of the two bodies, but a confounding of their identity, so that the field, staff, non-commissioned staff and company officers of the military body, under the designation of "Board of Officers of the State Fencibles Battalion," assumed to act as the corporate body, enacted by-laws, elected officers, held meetings, and generally conducted the business of the corporation.

6. On June 16, 1883, was approved an ordinance passed by the select and common councils of the city of Philadelphia, authorizing the commissioner of markets and city property to demise to the "Infantry Battalion of State Fencibles, National Guard of Pennsylvania," the city armory for ten years, at a nominal rental, with privilege of extending the lease for ten years additional, and the proviso that the building should not be used "for other than military purposes."

10 DIST. R.

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

7. On Oct. 1, 1884, a lease in writing was executed between the city of Philadelphia and the "Infantry Corps of State Fencibles, National Guard of Pennsylvania, a body corporate of the State of Pennsylvania," reciting the aforementioned ordinance and demising the city armory to the said "Infantry Corps of State Fencibles" for the term and rental and with the privileges and restrictions set forth in the ordinance. On behalf of the lessee, this instrument was signed by John W. Ryan, president, and Charles Berger, secretary of the corporation, and it was sealed with the corporate seal. John W. Ryan at that time was also major of the battalion.

8. Upon the execution of the lease, the battalion and the corporation took possession of the armory, and have ever since occupied and used it, the battalion for drill, for storage of arms and equipments, as headquarters, and for other military purposes; the corporation for meetings and transaction of corporate business.

9. On May 1, 1900, General Orders No. 17 issued from headquarters National Guard of Pennsylvania. It begins:

"I. The following assignment of companies of the State Fencibles Battalion Infantry is hereby made: 'Company A, State Fencibles Battalion Infantry, Philadelphia, Captain Frederick G. Zeh, to be Company K, Sixth Regiment Infantry.'"

In three succeeding paragraphs it makes the like assignments of Companies B, C and D to be Companies M, L and E, Sixth Regiment, respectively. It then directs commanding officers to report to commanding officer of the Sixth Regiment, and continues:

"II. Commanding officers of former companies of State Fencibles Battalion Infantry will immediately return cap ornaments to State arsenal, Harrisburg, accompanied by proper invoice, and forward requisition through channels for supply of cap ornaments, with regimental number and new company letter."

This order did not assign the commanding officer of the battalion or the staff officers, commissioned and non-commissioned.

10. A large majority of the members of the battalion, being nearly three-fourths of the whole number, were dissatisfied with General Order No. 17 and resigned, refusing to obey it. Among the number was the commanding officer of Company A. After his resignation, the members of Company A who continued in the command and obeyed the general order, becoming thereby Company K, Sixth Regiment Infantry, elected the plaintiff, Mihlbauer, to be their commanding officer, and he was afterward commissioned as captain of Company K, Sixth Regiment. Mihlbauer was formerly commanding officer of Company A of the State Fencibles Battalion, but he resigned in 1894 and had not since been connected with the organization.

11. The four companies assigned by General Order No. 17, and thereby designated as Companies K, M, L and E, Sixth Regiment Infantry, respectively, were, after assignment, organized into a new battalion, designated as the Third Battalion, Sixth Regiment, and Major Lumb, a member of the Sixth Regiment, was assigned to command the new battalion.

12. After May 1, 1900, the members of the Infantry Battalion of State Fencibles who resigned, renewed their organization in four companies, with the old letter designations, A, B, C and D, respectively, and renewed also the battalion organization under the old commanding officer and under the old name of "Infantry Battalion, State Fencibles," dropping, however, the addition of "National Guard of Pennsylvania," which had been used formerly as part of the designation of the military body. The organization now musters 185 officers and men; it is not connected in any way with the National Guard. One of the companies has had several drills at the armory, but the four companies of the

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

Sixth Regiment have continued to use and occupy the building with their company and battalion drills, so that all the nights of the week are engaged by them, and the State Fencibles Battalion have found it impossible to drill there under the present condition of affairs. The companies assigned to the Sixth Regiment have continued to use the armory since their assignment in much the same way as before, and the evidence does not sustain the averments of the bill that the plaintiffs have been excluded from the armory or interfered with in the use of it for military purposes. On the contrary, it appears that they have materially interfered with the use of the building for military purposes by the military body adhering to and maintained by the corporation, and that they have been treated, notwithstanding this, with commendable forbearance.

13. In December, 1900, the plaintiffs, or some of them, with their associates, caused an application to be made to city councils for the passage of an ordinance to revoke the existing lease of the city armory, and to authorize a new lease of the same to be made, granting the use of it to the Sixth Regiment. The bill being referred to the joint committee on city property, several hearings were had before that committee, which reported the bill to councils with a negative recommendation, and, after discussion in councils, *pro* and *con*, the report of the committee was adopted, and the ordinance failed to pass.

14. Since May 1, 1900, neither the plaintiffs nor those on behalf of whom they sue have either individually or collectively made any contribution whatever for the payment of the rent and cost of maintenance of the city armory.

Findings of law.

1. The real plaintiffs in this action are Companies E, K, L and M of the Sixth Regiment Infantry, National Guard of Pennsylvania. The nominal plaintiffs, by whom the bill is filed, who are the respective commanding officers of the said companies, are not suing for the establishment of their individual rights, but in behalf of their respective commands as companies. This appears from the tenor of the bill, and especially from its prayers, in each of which relief is expressly asked for the said four companies by name.

2. Companies E, K, L and M of the Sixth Regiment Infantry, National Guard of Pennsylvania, do not constitute the Infantry Battalion of State Fencibles. It is an axiom that the whole is equal to the sum of all its parts; no aggregation of parts of a thing less than all, however proportionately great, makes up the thing itself. When General Orders No. 17 issued, the Battalion of State Fencibles was composed of the following parts, namely, four companies of infantry, each with its officers, commissioned and non-commissioned; one officer commanding the battalion, and a battalion staff of officers, commissioned and non-commissioned. General Orders No. 17 assigned the four companies as companies; it did not assign the remaining parts of the battalion, and did not profess to assign the four companies as a battalion. Furthermore, it did not assign the companies as companies of State Fencibles; it changed the designation of each company, abolished for them the name "State Fencibles," and severed the connection of each with the battalion bearing that name, making the assigned companies component parts of a wholly different organization, namely, the Sixth Regiment Infantry.

The practical result of General Orders No. 17 was not to transfer the four commands bodily to the Sixth Regiment, with a mere change of designations; barely one-fourth of each command obeyed the order; see tenth finding of fact, *supra*. The Act of Assembly approved April 28, 1899, P. L. 133, designated as "The Military Code of Pennsylvania," provides, by section 10, "nothing herein contained shall be construed as affecting the right of any troop of cavalry, battery of artillery, or company of infantry, organized prior to 1861 and since

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

continuously maintained, to preserve their respective organizations with their original vested or chartered rights, privileges and immunities, and said organizations shall be deemed legal organizations in addition to the number of companies provided for in the 2nd section of this Act. The Battalion of State Fencibles was within the spirit of this enactment, if not within its letter, and entitled thereby to preserve its organization, but General Order No. 17 beat down the shield of the statute, abolished the name by which the organization had been long and honorably known, disrupted the battalion and destroyed its identity. To obey the order was to acquiesce in the destruction of the organization; the only alternative presented was to resign from the bodies affected by the order. Three-fourths of the commands accepted this alternative and resigned in order to preserve the organization which had existed and been continuously maintained since 1813, to uphold their chartered rights, privileges and immunities, and to sustain and perpetuate the honorable designation of "State Fencibles."

3. The lessee intended by the ordinance of June 16, 1883, was the "Infantry Corps of State Fencibles;" that is, the incorporated civil body, and not the unincorporated military body. That the name specified in the ordinance is "Infantry Battalion of State Fencibles, National Guard of Pennsylvania," affords no just ground for concluding that the corporation was not intended thereby. As already found, see fourth finding of fact, *supra*, the word "Battalion," by a general though erroneous usage, was substituted for "Corps" in the name of the corporation. This mistake probably arose from the fact that for the two years succeeding the grant of the charter the military body and the civil body had the same name; they were both correctly designated as the "Infantry Corps of State Fencibles." When the military body changed its designation from "Corps" to "Battalion," it was, no doubt, supposed that the like change was essential in the designation of the civil body, so that thereafter, as theretofore, both bodies should have the same name; and, in fact, they were both thereafter called by the same name, the "Infantry Battalion of State Fencibles," although, as applied to the corporation, the designation was certainly erroneous.

It is, however, fairly to be inferred that the city councils, in entering into contractual relations regarding the property of the city, intended to contract with the corps, which was a single corporate entity having perpetual succession, rather than with the battalion, which was not a single entity having contractual powers as such, but was an aggregation of many individuals associated into four separate assemblages or unincorporated societies. This inference is confirmed by the fact that the parties to the transaction based upon the ordinance so construed it. The lessor's careful solicitor, in preparing the draft of the lease, not only inserts the correct corporate name of the lessee, but adds the description that it is "a body corporate of the State of Pennsylvania." The lease is executed on behalf of the lessee by John W. Ryan, at the time major of the battalion as well as president of the corps, who affixes to his signature the official title of president and not that of major. The lease is sealed with the seal of the corporation; the battalion, being unincorporated, had, of course, no seal. The inference is further confirmed by the recent action of city councils, detailed in the thirteenth finding of fact, *supra*, which recognized and affirmed the validity of the lease as it exists.

4. The Infantry Corps of State Fencibles is possessed of the full title, legal and equitable, to the term created by the lease, and holds the same in its own right and free from any trust.

There is no trust expressed in the lease; there are no facts or circumstances from which a trust can be implied. The right of the military body in affiliation

Mihlbauer et al. v. Infantry Battalion, State Fencibles, et al.

with the corps to use the armory is wholly dependent upon the rights which its individual members may have as active members of the corporation, and not at all upon any supposed trust relationship which they as a body sustain to the corporation.

It follows as a corollary that the four companies, in whose behalf this suit has been brought, have, as companies, no right to use or occupy the armory except by permission of the Infantry Corps of State Fencibles, the corporation lessee of the premises.

In conclusion upon the whole case, I am of opinion that the evidence does not show that any rights, either of the individuals, who are the nominal plaintiffs, or of the four companies, who are the virtual plaintiffs in this suit, have been infringed or are threatened with infringement, nor does it disclose any facts or circumstances which call for the interference of the chancellor; it follows that the prayer for injunctions and a decree should be refused, and the bill dismissed with costs.

A decree proper for the decision of the cause in accordance with the foregoing findings is attached hereto, and will be entered by the prothonotary forthwith, in accordance with the rules of equity practice.

Rock Glen Street Railway Company.

Street railways—Application for charter—Acts of May 14, 1889, and June 7, 1901.

The Governor will not issue letters-patent to a street railway company under the Act of May 14, 1889, P. L. 211, as amended by the Act of June 7, 1901, P. L. 514, in a case where, after the filing of the articles of association, but before he has acted upon them, either to approve or disapprove them, an extension is filed by another company covering the same route as that indicated in such articles of association.

Protest by the West Chester and Southern Street Railway Company to application for charter. Executive Department.

GRIEST, Sec'y of Com., Sept. 13, 1901.—On June 24, 1901, the application of the Rock Glen Street Railway Company was filed in the office of the Secretary of the Commonwealth, describing the proposed route as partly within and partly without the borough of West Chester, Chester county, Pa.

The West Chester and Southern Street Railway Company was incorporated on June 12, 1901, and on June 28, 1901, the said company filed in the office of the Secretary of the Commonwealth an exemplification of extensions of said company, which exemplification was duly recorded therein. The streets and highways therein described are practically the same as those specified in the application of the Rock Glen Street Railway Company, and by reason of such extensions the West Chester and Southern Street Railway Company protests against the granting of said charter.

In view of these facts, has this department the authority, under the Act of 1901, to incorporate "The Rock Glen Street Railway Company?"

In the consideration of this question, it is very important to determine what is the nature of the property or rights which the West Chester and Southern Street Railway Company obtained by the said extensions.

It is only a corporation incorporated under the Act of 1889, and its amendment, the Act of 1901, that has authority to extend its lines. Corporations have this right by virtue of the said Acts. A valid charter must exist before the right can be exercised, and upon the filing of extensions in the office of the
10 DIST. R.

Rock Glen Street Railway Company.

Secretary of the Commonwealth, the corporation is vested with the franchises in, and the right to construct, the extensions at the end of thirty days. The extensions depend for their validity upon the charter route, but the corporation holds both the charter route and the extensions under title from the Commonwealth. The charter route is the trunk and the extensions the branches; and as the branches of the vine depend for sustenance upon the vine, so the extensions derive life from the trunk route. The property is a unit, and the whole, trunk and extensions, the franchises of the company granted by the State. The charter route is the trunk franchises, and the extensions are the branch franchises: *Hannum v. Media, &c., Electric Ry. Co.*, 200 Pa. 44. The latter vest in the company the moment the record of the extension is filed in the office of the Secretary of the Commonwealth. The incorporators of the West Chester and Southern Street Railway Company would have obtained no greater or different rights to the streets and highways mentioned in the extensions if, instead of extending the lines in the manner provided by the Act, they had obtained, by direct application, a charter covering said streets and highways.

This department acts ministerially in the filing of the record of extensions. It does not pass upon the validity of such extensions. It is immaterial to this inquiry whether or not the extensions are, in their present form, a valid exercise of the rights conferred by the Act. We must assume them to be valid.

Such, then, being the nature of the extensions and the rights under which the corporation holds them, can the charter for the Rock Glen Street Railway Company now be granted? Had the incorporators of the West Chester and Southern Street Railway Company obtained a charter, by direct application, covering the same lines as that mentioned in the extensions, instead of the company extending its lines, could the charter for the same route be granted to the Rock Glen Street Railway Company? This question must be answered in the language of the Act of 1901, viz., "Whenever a charter, after the approval of this Act, shall be granted to any corporation to build a road as provided by this Act, no other charter to build a road on the same streets, highways, bridges or property, shall be granted to any other company within the time during which, by the provisions of this Act, the company first securing the charter has the right to commence and complete this work." And the reason is, the prevention of the obstruction of the streets and highways of the Commonwealth by two lines of street railways: *Homestead Street Ry. Co. v. Pittsburgh, &c., Electric Street Ry. Co.*, 166 Pa. 162. But if, after an extension, a charter is granted over the same streets and highways, the same result necessarily follows. It would be a narrow construction of the Act to hold that the prohibition applies only in a contest between two charters, and not where the contest is between extensions duly made and an application for charter covering the same route. To give effect to the Act of 1901, the Act must be so construed that where a company extends its lines over certain streets and highways and files a record of the same in the office of the Secretary of the Commonwealth, then this department has no authority to grant a charter covering the same route.

It is true the charter of the Rock Glen Street Railway Company was filed several days before the filing of the record of said extension. While it is the practice of this department to grant charters in the order in which they are filed, a fair construction of the Act does not render this imperative. At all events, the charter was not granted before the filing of the extensions, and the company acquires no rights until the approval of the articles of association and the issuing of letters-patent by the Governor. The granting of the charter, now, to the Rock Glen Street Railway Company, under date of June 24, 1901, would not avail the company as against the extensions of the West Chester and Southern Street Railway Company. While such charter would, apparently,

Rock Glen Street Railway Company.

confer the better right on the Rock Glen Street Railway Company to the route therein mentioned, yet in a contest in court between the two companies it could doubtless be shown in truth and fact the pretended franchises granted the Rock Glen Company were parted with by the State subsequent to the filing of the extensions of the West Chester and Southern.

These views, therefore, require that the application for charter by the Rock Glen Street Railway Company be refused.

From W. C. Farnsworth, Harrisburg, Pa.

Lyons v. Lyons et al.

Partition—Equity practice—Appointment of master.

In cases of partition, before any reference can be made to a master, the court must decide (1) whether the plaintiff is entitled to have partition made; (2) who are the parties interested in the land; (3) what is the nature of their several titles; (4) what is the quantity of their several interests. After the case is heard and a decree ordered a master may be appointed to perform the duties prescribed by the Act of July 7, 1885, P. L. 257.

Bill in equity praying for partition. C. P. Lackawanna Co., March T., 1890, No. 9, in Equity.

H. C. Reynolds, for plaintiff; *James C. Vaughan*, for defendant.

EDWARDS, J., Dec. 11, 1900.—This is a bill in equity praying for a partition of a certain piece of real estate among a number of heirs. Some of the heirs make answer admitting the allegations of the bill; the other heirs make no answer, although they accept service of the bill. As to the latter heirs the bill must be taken *pro confesso*.

It is proper that the bar shall know our views as to the practice in cases of partition in the equity court. The amended rules regulating equity practice, adopted by the Supreme Court, and which went into effect on the first Monday of March, 1894, provided that "the office of master in chancery is hereby discontinued, except in proceedings where decrees or interlocutory orders are to be executed or their execution supervised by an officer of the court." In the case of *Palethorp v. Palethorp*, 184 Pa. 585, the Supreme Court, with considerable emphasis, condemns the practice of appointing a master in partition proceedings in the equity court before the case is heard by the court itself and a decree in partition made. The whole proceedings in *Palethorp v. Palethorp* were set aside because the equity rule was violated in this respect. We can see no reason why full force should not be given to this decision without violating the provisions of the Act of July 7, 1885, P. L. 257. This Act confers the right upon the court to refer proceedings in partition to a master after a decree in partition has been made. The master in such a case is an officer of the court charged with the execution or carrying out of its decree. It is apparent, therefore, that before there can be any reference to a master in a partition case the court must decide (1) whether the plaintiff is entitled to have partition made; (2) who are the parties interested in the land; (3) what is the nature of their several titles; (4) what is the quantity of their several interests. After the case is heard and a decree is ordered, a master may be appointed to perform the duties prescribed by the Act of Assembly.

In the case now under consideration it is unnecessary to make formal findings of fact or of law. All the defendants have been properly served. Those who answer confess that the plaintiff is entitled to partition. As to those who do not answer, in law they likewise confess. We find that the plaintiff is entitled to partition. The decree agreed upon by counsel is satisfactory.

From Thomas F. Wells, Scranton, Pa.

In re Vacation of Eastburn Road.

Roads—Vacation—Report of viewers—Exceptions—Certainty of exceptants—Sufficiency of report—Presumptions.

Exceptions to a report of viewers that it does not show that they attempted to obtain releases of damages from the owners abutting or fronting on said road, nor that they assessed any damages, will not be sustained :

1. Where no land-owner claiming or entitled to damages has filed exceptions to the report, but the exceptions are signed only by "attorney for plaintiff," on behalf of "divers citizens."
2. Where the depositions show that opportunity was given at the hearing for any person to claim damages, and that none were claimed.
3. Where the report states that no damages were claimed.

It is not necessary to the validity of a report that the viewers should state that they have endeavored to obtain releases. It will be presumed that they have rightly done their duty. An omission to assess and report damages is equivalent to a finding that none have been sustained. A report, however, that no damages were claimed is a report on the question of damages.

Roads—Vacation—Blind roads in boroughs.

The fact that by the vacation of a portion of a road a *cul de sac* will be formed by each of the unvacated parts, is not necessarily objectionable when the road lies in, or borders on, a city or borough.

Roads—Boroughs—Court of Quarter Sessions—General jurisdiction—Special jurisdiction in Montgomery county—Act of May 9, 1871—Practice.

The Court of Quarter Sessions has power to vacate a road which lies partly in a borough and partly in a township.

By the Act of May 9, 1871, P. L. 639, the Court of Quarter Sessions of Montgomery county has power to vacate streets in boroughs in said county, with the consent of the town council.

Where the portion of a road proposed to be vacated lay partly within and partly without a borough, and separate petitions were filed for each portion, the same viewers were appointed on each petition, and two reports were made, each favorable to petitioners. *Held*, that although such proceedings were unnecessary and irregular, yet the court could treat the matter as one proceeding.

Exceptions to report of viewers. Q. S. Montgomery Co., Dec. Sess., 1900, Nos. 25 and 26.

H. M. Brownback, for Upper Merion township ; *James Boyd*, contra.

WEAND, J., Feb. 18, 1901.—The road known as the Eastburn road, part of which is asked to be vacated, is the dividing line between the borough of Bridgeport and Upper Merion township, the middle of the road being the dividing line. The part asked to be vacated crosses the Philadelphia and Reading Railway at grade, and is said to be dangerous, inconvenient and useless. The road coming from the southwest intersects Fourth street, which continues on into Upper Merion. After the Eastburn road crosses the railroad northeast, it extends to Third street of the borough.

By the vacation of the part covered by the railroad the unvacated part from Fourth street to the railroad on one side, and from the railroad on the other side to Third street, will have no outlet after reaching the railroad, so that persons entering from Third or Fourth streets would have no means of egress except by retracing their steps.

Bridgeport is a thriving manufacturing incorporated borough, and requires house accommodations for the numerous employees engaged in the various factories, etc., or employed by the railroad company. By the Act of May 9, 1871, P. L. 639, the Court of Quarter Sessions of Montgomery county has authority, by and with the consent of the town councils, to lay out, vacate, etc., any streets, etc., within the limits of any incorporated borough in said county.

As one-half of the road proposed to be vacated lies within the limits of the borough, the petitioners conceived that two proceedings were necessary to effect their purpose, and they therefore applied by one petition to vacate that part

within the borough, with the consent of the town council, and by another petition to vacate that part within the township of Upper Merion. The same viewers were appointed on each petition. Two reports were made, each favorable to the petitioners, and in each report it was stated that no damages were claimed.

Exceptions, identical in character, were filed to each report, and we may, therefore, consider them together.

Exceptions 1 and 2 complain that the reports do not show that the viewers attempted to obtain release of damages from the owners abutting or fronting on said road, nor did they assess any damages.

There are three valid answers to these exceptions :

1. No land-owner claiming or entitled to damages has filed exceptions to the reports. The exceptions are signed by "attorney for plaintiff," on behalf of "divers citizens of the borough of Bridgeport and the township of Upper Merion," but we are left in ignorance as to who these citizens are, or whether any of them would be entitled to damages even if the law allowed damages in such cases.

2. The depositions show that opportunity was given at the hearing for any person to claim damages, and that none were claimed.

3. In re Road in South Abington Township, 109 Pa. 118, it was held : "Nor is it necessary to the validity of a report that the viewers should state in it that they have endeavored to obtain releases, nor that in the assessment of damages they have taken into consideration the advantages accruing to the land-owner from the opening of the road. It will be presumed that the viewers performed their duty, and that all things were rightly done, unless the contrary be shown. That this is the rule under the Act of 1845 was decided in McConnell's Mill Road, 8 Casey, 285, and in Road in Chartiers Township, 10 Casey, 413 ; and the general Act of May 14, 1874, contains precisely the same provision in this respect."

In Road in Kingston Township, 134 Pa. 409, it was ruled that "under section 2, Act of Feb. 24, 1845, P. L. 52, providing that if viewers shall decide in favor of locating a public road, and it shall appear to them that any damages will be sustained, it shall be their duty to assess and report the same. An omission to assess and report damages is equivalent to a finding that none have been sustained."

The Act of 1845, referred to in above-cited cases, is identical in language with the Act of 1874, which it is complained was not followed ; and in South Abington Township Road, *supra*, this fact is commented on. In this case the jury did report upon the question of damages, for they state that none were claimed. If none were claimed, and the parties appeared, releases would be useless.

In North Union Township Road, 150 Pa. 512, cited by exceptants, it did not appear that notice was given to the land-owners of the time and place fixed for the assessment of damages ; nor did it appear that the viewers considered the question of damages at all, etc. The expression in the *per curiam* opinion, "while it was entirely proper to set aside the report of the jurors for the reason that they made no effort to obtain release of damages from the property-owners," must be taken in connection with the other facts which controlled the lower court, and not as laying down a general proposition at variance with the other cases cited. With this view of the case it is not necessary to pass upon the question as to whether damages are recoverable for the vacation of a public road in Montgomery county. See McGee's Appeal, 114 Pa. 470.

Exceptions 3, 4 and 8 complain that by simply "vacating that part of the road which crosses the Philadelphia and Reading Railway Company it creates two blind roads, one leading from Fourth street to the railroad on the southwest 10 DIST. R.

In re Vacation of Eastburn Road.

side thereof, and the other leading from the said railroad to Third street on the northeast side thereof; and that neither the draft nor report shows what portion of the road remains unvacated," etc.

The draft and report we think very definitely set forth what portion is vacated, being the part asked to be vacated, and, of course, the balance remains unvacated.

The first part of the exception might be good if this road was wholly in the township, but we must keep in view the locality and surroundings. The road borders on the borough, and even if it is a *cul de sac*, it is not necessarily on that account objectionable. The property-owners may want to lay it out in building lots, giving them a front on a street, or erect factories, etc., although there might be no ingress or egress at one end. By leaving these portions unvacated, it leaves the properties bordering therein available for various purposes, when a vacation would entirely destroy their value. Blind alleys, no thoroughfares, courts and *cul de sacs* are not uncommon in cities and boroughs, and a glance at the draft will show that great injury will be done by vacating this road between the points mentioned; whilst the short distance from Fourth street to the railroad can cause no great inconvenience to a person entering that part. On the other side of the railroad there are already improvements which would be destroyed or injured by a vacation.

The seventh exception denies the power of the court to vacate the road, because the same lies partly in the borough and partly in the township.

That this can be done was ruled in Priceville Road, 4 Del. Co. Reps. 106; Winter Street, 6 Montg. 24; Somerset and Stoystown Road, 74 Pa. 61; Palo Alto Road, 160 Pa. 104. By the Act of 1871, *supra*, the court has power to vacate streets in boroughs.

The tenth exception relates to the two petitions.

We think this was useless, and might give rise to serious difficulty if the juries should disagree, or if either municipality had presented a valid exception not common to both. But whilst irregular, the proceeding up to this point is not necessarily fatal, and the court can treat the matter as one proceeding. The object is identical in both petitions, which were presented at the same time, and on which the same viewers were appointed, and whose reports agree. No one has been injured, and if both reports are confirmed, we cannot see how any difficulty can arise. With a disposition to abolish dangerous grade crossings, such as this is represented to be, we will not set aside an otherwise good proceeding for a mere irregularity working injury to no one. We might well dismiss these exceptions, because they fail to give us the name of any one in whose behalf they are filed. Who can we call upon to stand sponsor for the exceptions? And why may not a large body of the "citizens" complain that impliedly they are objecting to a matter in whose favor they really are?

By the Act of May 18, 1891, P. L. 90, "the Court of Quarter Sessions shall have power in all proceedings therein for the opening or vacating of roads, streets or highways, to make such order for the payment of the costs in each proceeding as to the said court shall seem just and proper." And if we were disposed to exercise that power in this case, we would be powerless to make the order for want of known persons on whom to impose the costs.

The other exceptions are without merit, and need no discussion.

And now, Feb. 18, 1901, the exceptions are overruled, and reviewers will be appointed on the petition filed.

From Montgomery Evans, Norristown, Pa.

Good's Estate.

Wills—Mistake in number of class of legatees.

Where a testator overstates the number of the objects of his bounty who are entitled to take as a class under a particular devise, the whole amount so devised will pass to the smaller number who fall within the class.

A testatrix directed in her will that the residue of her estate should be "equally divided amongst and between my three sisters and the children of my deceased brothers, Andrew and Daniel, they to receive between them the share that their father would have received if living." It appeared that at the time of her death and at the time of the making of the will there were only two sisters living, but three sisters were deceased, leaving children. The auditor distributing the estate treated the legacy to the sisters as void for uncertainty, giving two-fifths to the children of the two brothers, and distributing the remaining three-fifths under the intestate laws.

Held, that this was error, that the manifest mistake of the testator should be corrected, and that the children of each of the two brothers and the two living sisters should each be allowed a fourth part of the residue.

Exceptions to report of auditor. O. C. Lancaster Co.

A. J. Eberly, for exceptions; *Amos E. Burkholder*, contra.

M. G. Schaeffer, for estate.

LANDIS, J., March 2, 1901.—The auditor found this case one of great difficulty. It assuredly presents intricacies which careful investigation can alone overcome. When once, however, fairly entered upon and elucidated, it seems to us that the apparent troubles disappear, and the true interpretation of the testatrix's will becomes perfectly plain.

Susanna Good died on May 4, 1899, leaving a will, which is dated April 12, 1899. After making certain bequests, she provided: "5. The residue or remainder of the money remaining in the hands of the executor after the payment of my just debts, funeral expenses, expenses of settling of my estate and aforesaid bequests, it is my will, shall be equally divided amongst and between my three sisters and the children of my deceased brothers, Andrew Bare and Daniel Bare, they to receive between them the share that their father would have received if living, and their heirs and legal representatives." The executor named in the will filed his account, and an auditor was appointed to distribute the balance remaining in his hands. It was then ascertained that the testatrix, at her death, as well as at the time of the making of her will, had but two sisters living, and that besides the children of her deceased brothers, Andrew Bare and Daniel Bare, who are mentioned in said will, she also left nephews and nieces, the children of three deceased sisters. One of these sisters, Elizabeth Stoll, died Jan. 24, 1897; another, Lucy Wenger, died Dec. 21, 1895; and the third, Leah Graybill, died June 5, 1845. The question therefore arose as to what was meant by the testatrix in the said above-recited clause of her will, there not being three sisters living, and there being no means of ascertaining which of the deceased sisters, if either of them, she referred to, or whether the number was merely a mistake.

The auditor, upon these facts, treated the legacies to the sisters as void for uncertainty, and then proceeded to distribute one-fifth of the residue to the children of Andrew Bare, one-fifth to the children of Daniel Bare, and the remaining three-fifths he divided into seven shares, giving the two living sisters each one-seventh of the three-fifths, and the children of the three deceased sisters and of the two deceased brothers the remaining five-sevenths, *per stirpes*. By this method of distribution, the children of the deceased brothers received each one-fifth and one-seventh of three-fifths. The exceptions now under consideration were filed by the two living sisters, who complain that there was error in making such a division of the residue.

While this problem may have been no easy one for the auditor to solve, yet we cannot imagine any good reason why he should deprive the living sisters of their shares of the estate, and an examination of his report has not convinced us that he has there given a sufficient one. As to them, the intention of the testatrix was perfectly clear. They as exactly answered the description of the beneficiaries named in the will as did the children of Andrew Bare and Daniel Bare. At best, we conceive the controversy could only be about the remaining one-fifth. To deprive them of their shares and to give them only a share of the three-fifths, is a result which was surely not contemplated by the testatrix. In addition, there is no rule of law that we know of that demands such an interpretation. Many of the distributees are not referred to in the will, and the children of Andrew and Daniel are specially mentioned would indicate an express intention on the part of the testatrix not to include her other nephews and nieces as subjects of her bounty. The most natural and reasonable way to avoid the difficulty and to interpret the will correctly is to conclude that this is one of those mistakes which, either from misdirection or want of understanding on the part of the scrivener, have frequently occurred in the preparation of wills, and we should therefore be governed by the decisions which determine the course to be pursued whenever such unforeseen mistakes arise.

In *Vernor v. Henry*, 6 Watts, 192, a testator devised a tract of land to the two daughters of his deceased brother, John Vernor, and unto the grandson of the said brother, each of them to have an equal undivided third part thereof. It so happened that testator's brother, John Vernor, had three daughters, and it was held that the devise was not void for uncertainty, but that the three daughters took by it two-thirds of the land. Mr. Justice Kennedy, in discussing the case, said that "it is merely correcting a mistake of the testator, made manifest, as to the true number of those who appear to have been all alike the objects of his bounty, and this is done either by striking out the number inserted without more, or by reading it as if it were written 'all' instead of 'two' or 'three,' as it may happen to be." This is every day's practice in the construction of wills in order to effectuate the plain intention of the testator, as, for instance, "or" is construed "and," and *vice versa*. Mr. Roper, who has collated the cases on this subject, lays it down as settled "that, if a testator bequeathed to part only of a number of individuals of the same description, and none of them are named nor can be identified, either by the will or by extrinsic evidence, it is to be presumed that he intended the whole class of persons, and was mistaken in the number when confining his bounty to three or four of the class by the inserting of these words. These restrictive expressions are therefore rejected, and the entire number of individuals answering the description are admitted as legatees." In 1 Jarman on Wills, 661, it is said: "Sometimes the uncertainty of the person is in the number, and in such case the wrong number is generally made right;" and in *Lord Selsey v. Lord Lake*, 1 Beavan, 146, where the bequest was to pay an annuity to E. H. during her life, and, after her death, to her five daughters, and the survivor or survivors of them, it appeared that E. H. had five sons and one daughter, and Lord Langdale, M. R., held that the daughter alone was entitled to the annuity for life on the death of her mother. Many other cases appear in the books like that of *Vernon v. Henry*, *supra*, wherein the number of legatees mentioned are of a less number than those answering in the class. I, however, know of no reason why, in principle, because the actual number of those fitting the description in the class are less instead of greater, there should be any difference in judicial construction. The same rule should, and certainly does, apply with equal force to both propositions, and it is so held in our own recent case of *McMasters v. Shellito*, 14 Pa. Superior Ct. 303.

Good's Estate.

Determining, then, that the sisters are entitled to participate in the residuum, we must also decide what share they should each receive. It is necessary that every one claiming in the character of a legatee should answer the description the testator has given in the will. Here the children of the deceased sisters have not been mentioned at all. The whole dispute arises from a mistake, which it is now our duty to correct by inserting the word "two" instead of "three" before "sisters." The residuum is then bequeathed to the two sisters of the testatrix and the children of her two brothers. There is also the provision that it shall be equally divided between the "three (now two) sisters and the children of my deceased brothers, Andrew Bare and Daniel Bare, they to receive between them the share that their father would have received if living." Equality between the legatees *per stirpes* was therefore plainly in the mind of the testatrix. This object is accomplished by dividing the residue into four shares, and giving each of the sisters one share and the children of Andrew Bare and Daniel Bare each one share; and in order that the distribution may be expedited, instead of recommitting the report to the auditor to carry out the views expressed in this opinion, we will append a schedule of distribution, and the auditor's report, as so amended, will be now confirmed absolutely.

Exceptions sustained, and auditor's report as amended is now absolutely confirmed.

From George Ross Eshleman, Lancaster, Pa.

Creighton v. National Safe Company.

Practice, C. P.—Statements of claim must be definite and show amount of plaintiff's demand.

Unless a statement in *assumpsit* shows amounts by which a judgment can be liquidated without a writ of inquiry, a rule for judgment for want of a sufficient affidavit of defence will be discharged.

Practice, C. P.—Affidavits of defence—Sufficiency.

An affidavit of defence made by an attorney, which does not set out his means of knowledge, nor aver that he expects to be able to prove what he does allege, and also fails to state whether the defence is to the whole or part of plaintiff's claim, is insufficient to prevent judgment.

Rule for judgment for want of sufficient affidavit of defence. C. P. No. 2, Allegheny Co., Jan. T., 1901, No. 523.

William A. Golden, for plaintiff and rule; Frank W. Smith, contra.

SHAFFER, J., Jan. 2, 1901.—The action is *assumpsit* on a replevin bond, the plaintiff in the replevin having been non-suited, and plaintiff has taken a rule for judgment for want of a sufficient affidavit of defence. The reasons assigned are that the affidavit is made by an attorney or agent of defendants, who does not set out his means of knowledge nor allege that he expects to be able to prove what he does allege, and that the affidavit does not state whether the defence is to the whole or a part of plaintiff's claim. These objections are well taken, and the plaintiff would be entitled to judgment if he had set out his own case as required by the Act of Assembly. He sets out the replevin bond and the non-suit, and then claims to recover \$90, the penalty of the bond, and "damages sustained by reason of said writ." He does not state that the safe was of any value, or of what value it was, nor what damages he claims. No judgment could be rendered, except for the penalty, as if on a default of appearance. A good statement of claim in *assumpsit* must show amounts by which a judgment can be liquidated without a writ of inquiry.

Rule discharged.

From Edwin L. Mattern, Pittsburgh, Pa.

10 DIST. R.

Wolf v. Sailer.*Magistrates of the city of Philadelphia—Aldermen—Justices of the peace.*

Magistrates of the city of Philadelphia, aldermen and justices of the peace exercise the same jurisdiction, and are subject to the same limitations and restrictions.

Justices of the peace—Docket entries.

While the entries upon a justice's docket are to be construed very liberally, and the evidence upon which the judgment is entered need not be set out in the record, as there can be no reversal upon *certiorari* for error in judgment of the magistrate upon the facts or law, and every presumption not inconsistent with the record is in favor of the proceeding, yet it is essential that the record should disclose that evidence was heard to establish the plaintiff's claim.

Justices of the peace—Sufficiency of evidence—Sworn statement.

Neither presentation of the demand by an agent authorized to make the claim, nor a sworn statement, if admitted in evidence, is sufficient to warrant the entry of a judgment by a justice of the peace.

Where the record shows that no proofs were heard, a statement therein that judgment was entered "after hearing all proofs" will not give the judgment validity.

Certiorari from magistrate. C. P. No. 5, Phila. Co., Sept. T., 1901, No. 133.

H. E. Kohn, for plaintiff; *H. R. Kneass*, for defendant.

MARTIN, P. J., Oct. 7, 1901.—A *certiorari* having issued, the record returned shows that on July 8, 1901, the day of the hearing before the magistrate, "Harry E. Kohn, Agt. & Atty. for Plaintiff, sworn claims \$77.63 for goods sold and delivered Oct. 3d, 1900, interest \$3.85. Total \$81.48. Sworn statement offered in evidence. Deft. requires proof of actual sale and delivery. Deft. present. Attorney for Plff. calls J. F. Sailer, who is present in court for cross-examination to testify as of cross-examination. Defendant refuses stand and refuses to be sworn. Plff's. Attorney offers to prove by Deft. the actual sale and delivery and receipt of goods as alleged by Plff. After hearing all proofs and allegations judgment publicly rendered for plaintiff for \$81.48 and costs of suit."

An exception was filed by defendant "because the record failed to show that any evidence was submitted in support of plaintiff's claim."

"If the parties appear before the justice, either in person or by agents, the justice shall proceed to hear their proofs and allegations:" Act of March 20, 1810, § 3, 5 Sm. Laws, 161.

Section 4 of the Act requires that the proceedings before a justice "shall be entered at large by him in the docket or book to be kept by him for that purpose, in which he shall state the kind of evidence upon which plaintiff's demand may be founded:" Act of March 20, 1810, 5 Sm. Laws, 161.

By the terms of the Act of Feb. 5, 1875, § 12, P. L. 56, magistrates in the city of Philadelphia exercise the same jurisdiction as aldermen, and are liable to the same limitations and restrictions; and under the provisions of the Act of March 29, 1851, § 12, P. L. 272, aldermen were clothed with all the jurisdiction throughout the county as was by law vested in justices of the peace.

While the entries upon a justice's docket are to be construed very liberally (*Rhey v. Baird*, 51 Pa. 86), and the evidence upon which the judgment is entered need not be set out in the record, as there can be no reversal upon *certiorari* for error in judgment of the magistrate upon the facts or law, and every presumption not inconsistent with the record is in favor of the proceeding (*Campbell v. Doan*, 62 Pa. 86), yet it is essential that the record should disclose that evidence was heard to establish the plaintiff's claim: *Swartwood v. Exeter Township*, 1 Kulp, 304; *Bachman v. Siglin*, 7 Pa. C. C. Reps. 112; *Lenore v. Ingram*, 1 Phila. 519.

Wolf v. Saller.

A magistrate's court is of limited jurisdiction, and the proceedings must not only be within the scope of his authority, but it must so appear upon the face of the transcript: *McCale v. Kulp*, 8 Phila. 636.

A magistrate is permitted to enter judgment upon confession or on *proof*, which means legal evidence.

It appears by the transcript in the present case that the attorney and agent for plaintiff was sworn. If there was no further information, it might be implied that he gave oral evidence in support of the demand, but the record discloses that, instead of testifying, he "claims \$77.63 for goods sold and del'd," and that a sworn statement was *offered* in evidence, but defendant *required proofs* of actual sale and delivery, whereupon the attorney for plaintiff called the defendant as a witness, but *he refused to take the stand or be sworn*, although plaintiff *offered to prove* by him the actual sale and delivery and receipt of the goods as alleged.

It is apparent that the function performed by the agent and attorney of the plaintiff was to make the claim, but the presentation of the demand is not sufficient to warrant the entry of judgment: *Dauphin County Mutual Live Stock Ins. Co. v. Pidgeon*, 7 Pa. C. C. Reps. 449.

The record fails to disclose what action was taken by the magistrate upon the offer of the "sworn statement," but if admitted in evidence it would not authorize the entry of judgment: *Renshaw & Co. v. Proctor*, 16 W. N. C. 495.

Nor does the addition of the words "after hearing all proofs" give validity to the judgment when it clearly appears that no proofs were heard: *Penn Mutual Fire Ins. Co. v. Lenker*, 5 Pa. C. C. Reps. 667.

As the record in this case fails to disclose that there was any evidence in support of plaintiff's claim, the judgment is reversed.

Thompson v. Lodge et al.

Vendor and purchaser—Assumption of mortgage debt—Bill in equity against vendee for deficiency—Multifariousness of bill.

A bill in equity averred that A, the plaintiff, was the owner of sixteen properties; that he executed bonds, some in the penal sum of \$6500 and some in \$6000, and, to secure them, executed a mortgage on each of the properties; that, in 1896, he conveyed the properties to B, who assumed the payment of the mortgage debts, and who, in 1897, conveyed them to C, the deed to the latter containing the clause, "under and subject, nevertheless, as respects the first six lots, to the payment of \$3250 each, and as respects the following ten lots, to the payment of \$3000 each, secured upon the same by sixteen separate indentures of mortgage;" that on the failure of C to pay the taxes and interest, the mortgages were foreclosed, and the properties in each case realized at sheriff's sale less than enough to pay the judgments; that the mortgagees entered up judgments on the bonds for the various deficiencies against him; that, although he paid none of these judgments, he "stands in the position of a surety, and is entitled to indemnification from the defendants, prior to any actual payment by him," and praying that the defendants be decreed to save him harmless, &c. *Held*, on demurrer, (1) that the bill was not bad for multifariousness; (2) that the bill was bad for want of equity; (3) the plaintiff had an adequate remedy at law.

Blood v. Crew-Levick Co., 171 Pa. 339, and *McAbee v. Cribbs*, 194 Pa. 94, considered.

Demurrer to bill in equity by the building association. C. P. No. 1, Phila. Co., June T., 1900, No. 211.

Adolph Eichholz, for plaintiff; *Samuel B. Huey*, for defendants.

BEITLER, J., Oct. 7, 1901.—The bill sets out that the plaintiff owned certain properties on South Fifth street, in this city, the numbers being 1605, 1607, 1609, 1611, 1613, 1615, 1625, 1627, 1629, 1631, 1633, 1635, 1637, 1639, 1641 and 1643; that, being so seized, he executed, on Dec. 11, 1895, sixteen bonds, some in the penal sum of \$6500, others in the penal sum of \$6000, to pay, in the one case, \$3250, 10 Dist. R.

Thompson v. Lodge et al.

and in the other \$3000, within five years, to secure which he executed a mortgage upon each of the several properties. These mortgages were given to the Fidelity Insurance, Trust and Safe Deposit Company, and were held by that company for several different trust-estates. In 1896 the plaintiff conveyed the sixteen houses to George Lodge, the bill alleging that the consideration was "one dollar and of the assumption of the aforesaid sixteen mortgage debts." No copy of this deed is given in the bill. The said George Lodge, by deed dated March 22, 1897, conveyed the houses to Leon Folz, the deed containing this clause: "Under and subject, nevertheless, as respects the first six lots, to the payment of \$3250 each, and as respects the following ten lots, to the payment of \$3000 each, secured upon the same by sixteen separate indentures of mortgage," etc. The conveyance to Folz was really a conveyance to the association, Folz being its solicitor and Lodge being indebted to the association. Thereafter the association entered into the possession of the sixteen properties and collected the rents, and the bill avers that it was thereafter its duty to discharge the interest upon the mortgages, pay the taxes and save harmless the plaintiff from liability by reason of the encumbrances, either on account of the principal or interest thereof, in the same manner and to the same extent as the plaintiff was himself liable to the mortgagee. The association, however, failed to pay taxes and interest, the mortgagee foreclosed, and the properties in each case realized at sheriff's sale less than enough to pay the judgments, etc. The mortgagee has entered up the sixteen bonds given by the plaintiff, and in each case assessed the damages at the difference between its judgment on the several mortgages and the amount realized by it thereon at the sheriff's sales. These judgments, though differing in amount, are for about \$400 each. The plaintiff has paid none of these judgments, but avers that he "stands in the position of a surety and is entitled to indemnification from the defendants, Lodge, Folz and the association, prior to any actual payment by him."

To secure this, he prays that the several rights and liabilities of the parties may be ascertained, and that the three defendants above named be decreed to save him harmless, etc. To this, the bill, the building association demurs, assigning as reasons therefor that the bill is bad for multifariousness and want of equity. On these points the defendant cites and relies on two cases: *Young v. Forest Oil Co.*, 194 Pa. 248, and *Blood v. Crew-Levick Co.*, 171 Pa. 389.

We do not regard the bill as bad for multifariousness. Is there, then, under the circumstances, any equity in the plaintiff to have the relief he seeks? The three cases of *Blood v. Crew-Levick Co.* are interesting, and if they rule this case, they are conclusive against the plaintiff's right to the relief he now seeks. Crew-Levick Company purchased from Blood certain freeholds and leaseholds, upon which Blood had executed mortgages to secure negotiable notes given for the purchase-money. The deed for the property held by Blood in fee was made "under and subject to the lien of the mortgages, and to settle all questions about the duty of the purchasers, the following stipulation was also inserted in the deed: "It is hereby agreed between the parties to this instrument that the said party of the second part accepts the title to the foregoing and described pieces and parcels of land and oil rights, subject to the payment of the mortgages herein above mentioned."

This the Supreme Court held to be an express covenant to pay the mortgage debt to the holder of the mortgage. Crew-Levick Company did not pay the mortgages. Blood died, and his widow, as executrix, settled with one of the mortgagees. With the others she did not settle, but owed them at the time she brought suit upwards of \$24,000. Her action was *assumpsit*. A case stated was filed, leaving to the court to decide whether the executrix should have judgment for all her testator's estate owed on the several mortgages or only

Thompson v. Lodge et al.

what she had paid to settle one claim, or whether the defendants should have judgment. At the same time she filed a bill in equity setting out the facts before recited, praying that the defendant disclose the balance due upon the several mortgages, and be ordered and directed to pay the said balance to protect the estate. To this bill the company defendant demurred. At the same time the executrix brought an action of *assumpsit* to the use of the assignee of one of the mortgages to recover from Crew-Levick Company the unpaid balance on one of the mortgages, the property having been sold under the mortgage and having brought less than the judgment thereon.

The court below entered judgment in the action of *assumpsit* for the amount she had paid to settle a claim by one of the mortgagees upon the bond or notes secured thereby given by her testator. In the equity proceeding the court sustained the demurrer and dismissed the bill. On a rule for judgment for want of a sufficient affidavit of defence, in the case wherein the executrix brought suit to use, etc., the court discharged the rule.

The Supreme Court, reviewing the three cases, decided in the first that the Act of June 12, 1878, P. L. 205, had no application, that the company defendant had expressly covenanted to pay the mortgage on the freehold Blood conveyed to it, that, "as to the amount still due and unpaid on the mortgages, the plaintiff cannot recover to her own use until she has been compelled to make payment, and then only to the extent of the payments actually made." The judgment was affirmed.

The decree in the equity case was likewise affirmed, the Supreme Court holding that, as to the freehold deed, wherein there was the express covenant to pay the mortgages enumerated therein, "the remedy is at law," and that, so far as the action rested on the deed for the leasehold estates, "there is no remedy in law or at equity until the plaintiff has been compelled to pay."

In the third appeal the judgment was reversed, and the record remitted "so that judgment may be entered in favor of the use-plaintiff for the amount due to it upon the mortgage held by it," the court holding that "the defendant's express covenant to pay" (which was in the freehold deed) "may be enforced by action resting thereon, brought in the name of the covenantee."

These cases seem to rule this case. We have cited the facts fully because they are somewhat complex, and because, in the later case of McAbee v. Cribbs, 194 Pa. 94, Mr. Justice Fell says, referring to Blood v. Crew-Levick Co., "that case was decided on its own peculiar facts," and adds, "the land which, as between the parties, was primarily liable for the mortgage debt had not been sold, and the liability was not fixed as to either its character or amount."

By this the learned justice must have meant the leasehold, for the case stated recites that, as to the Bayer and Rice property (which was the freehold estate), it was "under proceedings on the said mortgage, . . . sold at sheriff's sale subsequently to the conveyance to the defendant." It was as to this property that the executrix settled the claim (of Bayer and Rice), and it was a part of the case stated that if the court should be of opinion that the plaintiff is entitled to recover "the entire balance remaining due and unpaid upon the mortgage to Bayer and Rice, then judgment to be entered in favor of the plaintiff for \$17,708.22, with interest.

McAbee v. Cribbs was an action of *assumpsit* on a contract of indemnity. The question whether it shakes or overturns Blood v. Crew-Levick Co., wherein the court decided that Mrs. Blood, as executrix, could not recover in an action of *assumpsit* the balance due by her testator upon the Bayer and Rice mortgage, not having paid it, is not before us, for this is a proceeding in equity.

We have not referred to the contention of the defendant, that there is in this case no such express covenant as in the Crew-Levick case. The Act of 1878
10 DIST. R.

Thompson v. Lodge et al.

enacted that a conveyance merely "under and subject" to the mortgage should not be construed to make the grantee personally liable, and there is nothing but that clause in the deed to Folz to make him or the association, for which he held the title, liable. We have not rested the case on this, for, even if the deed imposed a greater liability, still, under the Crew-Levick case, the equity branch of it, there is no equity to be enforced in favor of the mortgagor.

The demurrer of the building association should therefore be sustained, and judgment is therefore entered for the association on the demurrer.

Sample's Estate.

Decedent's estate—Distribution—Preference—Costs of administration—Compensation of discharged executrix—Counsel fee.

Compensation due a discharged executrix, and counsel fees of the administrator *c. t. a.*, are part of the expenses of administration, and are entitled to preference over the claims of general creditors. Ordinarily such counsel fees are given precedence in payment, but the right of precedence turns on the equity of the parties and the policy of the law. *Held*, under the facts in this case, that the counsel fees should first be paid.

Exceptions to the final account of a discharged executrix, filed by an administrator *c. t. a.*, are filed under stress of his official duty, and he is entitled to allowance of his incidental costs and expenses, including counsel fee.

The compensation of an executrix is due as it is earned, and should be deducted from the assets before the payment of preferred creditors. Hence, where an executrix paid preferred claims without deducting commissions and was then discharged, and the balance of the estate was insufficient to pay her compensation and the costs and expenses, including counsel fees, incurred by the administrator *c. t. a.*, *held*, that she was estopped from claiming as against such costs and expenses, and the latter were entitled to preference in distribution.

Exceptions to administration account. O. C. Allegheny Co., May T., 1901, No. 131.

The question involved in this matter is whether or not a claim for professional services rendered this accountant, who is administrator *c. t. a.*, is entitled to precedence over a claim for a balance found due on the settlement of the account of the discharged executrix? The facts are these: Messrs. Stoner and Hadfield, on behalf of Cartwright, assignee of one of the legatees, filed exceptions to the first and second accounts of Mrs. Sample (now Stevens), executrix of her husband's will. The contest involved a large amount, and was complicated; and the hearings occupied a great deal of time—the record, including the testimony, filling nearly 400 printed pages—and the result was a large surcharge in this court. On appeal, Messrs. Stoner and Hadfield again represented Mr. Cartwright. In the course of their employment they became thoroughly familiar with Mrs. Sample's manner of administering the estate; and when they were employed by the administrator *c. t. a.* to file exceptions to Mrs. Sample's third and final account, this knowledge was, no doubt, of great advantage to the estate. They attended to the hearings on behalf of exceptant, which lasted three or four days, and the result was a surcharge of \$—, although there still remained a balance of \$9554.06. One of the items of credit was \$4901.93 taxes, for which Mrs. Sample was personally liable, and which the administrator was compelled to pay.

The claim made by Messrs. Stoner and Hadfield of \$1000 for their services to the administrator *c. t. a.* is in the circumstances entirely reasonable.

There is also a claim of Lucy D. Iams, stenographer, for taking testimony at the audit, whose priority seems to be conceded by counsel for Mrs. Stevens.

Semple's Estate.

The ground upon which precedence is claimed on behalf of Mrs. Stevens seems to be that the balance due her represents commissions for services as executrix, whereas, Messrs. Stoner and Hadfield stand in the position of ordinary creditors.

J. M. Stoner and George Hadfield, for accountant.

Watson & McCleave, for Mrs. Stevens.

HAWKINS, P. J., June 11, 1901.—It may be conceded that, as claimed by counsel, the compensation due a discharged executrix is entitled to a preference over the claims of general creditors, for the obvious reason that this is part of the expense of the administration necessary to the adjustment of their claims; but the counsel fee for which claim of preference is here made is itself part of the expenses of administration. Ordinarily such fees are given precedence in payment. Mrs. Stevens herself recognizes this by taking credit for a large amount paid counsel; but the circumstances of this case are peculiar, and the right of precedence turns on the equity of the parties and the policy of the law.

The equities are strongly in favor of the claim of preference made by Messrs. Stoner and Hadfield. The decision of the Supreme Court made the readjustment of Mrs. Stevens's account, and the employment of counsel by her successor, an essential part of the administration of the estate; final settlement could not have been had without it, and the familiarity of Messrs. Stoner and Hadfield with the previous litigation made their employment the logical course. As neither they nor the administrator had any interest other than professional, gratuitous services ought not to have been expected. They had a right to assume that the costs and expenses which should be incurred in continuing the administration would take precedence in the usual course. If it had been suspected that Mrs. Stevens would have a preference for the balance due, it is reasonably certain administration would not have been undertaken, for visible means of paying costs and expenses would have been wanting, and final settlement, in which Mrs. Stevens, both as executrix and widow, as well as legatee, were interested, would have been indefinitely postponed. There is no pretence that either the administrator or its attorneys acted in bad faith; in filing the exceptions they had probable cause, and these were made necessary by the conduct of the executrix; and the result of the audit proved beneficial to the estate.

It is true that where exceptions have been filed by the voluntary act of a party interested, he must ordinarily pay his own counsel fees; but here the administrator was under stress of official duty, and, of course, entitled to allowance of the incidental costs and expenses. On the other hand, since there was probable cause of litigation, Mrs. Stevens has no equity to deny these incidents. The administration of justice was the question involved, and the correction of mistakes was as much her duty as executrix as it was the right of the legatees. And besides this, another reason of estoppel lies in her postponement of claim to general creditors. Her compensation was due as it was earned, and might then have been deducted from the assets which passed through her hands; if she had asserted her right, the claims of those creditors whom she preferred would now be here for payment instead of that of the executrix, and take distribution only after costs and expenses of administration. It is obvious that if these creditors could have had no preference she can have no higher rights. She stands on their foot.

It follows that the costs and expenses incurred by the administrator *c. t. a.* are entitled to a preference in distribution.

From Edwin L. Mattern, Pittsburgh, Pa.

Williamsport v. Hughes et al.

Streets—Paving—Assessment—Including costs for repairs—Objection to assessment—Estoppel.

The cost of paving a city street may be imposed by local assessment on the property along its line, but the assessment should include the cost of paving only, and cannot include the cost of keeping the pavement in repair for a term of years and the expense of erecting and maintaining a plant where repairs can be made after the expiration of the term, and in such case the whole assessment is bad.

A property-holder objecting to the assessment, on the ground that it includes more than the cost of the pavement, is not estopped from so doing by the fact that he joined in the petition asking for the pavement, and that he made two payments on account of the assessment against him, nor by the fact that the city engineer made the assessment, of which he had notice, and on which he had an opportunity to be heard. He is, however, estopped from asserting the invalidity of the assessment, because of its having been made in accordance with the foot-front rule, when he suggested in his petition that the cost should be assessed against the property according to that rule.

Sci. fa. sur municipal lien. C. P. Lycoming Co., Dec. T., 1899, No. 129.

John J. Reardon, city solicitor, and John G. Reading, for plaintiff.

C. L. Munson, S. T. McCormack, C. E. Sprout, W. W. Hart, H. W. Watson, J. A. Beeber, J. T. Fredericks, W. H. Spencer and W. E. Ritter, for defendants.

ARCHBALD, P. J., 45th judicial district, specially presiding, March 28, 1901.—This is a *sci. fa.* to enforce a municipal lien for asphalt pavement laid in front of the defendants' property on West Third street, in the city of Williamsport. The defence set up is, that the ordinance and contract by which the pavement was laid provide not only for original construction, but also for keeping the pavement in repair for a term of years, thus imposing, as it is claimed, an extra and unlawful burden on the property. By agreement, the case was tried by the court without a jury, and the facts are as follows:

1. On April —, 1893, a petition was presented to the council of the city of Williamsport, praying for the paving of West Third street, between West and Park streets, in the said city. This petition was signed by a majority in number of the owners of property abutting on the part of the street to be paved, and, among others, by Nelson A. Hughes, the defendant. The prayer of the petition was that the said West Third street, between West and Park streets, should be paved with Trinidad sheet asphalt, to be laid in the best possible manner, on a foundation of hydraulic cement concrete not less than six inches in depth, with a wearing surface of two and one-half inches, the city to pay the cost of paving street and alley intersections and the frontage of non-assessable property, and the property-owners to pay the balance in proportion to the feet front of their respective properties on said street, less the portion to be paved by the Williamsport Passenger Railroad Company—the same to be paid at the option of the said property-owners in ten annual instalments, if desired.

2. In pursuance to the petition, a resolution was passed by the councils May 12, 1893, deciding to pave the street as prayed for, five days' notice of which was duly given by publication in two newspapers of the city, as required by law.

3. Following this, on Aug. 5, 1893, an ordinance was duly passed authorizing the paving of the street in the manner suggested, and providing for the issuing of improvement bonds based on assessments therefor.

4. In pursuance of the ordinance, after due advertisement for bids, the bid of the Sicilian Asphalt Paving Company was accepted, and a contract executed Sept. 5, 1893, between the said paving company and the city of Williamsport for the laying of the pavement, the company giving bonds in \$20,000 for the faithful performance of their contract.

5. In the summer of 1894 the pavement was laid by the paving company, the

section in front of the defendant's property being completed on July 18. It was laid in conformity with the ordinance and contract, with the exception that there was a slight deficiency of one-fourth to one-half an inch in the thickness of the wearing surface in some places, on account of which a deduction of five per cent. was insisted upon and agreed to by the company, after which the work was accepted by the city authorities.

6. On Sept. 22, 1894, after due notice to property-owners by publication three times in two daily newspapers in the city of Williamsport and written notices left on the premises, the city engineer proceeded to make the assessments to pay for the pavement. These were made according to the foot-front rule and at the rate fixed by the contract, \$3 per square yard, less the deduction of five per cent. for insufficiency, already referred to, and excluding street and alley intersections and the frontage of non-assessable properties, as well as the part of the street to be paved by the street railway, as provided by the ordinance. The property of the defendant, Nelson A. Hughes, is situated on the north side of West Third street, between Walnut and Park, and has a frontage of 46 feet 6 inches thereon. The assessment against this property at the rate mentioned was \$337.85, less \$16.09 for the five per cent. deduction, making \$321.76, the amount for which the lien was filed.

7. On Feb. 8, 1895, in pursuance to the foregoing facts, a municipal lien was filed in this court against the property of the defendant, Nelson A. Hughes, on West Third street aforesaid, for \$321.76, with a penalty for non-payment of \$16.09, and interest from Oct. 1, 1894, such assessment being made payable in ten annual instalments, with interest. Upon this lien a *sci. fa.* was issued Sept. 22, 1899, to No. 129, December Term, 1899, which was duly served on the defendant, and to which he appeared, and this is the case now on trial.

8. The defendant has made two payments on account of the assessment against him, one of \$41.83, April 4, 1895, and another of \$59.03 on Sept. 4, 1896. The amount now due, if the assessment is valid, is \$257.42, with interest to date, \$78.35, and penalties, \$12.87, making the total sum due at the time of the trial \$348.64.

Conclusions of law.

1. The cost of paving a city street may be imposed by local assessment on the property along the line of it to the extent of the benefit conferred. But the cost of keeping such pavement in repair after it is once laid must be borne by the city at large.

2. The defendant, with others, having petitioned for the pavement and suggested that the costs should be assessed against their properties according to their foot-frontage, is estopped from asserting the invalidity of the assessment made against his property because of its having been made in accordance with that rule.

3. He is not estopped, however, from contesting its validity on the ground, if that be the fact, that it has been made to include other things than the cost of the pavement or improvement; for instance, keeping it in repair for a term of years, for which he would not be liable; and the mere fact that the assessment was made by the city engineer and the highway committee, either or both, after notice, does not affect the right of the defendant to contest it on the ground that it does.

4. The ordinance, in pursuance of which this improvement was made, provided as follows, viz.:

"Section 11. The person to whom the contract is awarded shall be required, at his own cost, to keep the pavement in good order and repair during the period of ten years from date of completion, and during said period repair and make good, at his own expense, and without any expense to the said property-

holders, all defects in said pavement due to its proper use as a public highway. Provided, however, that this guarantee of repairs shall not apply to any openings made in said pavement for any purpose whatsoever, nor to any settlement of the pavement due to the settling of trenches, the back filling of which shall be done by other parties than the contractor. The said contractor shall, before any money is paid to him under the terms of his contract, enter into and execute a bond in the sum of \$20,000, with two sufficient sureties to be approved by councils, conditioned that the said contractor shall keep said pavement in good order and repair during the period aforesaid, to the satisfaction of the committee of highways and sewers.

"Section 12. The contractor shall be required to enter into an agreement with the city to make all necessary repairs for property-owners and others who are compelled to open said pavement at the original contract price per square yard, viz., \$2.80, whether such repairs at a given point amount to a fraction of a square yard or more.

"Section 13. The contractor shall erect, keep and maintain in the city of Williamsport a plant embracing the necessary machinery and materials, by means of which repairs can be made after the expiration of the ten years' guaranty aforesaid at the price above mentioned; or if, at the expiration of the ten years, the said plant is removed or destroyed, the contractor shall give, assign and transfer to the city of Williamsport the absolute right to use in the city of Williamsport their formulas and machinery for such necessary repairs, and to furnish to the city at reasonable prices such materials as must of necessity be purchased from said contractor or to insure perfect repair."

And the Sicilian Asphalt Paving Company, the successful bidder and contractor, having agreed thereto and given bond to comply therewith, this imposed on the property of the defendant and others without warrant of law, not only the cost of the pavement, but the repair of it for the period named, if not also for that of keeping up the necessary plant and machinery for doing so.

5. The extra undertaking required of the contractors by section 11 was something more than a guaranty as to the high character of the pavement to be laid; it was an express agreement to keep it in repair and make good the defects arising from its proper and ordinary use as a public highway.

6. The assessment in this case is invalid and cannot be enforced.

7. The defendant, Nelson A. Hughes, is not estopped by his payment of a part of it, nor by any other circumstances which have been shown, from denying its validity and resisting the collection of the balance out of his property.

8. Neither is he concluded from making the defence which he now makes by the fact that the assessment was made by the city engineer and the highway committee, both or either of them, after notice.

9. Judgment should be entered for the defendant, with costs.

Opinion.

The defence to this assessment is that it covers, as is alleged, not only the cost of laying the pavement, but of keeping it in ordinary repair by the contractors for the term of ten years, they, at the same time, agreeing to maintain in the city a plant with the proper machinery and materials by which repairs made necessary by cutting through it to secure the usual gas, water and other street connections can be made at a certain guaranteed price, both during the period named and afterwards. The ordinance and the contract in pursuance of it in substance so provide, and the question is how this affects the assessments which follow. So far as our own courts are concerned, this is a case of first impression, but it has arisen and been disposed of in not a few of the other States, and we may well turn to the decisions there made for our present guidance.

The first and leading case seems to be that of *People v. Maher*, 56 Hun (N. Y.), 81, decided by the general term of the Supreme Court of New York. It arose in the city of Albany, where, by statute, adjacent property-owners are relieved from the expense of ordinary street repairs. A contract having been let for the paving of a certain avenue with asphalt, it was objected to on the ground that the ordinance on which it was based required the contractor to also keep it in repair for the period of seven years, thus imposing on property-owners an expense properly chargeable to the city, and, on *certiorari* to the proceedings of the board of contract and apportionment of the city of Albany, it was set aside. The question involved in cases of this character are so fully covered by the opinion of the court that I am moved to quote from it at large. "The contractor who alone appears here to sustain the award," says Larned, P. J., "urges that the proof shows that the bid did not include any item for repairs, and therefore property-owners are not injured. One of the officers of the contracting company said that he calculated that the pavement would last the time required, and therefore did not estimate anything for repairs. But that is not conclusive on the question. Other bidders may have thought it necessary to make their prices higher for the reason that they would be required to keep the work in repair for seven years, and if no such requirement had been inserted, such other bidders might have made a proposal lower than this contract, [and] then the property-owners would have had less to pay, and for the ensuing years the city would have done the repairs.

"It is further urged that the relators have another remedy, viz., to apply for a reduction of the assessment to be levied if an illegal item should be therein. But the remarks just made show that this, if any remedy at all, is not sufficient, because it cannot be held that lower bids might not have been made if the specifications had not contained the item now objected to."

And again: "It is urged with some force that this agreement is only equivalent to a warranty that the pavement will last seven years without repairs, and that such a warranty would be a benefit. Undoubtedly such a warranty would be a benefit, as this very provision may be. But the difficulty arises from the circumstances that [by the statute] the property-owners are to pay only for the paving, and the city is to pay for subsequent repairs. Anything, therefore, which throws on the property-owners more than the burden of having the pavement well constructed in the outset is unjust to them." There are other valuable observations in the opinion, but I must pass them by.

The next case is *Schenectady v. Union College*, 66 Hun (N. Y.), 179, in the same court, but with somewhat different judges. It was an action to recover the cost of asphalt pavement laid in front of the defendant's property. The contract by which the work was let provided that it should be done "in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion;" and, distinguishing the case of *People v. Maher*, 56 Hun (N. Y.), 81, it was held that this was merely a guaranty as to the quality of the work, and that the assessment was valid. There is no extended discussion of the question, and the decision was by Mayham, P. J., with Putnam, J., concurring, and Herrick, J., dissenting. It was reversed on another ground in 144 N. Y. 241, which, to a certain extent, weakens it on this; and its importance consists chiefly in serving to contrast the two positions on which these as well as other cases range themselves; the one holding that the provision under discussion, which, in some instances, is somewhat affected by its phraseology, is no more than a guaranty as to the quality of the pavement; and the others, that it is a substantial agreement to repair, necessarily entering into the cost of the work and imposing an unlawful burden on the property-owners, which vitiates the whole assessment. A third position, somewhat aside

from either of these, is to be found in those cases which hold the assessment only in any event affected *pro tanto*. In order to have a full view of the situation, it will be necessary to consider each of these separately and at some length.

One of the strongest cases against the validity of an assessment of the character here complained of is *Boyd v. Milwaukee*, 92 Wis. 456. That was a proceeding—or, as we should say, a bill—to set aside a local assessment for asphalt pavement, and to enjoin a proposed sale under it. The specification on which the contract was let provide in these terms: "Guarantee: The contractor will be required without additional compensation to keep in good order and repair all the work done under these specifications and contract for a period of five years from and after the date of its completion, and to guarantee that during that period neither the municipal authorities or property-owners shall be at any expense whatever for any repairs made necessary on account of any defective workmanship or material or other reason, excepting where the same has been caused by cutting through the pavement for the laying or repairing of sewer, drain, gas, water or electric service pipes or other work authorized by the board of the public works, and that the pavement shall be in good condition and repair at the end of said period, and there will be retained until the expiration of such time out of the money payable to the contractor such per cent. of the amount of this contract as the board of public works may deem proper, not exceeding, however, 10 per cent. of the aggregate amount of the contract, as a guaranty that the contractor will conform to the requirement." It was held that it was unlawful to include in the contract in this way any charge for keeping the pavement in repair for a series of years, and that to do so was fatal to the whole assessment. "It will not do to say," observes Winslow, J., "that these agreements to repair are in effect but guarantees of material and workmanship. Such a contention is made here, and an offer was introduced showing that the life of such a pavement (if properly laid) was at least ten years, and that it would require no repairs at all for five years. If the agreement to repair were confined to repairs made necessary by defective workmanship or material, the argument would be entitled to serious consideration. But they go further. They cover in terms everything that may happen to the pavement except the cutting through it for the purpose of laying certain pipes. Just how far these agreements might go in case of damage to the pavement from unusual causes it is not necessary to consider, nor is the question properly here. It is sufficient to say that it is very evident that no one in possession of good business sense will make such a contract without considering and charging for the very extended liability which he assumes of keeping the pavement in repair for five years, and thus the property-owner is compelled to pay for that which the law charges upon the ward in general. We shall not strain the language of the contract or of the law for the sake of holding a special assessment of this nature valid. All such assessments are harsh proceedings at the best, and it is a salutary rule which holds the authorities making them quite strictly to the terms of the law."

Quite in line with this is *Brown v. Jenks*, 98 Cal. 10, which was an action directly upon the assessment. By the ordinance which provided for the pavement, the contractor was required to give bond to keep the streets improved and in thorough repair for five years; with regard to which it was said by Temple, C.: "The bond is not only unauthorized by the words of the statute, but the requirement changes and may increase the burden of the property-owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore, a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expenses undertaken are indefinite and the property-owner must pay for them in advance; whereas, the statute provided for repairs after

the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required. . . . From the argument of appellant I gather that it was suggested in the lower court that this requirement in the specifications was intended as a guarantee that the work would be well done, and would not require repairs for that period. If so, the provision is equally unauthorized. The lot-owner cannot be made to pay for such a guarantee, which may become worthless before the time has elapsed. Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty. Besides, it is for all repairs and not such as may result from defects of work. It covers repairs for defects from unforeseen causes or wanton abuse of the street by individuals. [Even] if the contractor is willing to testify that the anticipated cost of repairing did not enhance the price, such testimony would not help the matter. Others might have bid for the work at a less sum if this requirement had not been made." In pursuance of these views, the whole assessment was held invalid and no recovery allowed upon it.

The case of *Portland v. Bituminous Paving Co.*, 33 Ore. 307; 72 Am. St. Reps. 713, is to the same effect. That was an action on a bond given by the paving company for breach of an agreement to repair. The contractors were required by the ordinance, as part of their undertaking, to give bond, conditioned that for the period of five years from the date of the completion of the work they would keep the pavement in repair by immediately, upon proper notice, repairing, at their own cost and expense, any injuries or worn out places or other defects due to traffic, or on account of disintegration or decay, or in any manner attributable to defective materials or workmanship. The paving company, defendant, complained that the bond was invalid because without warrant of law, and so, to their prejudice, the cost of the repairs had been illegally assessed against the adjoining property-owners. The charter of the city authorized the repair of a street to be deemed an improvement, and the cost assessed against adjoining owners, but this, as it was claimed, did not warrant a contract for keeping the streets or any improvement upon them in repair, or the levy of anticipated future repairs against individual property. In this indirect and somewhat peculiar manner, the validity of this provision of the contract came up, and it was said with regard to it, by Wolverton, J.: "It is manifest that the letting of the contract upon condition that the contractor should bind himself to keep up repairs for a period of five years due generally to traffic, disintegration and decay, defective materials and workmanship, was calculated to increase the amount of the bid by the estimated cost of such repairs. At least, the condition imposed an additional burden which would not be assumed or undertaken without compensation. And the contractor would naturally be expected to demand a higher price in consideration of the obligation to assume the additional burden. Thus, by exacting the bond, a burden was undeniably imposed upon the adjacent property beyond such as was authorized by the charter." It was accordingly held that the assessments against adjoining property to meet the added expense of such repairs were invalid, the case, however, being decided against the paving company on other grounds.

To the same effect, according to the digest, is *Verdin v. St. Louis*, 131 Mo. 26, a case which it is somewhat important to note by way of contrast with the previous case of *Morse v. West Port*, 110 Mo. 502, where a contract for construction and maintenance was held valid, because the charter of the city expressly authorized an assessment against adjoining property-owners for repairs.

In *Fehler v. Gosnell*, 99 Ky. 380, the paving contract required that "the pavement and material composing the same shall be kept in good repair for the period 10 Dist. R.

Williamsport v. Hughes et al.

of five years from the completion of the work and its acceptance by the general council;" and in order "to protect the city as to the character of said work and material and such repairs as may be needed, the contractor shall deposit bonds of the city of Louisville, or of the United States, amounting to 10 per cent. of the original contract price of the entire work with the city treasurer, who shall hold the same, principal and interest, to be applied, as far as need be, in the necessary repairs of said work." It was held that this embraced not only a guarantee of faithful work but also a provision for repairs rendered necessary by other causes than defects in the contractor's work; and further, that the provision requiring the withdrawal of capital from the contractor's business and its investment in bonds as security for the making of repairs of whose nature and extent he could not be certain, necessarily caused the bids for the work to be higher than they would have been without such provisions, and that the assessment was to that extent invalid. But under the provision of the Kentucky law, allowing the courts in which suits for paving are instituted to make all necessary corrections so as to do justice to all parties, the contract was not regarded as wholly invalid, but only to the extent that the assessment had been increased on account of the objectionable features. This case is also important as limiting the scope of previous decisions, for it had been held in the *City of Louisville v. Henderson*, 5 Bush (Ky.), 515, that an undertaking in a paving contract to keep the pavement in good order and repair at the contractor's own proper cost and expense for the period of six months was merely a guarantee that the work was well done, and would need no repairing within that time. And this had been repeated in *City of Covington v. Dressman*, 6 Bush (Ky.), 210, where the period named was a year. It was, however, said in the latter case by Williams, C. J.: "It is certainly not a felicitous way of expressing a guarantee for sound, good work, yet that may be what it means; at least it would be so presumptively held on demurrer [as was the case before the court], when, if such is not the case, this may be put in issue and elucidated by the evidence; and if, on trial, it should appear that this imposes an additional burden on the property-holder, and is not a mere guarantee by the contractor that he will perform his work, they should to that extent be released, for it is the duty of the city to keep such streets in repair, and not impose this on the property-holders." The latter observation really puts this case in line with the decisions so far quoted, and pre-figures that which was subsequently made in *Fehler v. Gosnell*, 99 Ky. 380, already referred to.

This brings us to the cases on the other side of the question, and they are neither numerous nor convincing. *Cole v. People*, 161 Ill. 16, was an action to enforce an assessment for a street improvement in Peoria. The defence set up was that the ordinance on which the assessment was based provided not only for paving the street, but also for its maintenance and repair for five years. In overruling this, it was held that if the ordinance did so provide it would have been invalid, but that the requirement in the specifications attached to the ordinance that the contractors should furnish a bond to faithfully perform the work and keep the pavement laid by them in good repair for five years, was a mere guaranty of the fitness of the material for the use intended. "There is nothing in the provision," says Magruder, J., "to indicate that any of the money raised by special taxation is to be applied to the purpose of maintaining the pavement and keeping it in repair. As a guarantee that the pavement is properly constructed, the contractor makes himself liable by a bond to keep it in repair for a certain time. It is not otherwise than if the city had inserted a clause in the agreement that it would retain a certain per cent. of the contract price of the work for the purpose of repairing any defects in the pavement that might reveal themselves within the period specified. We do not regard it as

improper that the city should require some such guaranty as that set out in this agreement."

The most extreme case of any is *Wilson v. Trenton*, 60 N. J. L. 394; 61 N. J. L. 599. That was a *certiorari* to set aside a contract for paving a street with asphalt, because it required the contractor, besides laying a good pavement, to guarantee its durability for five years, and to maintain it in good condition, repaving at a price stated all openings made in the street during that time. This it was held was a mere guaranty that the pavement would remain in good condition for at least five years, and if it got out of order within that period that the contractor should restore it at his own expense, and that if he failed to do so the city might make the repairs and retain the cost out of the contract price. "It does not," says Gummere, J., in the Supreme Court, 60 N. J. L. 396, "require him to make all repairs which shall become necessary during the period named, but only those which arise from lack of durability of the pavement. Certainly it cannot with reason be contended that a provision in the contract requiring the contractor to guarantee the durability of his work for a reasonable period imposes upon the adjacent property-owners the burden of keeping the street in repair; it is merely an added precaution for insuring good workmanship and the use of good materials." It is put a little differently, however, by Dixon, J., in the Court of Appeals, 61 N. J. L. 600. Answering the complaint that the provision for repair enhances the price of the pavement to the property-owner, he says: "This contention, we think, ignores the principle on which assessments for municipal improvements are levied in this State. Property-owners are not chargeable with the price of such improvements, but only with an equivalent for the special benefits they derive therefrom. Such an equivalent cannot exceed the reasonable value of the improvements, and hence the municipality itself, not the assessable property-owners, must bear the excess price beyond fair costs. If, therefore, the commissioners, who levy an assessment for this improvement, charge upon the property-owners anything beyond the fair cost of laying a good pavement, their assessment will to that extent be illegal. The same evidence which would now show that the nominal price for paving includes compensation for the guaranty and for repaving will be then available for the same purpose, and if produced will result in reducing the assessment to such sum as would have secured a proper pavement without the added stipulation. The plaintiff's complaint, if well founded in fact, must be reserved until the assessment is levied.

"This point being decided, we see no reason for denying the power of the municipal authorities to include in the same contract the three stipulations above mentioned. The preparation and laying of the asphaltum as a pavement require special skill, and the quality of the pavement cannot well be ascertained by municipal authorities without the test of time. It is, therefore, reasonable that those who lay much pavement should submit it to this test in order to insure its goodness. And since the contractors who engage in this kind of work obtain their crude asphaltum from different sources and subject it to various processes of preparation, there is a manifest fitness in providing that those who lay the original pavement should relay it whenever openings are made, so that uniformity of work and materials may be secured. It thus appears that the guaranty of durability and the stipulation for repairing are but incidents of the principal object of the bargain dictated by prudence, and therefore rightly included with it in a single contract."

To what conclusion, then, does this review of the authorities lead? It seems to me there can be but one answer; the very decided weight of them all is that such a provision as we find in the ordinance and contract before us is not a mere guaranty of the character of the work or its durability, but is a substantial

Williamsport v. Hughes et al.

agreement to meet the repairs made necessary by the ordinary use of the pavement by the public, a matter which, in this State, must unquestionably be borne in every instance by the municipality : *Williamsport v. Beck*, 128 Pa. 147. No doubt the provision might be drawn so as to make it strictly a guaranty as in *Schenectady v. Union College*, 66 Hun (N. Y.), 179, *supra*, and it is possible that all the cases which I have cited may be reconciled on some such basis. In *Cole v. People*, 161 Ill. 16, for instance, it is recognized that if the undertaking required of the contractor was more than this it was invalid, but the court does not so construe it. And in *Wilson v. Trenton*, 60 N. J. L. 394 ; 61 N. J. L. 599, it will be noted that, according to Gummere, J., the contractor was not required by the specifications to make all repairs during the period named, but only those arising from the want of durability in the pavement, and we have considered considerably more than that here. In the present instance the agreement is to repair generally, for the contractor is required during the period named "to make good at his own expense . . . all defects in said pavement due to its proper use as a public highway." It is also to be observed that it cannot be said in the case before us, as it was by Dixon, J., in *Wilson v. Trenton*, *supra*, that the property-owner in his assessment is not charged with the cost of the improvement, but simply with the actual benefit conferred, regardless of the contract price. The New Jersey courts have consistently adhered to that principle, and it is the correct one, and, under the lead of the Federal courts (*Norwood v. Baker*, 172 U. S. 269), we may have to hark back to it. But as the law stands in this State, it is the cost of the improvement, or, more strictly speaking and still worse for the opposite argument, it is the contractor's price for it, that the property-owner must pay *pro rata* according to the foot frontage of his property, without regard to the actual benefit, the benefit being conclusively presumed, and its extent calculated, mathematically, by the rule of three : *Michener v. Philadelphia*, 118 Pa. 535 ; *Harrisburg v. McCormick*, 129 Pa. 213 ; *McKeesport Borough v. Busch*, 166 Pa. 46.

So far, I have not touched on the additional provision found in the contract under discussion, that the contractor shall maintain in this city a plant, whereby repairs made necessary by cutting into the pavement to make house connections can be effected at a certain guaranteed price, both during the ten years' period and afterwards. No doubt, for the protection as well as the benefit of those in front of whose property a pavement is laid of such a highly artificial and special character as sheet asphalt, some sort of a provision of this kind is necessary ; otherwise, in a short while, by the sappers and miners that, for one reason or another, are constantly tearing up our streets, paved and unpaved, the pavement would be ruined, there being no means at hand for patching it up again. But there are other ways of getting at this, and, to say the least, it has a doubtful place in a paving contract. Were it simply an exacted guaranty that, for a specified price, all such inroads on the integrity of the pavement should be repaired at a specified price, no one could find just fault with it, and it might be enforced, as here, by requiring a substantial bond. In that shape it would be a mere incident or detail of the contract, which would not affect its general character. But the difficulty is, it does not stop with that ; the demand is that an asphalt plant, with all the needed machinery and appliances, shall be kept up in this city to make such repairs. This involves a material expense on which the contractor must calculate, and for which he must, in some way or other, recoup himself, and the only apparent way available to him is by marking up the price of his contract, for which the property-owner has thus to pay. While the laying of sheet asphalt is an art, and the proper material for it is not always at hand, yet it is no longer so uncommon as it once was, and contracts are now being freely made by municipal authorities for the keeping of

such pavements in repair for a term of years at reasonable rates, which is all that would seem to be required. I am inclined to regard this provision, therefore, equally with that with respect to the general repair of the pavement for a term of years, as calculated to enhance the cost of it to the property-owners who have to foot the bill, imposing upon them a burden which they cannot lawfully be called to bear.

Two answers are attempted to the position taken by the defendant: One, that the assessment is good *pro tanto*, and only bad for the excess which any one who calls the assessment in question is bound to show; and the other, that the defendant is estopped by his conduct from availing himself of the defence he makes. As to the first of these, it is conclusively answered in the cases to which I have referred. How can any one tell at this day what the price would have been had this additional demand not have been made of the contractor? Contracts of this character have to be let, after due advertisement, to the lowest responsible bidder, and what parties examined the specifications or how much either of them would have bid had they been different is not now open to proof, and, indeed, hardly to conjecture. If it is incumbent on the property-owner to show this, we might just as well not trouble ourselves further about the matter. But that clearly is not the rule. The right to charge the adjoining property with the expense of a street improvement is purely statutory, and the provisions of the law must be substantially observed in order to do so. There must be a valid ordinance, and a contract duly executed and carried out in pursuance of it. If the ordinance, as here, unwarrantably introduces a provision which enters into the contract and necessarily enhances the price, the whole proceedings are invalid and the assessments based upon them cannot stand.

Nor can I see that anything has occurred to work an estoppel. The defendant, Nelson A. Hughes, with others, no doubt petitioned for the pavement and committed himself to an assessment for the cost of it by foot frontage, after deduction for street and alley intersections and the portions of the street occupied by the railway. But, after this initial step, he had nothing further to do with it, so far as it appears, nor, indeed, could he. He certainly cannot be held responsible for the form of the ordinance nor of the contract which followed it, nor can I see that he was bound to intervene and, if possible, prevent by injunction the progress of the work. Any attempted interference in that way might have been met by the suggestion that if the ordinance and contract were invalid, as now claimed, he could not be hurt by them, and that the work should therefore go on. In some of the cases cited, it is true, such interference was successful and the contract was set aside before it had been carried out, but in others it was not, while in still others the same defence that is now interposed was allowed to prevail and defeat a recovery on the assessment after the work had all been done. Estoppel *in pais*, it must be remembered, arises either by the positive acts of the party, by which another has been misled to his hurt, or by his silence when he was called upon to speak. But how can that be set up here? Except, as already said, by petitioning for this improvement, the defendant has had nothing to do with regard to it, and that certainly did not commit him to the whole course of the proceedings, whether they followed the law or not. After the beginning, they must be regarded as essentially out of his hands, and not binding upon him unless the law has been observed. It is true, also, that two payments have been made by the defendant on his assessment since it was levied; but, although they were voluntary, they cannot be held to have waived the irregularities which have been pointed out. The city is in no wise prejudiced by them, nor the holders of the improvement bonds, if any, but, on the contrary, both are by just so much the better off.

The only other question in the case is whether the defendant is concluded,
10 DIST. R.

Williamsport v. Hughes et al.

not estopped, by the assessment as made by the city engineer, of which he had notice, and on which he had opportunity to be heard. I had occasion to consider this question in *Scranton v. Davidson*, 3 Lack. Jurist, 141, and there held that an assessment made by the city engineer, after notice, was of the same binding effect, under the Act of May 23, 1889, P. L. 326, as the report of viewers. It was at the same time declared that if a wrong principle were adopted, so that the assessment was affected with an inherent vice, it might be successfully attacked and set aside. This exception was again recognized in *Scranton v. Koehler*, 14 Pa. Superior Ct. 1, and so, I think, it must be here. We have not to deal with a mere question of calculation or amount, as was the case in *Scranton v. Davidson*, but whether the ordinance and contract do not impose a burden to which the adjoining property-owners cannot be lawfully subjected. With this the city engineer had nothing to do. He could not cut down the contract price, so as to eliminate the objectionable part of it, any more than we can. He had to take it as it stood, and apportion it, according to the ordinance, by the foot-front rule, after the proper deduction for street intersections, etc., and it would have been idle to have appeared and attempted to get him to do more. This is the sum and substance of his duties, and however any one may be bound, after notice, to accept his calculations, if the result, as here, is to impose upon such party an assessment which is, at least, illegal as to the excess, the whole of it is invalid and cannot be enforced: *Norwood v. Baker*, 172 U. S. 269. As it is said in *Fell v. Philadelphia*, 81 Pa. 58, a city cannot subject its citizens to a legal obligation except by the lawful exercise of its powers, much more can it not go outside of it and expect its action to stand.

In every view of the case, therefore, I am of the opinion that the municipal assessment and lien on which the plaintiff's case depends are affected with the vice of which complaint is made, and that it is ineradicable and avoids the whole. This was the judgment of the late learned president of this court in the kindred case of *Williamsport v. Lloyd*, 9 District Reps. 735, with which I am gratified to find myself in entire accord.

Let judgment be entered for the defendants, with costs, on the findings of fact and conclusions of law above set forth, unless exceptions thereto be filed within thirty days.

From T. M. B. Hicks, Williamsport, Pa.

Plymouth Township Commissioners v. Sweeney et al.

Mandamus—Quo warranto—Proceedings against claimant of defunct office—Act of April 28, 1899.

Mandamus lies to compel a claimant of a defunct office to hand over the papers and property thereof to the incumbent of such office as supersedes it.

A pretended intrusion into a defunct office will not warrant withholding township property and thereby forcing the officer who should legally execute its duties to resort to *quo warranto*.

The township of Plymouth is a township of the first class. Under the provisions of the Act of April 28, 1899, P. L. 104, townships of the first class are governed by commissioners, and the office of supervisor of the highways ceases when the government under the Act becomes operative. Both sets of officers, however, were elected, the commissioners organized and assumed the duties of their office, and the supervisors also assumed the duties of that office and refused to surrender the property of the township to the commissioners. On mandamus by commissioners, *held*, that the writ properly lay.

Mandamus—Practice—Pleading—Demurrer to petition—Act of June 8, 1893.

A demurrer to a petition for a mandamus will not be sustained. The practice under the Act of June 8, 1893, § 11, P. L. 348, is to move to supersede or quash the writ.

Motion for a peremptory mandamus and demurrer. C. P. Luzerne Co., March T., 1901, No. 127.

Plymouth Township Commissioners v. Sweeney et al.

J. M. Garman, P. W. McKeown and John McGahren, for plaintiffs.

E. F. McGovern, for defendants.

LYNCH, P. J., March 18, 1901.—Upon petition of the commissioners of the township of Plymouth, by their president, Harrison Nesbitt, this court, on Feb. 16, 1901, awarded a writ of alternative mandamus against Neil Sweeney and Isaac Cox, returnable 28th, at 10 o'clock A. M.

The petition and writ averred that Harrison Nesbit, Thomas Gately, William H. Walker, William E. Jones, George Hart and William Morgan were duly elected, Feb. 20, 1900, to the office of commissioners of the township, which was duly declared a township of the first class under the Act of Assembly approved April 28, 1899, P. L. 104; that they duly qualified and organized by electing a president, a secretary and a town clerk, and are acting in said office for the term of two years, beginning March, 1900; that, Feb. 20, 1900, Sweeney and Cox were elected supervisors, and have taken upon themselves the duties thereof, and have continued so to do to the present time, contrary to the Act of 1899, and persist in conducting the business of the road district of said township by levying and collecting a tax and working the roads, and have assumed the right to hold all the property of the township, consisting of books, papers, machinery, stone-crushers, road-scrapers, road-plows and other tools and implements for the making of roads, and persist in holding the same against the demands of the commissioners to deliver to them.

Answer has not been filed, but Sweeney, on Feb. 25, 1901, filed a special demurrer to the writ, viz.: The only way they (Sweeney and Cox) can be deprived of the rights of said office, if they are not entitled to the same, is by writ of *quo warranto*.

There is no denial that the township is one of the first class, and that the officers named in the petition were duly elected, have organized and assumed the duties of office.

The 4th section of said Act, paragraph first, provides: "In the first year of its organization, and in every second year thereafter, five township commissioners" shall be chosen by the qualified voters at the township election on the third Tuesday in February; and by section 4, paragraph four: "The term of the above-named officers shall commence on the first Monday in March and continue until the election and qualification of their successors;" and "when-ever the form of government provided for by this Act for townships of the first class becomes operative in any township, the office of supervisor of highways shall cease to exist in said township."

The 7th section vests all the corporate power, authority and franchise of the township in the board of township commissioners, and gives it particular power to grade, pave, light and repair highways, pave and curb sidewalks in villages, establish a system of sewers, etc., provide for cost of maintenance, abate nuisances, establish a night-watch, provide a lock-up, arrest vagrants, levy a tax, borrow money, and to adopt by-laws and ordinances prescribing the manner in which these powers shall be carried out, and generally regulating the affairs of the township within the powers conferred. Section 9 makes it the duty of the board to cause all public highways within the township to be effectually opened and constantly kept in repair at all seasons, and clear of all impediments to easy and convenient passing and traveling. By section 10 the board has the right to appoint one or more supervisors or engineers of highways, and to employ workmen for the proper care of the roads, and to purchase machinery, etc. Sections 15 and 16 give power to the board to levy and collect taxes. Section 17, "no money shall be paid out by the township treasurer except on the written order or warrant issued by the board of township commissioners, attested by 10 Dist. R.

Plymouth Township Commissioners v. Sweeney et al.

the signatures of the president or vice-president and the secretary of said board."

Thus the form of government provided for by the Act of 1899 became operative, and the office of supervisor of highways ceased to exist in the township of Plymouth.

A demand by the commissioners on respondents for books, papers, personal property, etc., admittedly owned by the township, and necessary for plaintiffs in the performance of their official duties, a denial to hand over these things for the reason that this is not the proper remedy to enforce the duty. This refusal is based on the erroneous idea that the case presents a dispute concerning the right to exercise functions of an existing office, or that the writ is to compel the performance of acts and duties necessarily calling for the exercise of judgment and discretion on the part of public officers, but it is for no such thing. The office of supervisor of highways no longer exists in the township. It is the undoubted duty of respondents to deliver the township property to the plaintiffs and thereby prevent the delay and confusion which otherwise will arise in administering its affairs.

In *Com. ex rel. Klugh v. Lyter et al.*, 162 Pa. 50, was a petition for mandamus to compel issue of tax duplicates. The Supreme Court said: "The relator was duly elected a collector of taxes. He has been denied by the county commissioners the tax duplicates, without which he could not perform his duties. His purpose is to require their delivery to him. He has no issue with any one claiming title to the office by election or appointment but with the defendants alone, and as to whether, as public officers, they shall do a purely ministerial act. For this, the writ of mandamus is the proper remedy." And in 14 Am. & Eng. Ency. of Law, 147, it is stated, mandamus lies by an officer to compel the delivery, by his predecessor, of the records, books and papers of the office, and to compel the payment of money which the officer is required by law to apply to public purposes, the needs of which may require the prompt application of the money. To the same effect are *Conlin v. Aldrich*, 98 Mass. 557. Thus it appears that a pretended intrusion into a defunct office will not warrant withholding township property, and thereby force plaintiffs to resort to *quo warranto*.

So far, the case has been examined as if answers had been duly filed and the pleadings regular, but instead thereof Sweeney alone demurred to the petition. This, under our law, is not good practice. The Act of 1898 requires the person desiring to obtain a writ of mandamus to present his petition therefor, verified by affidavit, "setting forth the facts upon which he relies for the relief sought." Defendant may move to supersede or quash the writ; if he fails, he shall be permitted to file his return. The defendant should file in the office of the prothonotary a return to the alternative writ, "*verified by affidavit*," within the time specified in the writ, and in default thereof judgment shall be given against him with the same effect as if he had filed a return and such return had been adjudged insufficient. If the return is vague, evasive or informal in any respect, opportunity may be afforded for its correction. To the return of defendant, plaintiff may demur and the defendant may reply, but nowhere does the act or the practice sanction demurrer to the petition. For these two reasons a peremptory mandamus is now awarded forthwith, returnable March 30, 1901, and judgment is given for the plaintiffs for costs.

From Sidney R. Miner, Wilkes-Barre, Pa.

City of Chester v. Sinex.

Cities of third class—Taxes—Duration of lien—Acts of May 4, 1889, and May 23, 1889.

Under the Act of May 23, 1889, art. xv, § 11, P. L. 277, in cities of the third class, municipal taxes assessed upon real estate remain a lien thereon until paid.

The lien is not dependent upon the return required by the Act of May 23, 1889, P. L. 277, of unpaid city taxes by the city treasurer to the city solicitor, or their registry by him in the prothonotary's office.

The Act of May 23, 1889, P. L. 277, repeals the tax law of 1873, local to Delaware county, and also the Act of May 4, 1889, P. L. 79.

Rule for judgment for want of a sufficient affidavit of defence. C. P. Delaware Co., March T., 1900, No. 425.

A. A. Cochran, for rule; D. M. Johnson, contra.

JOHNSON, P. J., Jan. 28, 1901.—This lien is for \$23.32, city taxes for the years 1893 and 1894. One-half of said amount for each year. The lien was filed on May 31, 1895. The affidavit of defence admits that the lien is good for the taxes of 1894, but denies its validity for those of 1893.

The Act of May 4, 1889, P. L. 79, provides "that hereafter no county, city, borough, township or school tax, levied or assessed, shall remain a lien on real estate for a longer period than two years from the time of such levy or assessment, unless the same be entered of record in the prothonotary's office of the proper county in which such real estate is situate," &c.

The Act of May 23, 1889, P. L. 320, relating to cities of the third class (which the city of Chester is) provides: "That it shall be the duty of the city treasurer, upon the return to him of the schedules of unpaid city taxes as provided in the preceding section, to certify the said schedules and taxes, or a copy thereof, to the city solicitor, who shall cause the said taxes, with the penalties thereon, to be registered in the name of the city and against the person or persons charged in the duplicates with the same, in the office of the prothonotary of the proper county, who shall keep a separate book for that purpose, to be called the city lien docket; and all taxes assessed upon real estate shall be and continue to be liens thereon from the date of the levy thereof until paid."

So far as the duration of lien of city taxes for the city of Chester are concerned, this Act repeals the tax law of 1873, local to Delaware county: *Com. ex rel. McKirdy v. Macferron*, 152 Pa. 244. Does it repeal the Act of May 4, 1889, P. L. 79, as to city taxes?

The Court of Common Pleas of Berks county, in the case of *Brooke v. Kaufman*, 6 District Reps. 513, held that it does not, and that both Acts could stand. I am inclined to think that this is not a correct view of the subject.

The Act of May 23, 1889, is an Act providing for the incorporation and government of cities of the third class. It provides an entire scheme for the collection of taxes, and further provides that "all Acts or parts of Acts inconsistent herewith, or supplied by the provisions hereof, be and the same are hereby repealed."

The Act of May 4, 1889, relates to the subject of the lien of taxes and limits their lien. The Act of May 23, 1889, relates to the same subject, and not only presents an entire scheme for their collection, but is inconsistent in the limitation of lien provided for in the Act of May 4. As to duration of lien this Act is express. It provides that all taxes assessed upon real estate shall be and continue to be liens thereon from the date of the levy thereof until paid. True, the scheme also provides that the city treasurer shall return the schedule of unpaid city taxes to the city solicitor, who is required to register them in the prothonotary's office, but the lien is not made dependent on either the return or the registry. Rule absolute.

From W. Roger Froncfield, Media, Pa.

Hall Association of Washington Camp No. 485, P. O. S. of A.

Corporations—Act of 1874—Meaning of "person" within the Act—Unincorporated associations.

A subordinate camp of a secret unincorporated association, national in its scope, is not a "person" within the meaning of the Act of April 29, 1874, P. L. 73, and cannot become an incorporator thereunder.

Unincorporated associations—Funds thereof—Trust funds—Hazardous business venture.

When an unincorporated association holds its funds for the primary purpose of paying benefits to parties entitled, the funds are in a measure trust funds, and should not be expended in a business venture which involves hazards not contemplated in the ordinary course of investment.

Corporations—Hall associations—Application for charter—Facts essential to articles of association.

Where the greater part of the funds to be used in the venture belong to an unincorporated beneficial association, the application for a charter of incorporation to erect a hall for private or public purposes, under the Act of April 29, 1874, P. L. 73, should contain definite information as to the amount proposed to be expended in the purchase or erection of the hall-building, how the funds additional to those already subscribed are to be collected or procured, and what proportion, if any, is to be secured by ground rent or by mortgage or other lien, and the failure of the evidence taken before the master in support of the application to disclose such information is sufficient ground for refusing the charter.

Application for charter. C. P. No. 2, Phila. Co., June T., 1901, No. 2466.

S. H. Kirkpatrick, for applicants.

SULZBERGER, J., Oct. 8, 1901.—The Patriotic Order Sons of America is a secret organization, intended to be national in its scope, and is composed of subordinate organizations known as State Camps and subordinate camps, culminating in a supreme body known as the National Camp. Washington Camp No. 485 is one of these subordinate camps and is unincorporated.

Its by-laws, which, in the technical language of the organization, are known as "local laws," provide for regular stated meetings on Monday evening of each week at 8 o'clock, for the payment of fees and dues by members, for securing beneficial payments to members in case of their sickness or disability, or in case of the death of a member's wife. They further provide that no money shall be drawn from the treasury save for benefits and the necessary expenses of the camp, except by two-thirds vote of all members present at a stated meeting.

The present application for a charter is made by seven persons, each of whom subscribes for five shares, and by the Washington Camp, which subscribes for 1965 shares, making a total subscription of 2000 shares. The amount of the capital stock is fixed at \$20,000, divided into 20,000 shares of the par value of \$1.

By the Act of April 29, 1874, the Courts of Common Pleas are empowered to grant charters of incorporation to organizations for "the erection of halls for public or private purposes."

The learned master to whom the application was referred heard witnesses, and having considered the matter, reported in favor of granting the charter.

The testimony of Wilson A. Landis, the secretary of Washington Camp, given before the learned master, was that, at present, Washington Camp No. 485 holds its meetings in a rented hall at No. 2214 Germantown avenue; that the object of the Hall Association, for which a charter is asked, is to build a hall for meeting purposes of the Washington Camp, and to rent out the rest of the building, the proceeds of the renting to go to the Hall Association. This Hall Association is to be formed for the purpose of holding title to that property, and the application is made at the request of the Washington Camp, and authorized by them.

Hall Association of Washington Camp No. 485, P. O. S. of A.

The testimony of George Willard Benner, one of the petitioners, was that he heard Mr. Landis's testimony and that it was substantially correct. He further testified, that he did not believe that the question as to whether the society would pay rent to the corporation for the portion of the building used by it had been discussed. "They are composed of the same members. The hall is not intended to be operated at a profit. The prime object is to get a hall in which we can meet and have our own paraphernalia, and a place where our members can go. We have 828 members at present and are still growing, and we feel as though we would like to have a place of our own. The idea as we have laid it out, is that the money advanced by the stockholders is simply in the nature of a loan, and the by-laws read so that the camp itself can eventually acquire the stock and own the entire hall. I suppose if there is any profit we may have to pay the stockholders some percentage of the profit; but just as soon as it possibly can, the camp wishes to acquire all the stock and own the hall itself. Our purpose is to get as many of the members as possible to subscribe. At present, I believe at least 90 per cent. of the membership have subscribed, but it is more than likely that all the members will not have shares. . . . The right to subscribe is to be restricted to members of the Washington Camp."

The case presents questions of some moment. We do not think that the unincorporated association known as Washington Camp is a "person" within the meaning of the Act of 1874. Excluding it, we have the petition of seven persons, whose total subscription amounts to \$35, out of a proposed capital of \$20,000.

In cases of corporations of the second class, the statute requires that 10 per centum of the whole amount of capital stock be paid to the treasurer of the corporation before the filing of the certificate.

Even under the view taken by the applicants that the proposed corporation is not for profit, we cannot think it wise to ignore the necessity of a reasonable contribution to the capital stock of a moneyed corporation, though its receipt of profits may be merely incidental. That \$35 is too small a portion of \$20,000 to constitute a reasonable proportion needs no argument.

Nor is the difficulty overcome by viewing the seven petitioners as mere trustees for Washington Camp and considering them the subscribers for the whole 2000 shares in said capacity. The Washington Camp itself holds its funds for the primary purpose of paying benefits to parties entitled, and such funds ought not to be expended in a business venture which involves hazards not contemplated in the ordinary course of investment.

From the evidence before us, we may well believe that the sum of \$1965 to be furnished by Washington Camp is the bulk of the funds in its treasury, and that our approval of this charter would, in effect, sanction the appropriation of this fund for the purchase of shares in the proposed business corporation. Under such circumstances, the exact nature of the business to be transacted and the financial methods proposed become important to be considered.

We are, however, without definite information as to the amount proposed by the Hall Association to be expended in the purchase or erection of a hall-building; how the funds additional to those already subscribed are to be collected or procured, what proportion, if any, is to be secured by ground rent or by mortgage or other lien. These are essentials of such articles of association: 6 District Reps. 477; 15 Pa. C. C. Reps. 516; Italian Mutual Beneficial Association, 4 District Reps. 357.

And these considerations receive added force when we are asked by implication to sanction an investment in securities possibly hazardous of moneys which, in a certain aspect, are trust funds.

The recommendation of the learned master is disapproved, and the prayer for a charter is dismissed.

10 DIST. R.

Howland Pulp Company v. Jessup & Moore Paper Company.

Practice, C. P.—Affidavit of defence—Essentials of—Warranty—Measure of damages.

In a suit to recover a balance due on a book account for goods sold and delivered, when there is nothing in the affidavit of defence to indicate the terms of sale, or that there was a warranty of the quality of the goods sold, a rule for judgment will be made absolute.

Even if a warranty were properly averred in the affidavit of defence, it would still be insufficient, unless it contained a clear and concise statement of facts sufficient to constitute a basis for an assessment of the damages under the legal rule by which they are to be measured.

The fact that paper pulp sold and delivered was "billed at 85.3 per cent. air-dry test" does not create a warranty of quality.

Motion for judgment. C. P. No. 5, Phila. Co., June T., 1901, No. 741.

George W. Carr, for plaintiff; *John Weaver*, for defendant.

MARTIN, P. J., Oct. 14, 1901.—Plaintiff sued to recover a balance of book account for paper pulp sold and delivered to defendant. An affidavit of defence was filed, alleging that plaintiff agreed to deliver the merchandise at defendant's mill, and stating that \$179 had been paid by defendant for freight to obtain the paper, which sum defendant claimed as a set-off.

It was also alleged in the affidavit of defence that "the said pulp was bought from plaintiff and billed at 85.3 per cent. air-dry test, and that when it arrived at the defendant's mills they immediately had a test made thereof, and found that it was only 75.7 per cent. air-dry test, making 9.6 per cent. excessive moisture, so that the moisture charged for in the said two cars amounted to 41,546 pounds at 9.6 per cent., equals 3989 pounds dry weight overcharged at \$2.10 per hundred pounds, making an overcharge which the plaintiff has made against the defendant in the said statement of claim of \$83.77." Defendant admitted liability for the balance.

There is nothing in the affidavit to indicate the terms of the sale, or that there was any warranty of the quality of the pulp.

In the absence of a warranty or fraudulent representation, defect in the goods does not constitute a defence: *Hellbruner & Co. v. Wayte*, 51 Pa. 259; *Wetherill v. Neilson*, 20 Pa. 448.

"Though the seller is answerable to the buyer that the article shall be in specie the thing for which it was sold, yet if there be only a partial adulteration which does not destroy the distinctive character of the thing, the buyer is bound by the bargain. And in doubtful cases the test seems to be that the article shall be merchantable under the denomination fixed to it by the seller:" *Jennings et al. v. Gratz*, 3 Rawle, 168.

In the absence of express warranty, it was said by Coulter, J., "all gradations in quality are at the hazard of the buyer:" *Fraley v. Bispham*, 10 Pa. 320.

The fact that the pulp was "billed at 85.3 per cent. air-dry test" does not create a warranty of quality.

In *Carson & McKnight v. Baillie*, 19 Pa. 375, *Lowrie, J.*, said: "Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. The name given to them in the bill is then immaterial, because faith was placed, not in the name but in the quality and kind discovered on inspection:" *Fraley v. Bispham*, *supra*; *Whitaker v. Eastwick*, 75 Pa. 229; *Ryan v. Ulmer*, 137 Pa. 309.

Had the existence of a warranty been properly set out in the affidavit, it would have still been defective. The measure of damages is "the difference between the market value of the goods contracted for and of the goods delivered. In an action for the price of the goods, the purchaser may interpose this difference as a defence *pro tanto*. If an affidavit of defence is required, it should contain a

Howland Pulp Company v. Jessup & Moore Paper Company.

clear and concise statement of the facts which constitute a basis for an assessment of the damages under the legal rule by which they are to be measured. All the elements of a defence should appear with reasonable certainty in the affidavit, and if any fact essential to complete the defence is omitted, the "affidavit is insufficient:" *Ogden v. Beatty*, 137 Pa. 197; *Weed & Co. v. Weinberger*, 12 Pa. Superior Ct. 12.

Rule absolute for amount of plaintiff's claim in excess of sums paid by defendant for freight or on account.

Assessor's List of Voters.

Elections—Assessor's list—Jurisdiction of court—Power to review list—Effect on elective franchise.

The Courts of Common Pleas have jurisdiction defined by statute to review the assessor's list of voters, should citizens be dissatisfied with the action of the assessor. It is not a trial of the assessor for breach of duty, innocent or otherwise, to examine his work in the Court of Common Pleas, and, although the court will be moved, in cases of apparent fraud in the assessment, to correct a list one way or another, yet such action bears only upon the work of the officer and adjudges nothing against him individually.

The elective franchise of the citizen is not prejudiced by the action of the Court of Common Pleas upon inspection of the assessors' lists. A right to vote is not granted by the court, nor is the right to vote taken away; nor, *ex necessitate*, can any action of the assessors operate in such manner as to create or impair a right in the citizen. The officers of election acting at the poles are charged with the responsibility of passing upon questions of franchise raised before them upon challenge.

Elections—Assessors—Duties of.

The duty of the assessor of each election district is to make a list of voters, and, after doing so, to correct and perfect his list according to the results, not only of his investigation, but also of applications to him of men who may demand that their names be added, or that names shown to be improperly thereon shall be stricken off.

Elections—Assessor's list—Striking from list the names of those not added on personal application—Act of May 16, 1895.

Under the Act of May 16, 1895, P. L. 75, after the assessor of an election district has made a house-to-house canvas before the fourth Monday of May, as required by the Act, and prepared his list of voters as the result of his scrutiny and the information given him, he cannot add to that list additional names, except upon the personal application of the voter himself; but names added to the list without personal application cannot be stricken off by the court, unless an appeal was made to the assessor at his public sitting or cause shown why such appeal was not made, or upon exhibition of fraud.

Application for an order that names added to the assessor's list without personal application, in the 17th division of the 13th ward, be stricken off. C. P. No. 2, Phila. Co., Oct. T., 1901, No. 1528.

John H. Fow, Cornelius Haggerty, George Henderson, and Bernard Gilpin, for applicants. *R. O. Moon*, contra.

WILTBANK, J., Oct. 24, 1901.—The present inquiry bears upon the power and duties of the assessors in the several election divisions of the city. The assessors are officers of the county charged with the duty of preparing lists of voters and their residences, in order that citizens generally may be aided thereby in their claim to vote, and that individuals may show defects of omission therein and move to have names added, whilst, independently of their personal privilege, the people at large may object to names of others as registered and move to have them stricken off.

The duty of the assessor, therefore, is to make a list of voters, and, after doing so, to correct and perfect his list according to the results not only of his investigation but also of applications to him of men who may demand that their names be added, or that names shown to be improperly thereon shall be stricken

Assessor's List of Voters.

off. We do not discuss the circumstances and conditions in which voters' names may be added, because such cases do not here arise. We must examine the statutes to determine what is the function of the assessors in respect of the striking off of names, and what is the jurisdiction of the Court of Common Pleas upon review of the lists, should citizens be dissatisfied with the action of their officer.

It is to be premised that it is not in any sense a trial of an assessor for breach of duty, innocent or otherwise, to examine his work in court, and that, although the court will be moved, in cases of apparent fraud in the assessment, to correct a list one way or another, yet such action bears only upon the work of the officer and adjudges nothing against him individually. The ascertainment of fraud in an assessment does not necessarily impute fraud to the assessor; the fraud violating an assessment may be the fraud of others upon him. Dereliction of duty under the election laws is the subject of legislation for the punishment of crime and for the annulling of an unlawful count; but we act in an inquiry like the present in another sphere, and can reach by our final order only the list itself.

It is to be further premised that the elective franchise of the citizen is not prejudiced by the action of the Court of Common Pleas upon inspection of the assessors' lists. A right to vote is not granted by us, nor is the right to vote taken away; nor, *ex necessitate*, can any action of the assessors operate in such manner as to create or impair a right in the citizen. The officers of election acting at the polls are charged with the responsibility of passing upon questions of franchise raised before them upon challenge.

It follows from these general but necessary observations that the interposition of a court in matters of registration may be properly invoked only in cases clearly provided for by legislation, and that for the main purposes of government through purity of elections an ample system has been established in four great provisions, to wit, in an organization for the registration of the voters; in an organization for the punishment of the assessor who violates his obligations and is condemned by a jury; in an organization created to pass upon contested questions of a right to vote, which sits at the polls on every day of election; and in an organization for contesting elections alleged to be based on an abuse of the ballot. These four organizations work independently of this court as a tribunal of review of assessors' lists, and may be regarded as ample for the purposes of the citizens, save in but a few exceptional classes of cases.

One of these classes of cases is claimed by the petitioners to have arisen upon the action of certain assessors in adding names of voters to their lists after the fourth Monday of May, and before the fifth day of September, and not upon the personal application of the voters themselves. It is contended that this action was without authority, and that this court is directed by statute to pronounce it a nullity and strike off the names.

The Acts of Assembly applicable are of May 29, 1891, entitled "An Act to amend sections 1, 2 and 3 of an Act, entitled 'A further supplement to the Act regulating elections in this Commonwealth,' approved Jan. 30, 1874, changing the time and manner of making the registry of voters and the duties of registry assessors:" P. L. 134; and of May 16, 1895, entitled "An Act to amend sections 2 and 3 of an Act, entitled 'A further supplement to the Act regulating elections in this Commonwealth,' approved May 29, 1891, changing the time and manner of making the registry of voters and the duties of registry assessors:" P. L. 75.

The 1st section of the Act of May 29, 1891, is as follows:

"Section 1. That for the purpose of making the original annual assessment and registration of voters in each of the election districts of this Commonwealth,

it shall be the duty of each of the assessors, who are required to perform any of the duties incident to the holding of elections and the registration of voters in the different election districts of this Commonwealth, to visit in person each and every dwelling-house in his district on the first Monday in May and on the first Monday in December of each year, or as soon thereafter as may be possible and practicable, when all of said dwelling-houses cannot be personally visited by him on the said first Monday of May and on the first Monday in December, and to make a list, in a book prepared for that purpose by the county commissioners, of all the qualified electors that he shall find, upon careful and diligent inquiry, to be *bona fide* residents of his district, together with the date when such dwelling-house was visited by the assessor, entering them in such book in the order in which such dwelling-houses are visited, and the qualified electors in each dwelling-house being grouped together, and, if in a city or town, the names of the qualified electors shall be grouped together by streets, alleys or courts, and the persons so found to be legally qualified electors shall forthwith be assessed; the assessor shall, in all cases, personally ascertain, by careful and diligent inquiry of the voter, or of some known resident of the election district in which the voter claims the right to vote, upon what ground each person so assessed claims to be a legally qualified voter. The list thus prepared shall be designated and known as the "original registry list." It shall be the duty of said assessor to enter in said "original registry list" the names of the male citizens twenty-one years of age and upwards claiming to be qualified voters in the election district of which he is the assessor, and opposite each of said names state whether said citizen is or is not a housekeeper, and, if he is, the number of his residence in cities or towns where the same are numbered, with the street, alley or court in which situated, and if in a city or town where there are no numbers, the name of the street, alley or court on which said house fronts; also the occupation of the person at the date of such assessment, and, where he is not a housekeeper, the occupation, place of boarding and with whom at the date of his assessment, and if working for another, the name of the employer, and write opposite each of said names the word 'voter.' Where any person claims to vote by reason of naturalization, he shall exhibit his certificate thereof to the assessor, unless he has been for two consecutive years next preceding a voter in said district; and in all cases where the person has been naturalized, the name shall be marked with the letter 'N.'; where the person has merely declared his intentions to become a citizen and designs to be naturalized before the next election, he shall exhibit the certificate of his declaration of intention, and the name shall be marked 'D. I.'; and where the person shall be entitled by existing laws to be naturalized without making a declaration of his intentions to be naturalized, and intends to be naturalized at least one month before the next general election, the name of such person shall be marked 'I. N.'; where the claim is to vote by reason of being of the age of twenty-one years and under twenty-two, as provided by law, the word 'age' shall be entered, and if the person has moved into the election district to reside since the last general election, the letter 'R.' shall be placed opposite the same."

The 2nd section of the Act of May 16, 1895, is as follows:

"Section 2. It shall be the duty of the said assessor to forthwith make a copy of the said original list, with the observations and explanations required to be noted as aforesaid, to be made out as soon as practicable. It shall be his duty, on or prior to the fourth Monday of May and on or prior to the second Monday of December in each year, to place a copy on the door of, or on the house where the election of the respective district is required to be held, and retain the original list in his possession for the inspection, free of charge, of any person resident in the said election district who shall desire to see the same; and it

10 DIST. R.

Assessor's List of Voters.

shall be the duty of the said assessor to assess, from time to time, on the personal application of any one claiming the right to vote, the name of such claimant, and mark opposite the name 'C. V.,' and immediately assess him, noting, as in all cases, his occupation, residence, the date of his assessment, whether a boarder or housekeeper; if a boarder, with whom he boards, and whether naturalized or designing to be, marking in all cases opposite the name the letter 'N.,' 'D.' or 'I. N.,' as the case may be; if the person claiming to be assessed be naturalized, he shall exhibit to the assessor his certificate of naturalization, and if he claims that he designs to be naturalized before the next ensuing election, he shall exhibit the certificate of his declaration of intention, if such previous declaration is required by the laws of the United States. It shall be the duty of the said assessor to be present at the election-house of the said election district during the two secular days next preceding the day fixed by the 3rd section of this Act for returning the lists to the county commissioners, from ten *ante* meridian to three *post* meridian, and from six *post* meridian to nine *post* meridian, of each of said days, for the purpose of hearing and acting upon applications to be made under the provisions of this section, or relating to names upon said list, or that are sought to be placed thereon or struck therefrom; and it shall be his duty to correct said original list by adding thereto, upon personal application, the names of persons entitled to vote not already thereon, and by striking therefrom fictitious names, or names of persons who may have died or removed from said district; and in all cases it shall be the duty of the said assessor to enter in his book, opposite the name of each voter, the name or names of the person or persons, together with the residence of the same, who shall furnish information as to the residence and qualifications of each voter who has been assessed, or as to the persons whose names shall be stricken from said original list; and the said original list shall be open for inspection by any qualified elector of the county or ward in which the election district is situated, as well as by the person claiming to be registered; and the Court of Common Pleas of the proper county, or any law judge thereof at chambers, on the application of any qualified elector of the ward or county, under oath, which oath may be made at any time before the day of election, shall call the assessor and the complainant before it or him, by citation or rule to show cause, and shall hear the parties and dispose of the subject in a summary manner, as to law and justice shall belong, and shall, if need be, order the assessor to correct the registry accordingly, and the said court or judge may enforce such order by attachment as in proceedings for contempt."

The question propounded arises upon the following clauses of the last quoted section: "And it shall be the duty of the said assessor to assess from time to time, on the personal application of any one claiming the right to vote, the name of such claimant, and mark opposite his name 'C. V.,'" and "it shall be his duty to correct said original list by adding thereto, upon personal application, the names of persons entitled to vote not already thereon, and by striking therefrom fictitious names or names of persons who may have died or removed from said district."

The original assessment began this year on May 6 and continued up to the fourth Monday of that month, or May 27. The sittings for correction of the lists were held on the third and fourth days of September. The lists were finally returned to the city commissioners on Sept. 5, after which return the assessors had no control of them. The work of the assessors was published during the time named, on the door of the house where the election was to be held in any district; that is to say, from May 27 to Sept. 5, and a copy was held by the assessors themselves for free inspection. Thus the citizen had three sources of information open to him prior to the final settlement of the lists for

use at the coming election, and he had two days in September for application for correction of errors or wrongdoing.

We find three warrants in circumstance for the making up of the list : First, he house-to-house investigation by the assessor before the fourth Monday of May ; second, the duly supported demand of a voter in person that his name be put down, which demand may be made upon the assessor up to and including the second of the days provided for the extra assessment, in this instance Sept. 4 ; and third, the credible testimony of any qualified elector of the ward in which the list is questioned as to fictitious names thereon, "or names of persons who may have died or removed from said district."

It would appear from this that the legislative object to secure a full and correct assessment of the voters in an election district required the direct action of the assessor in a canvas from house to house, and a list made up by him as the result of his scrutiny and the information given him ; also, his further action upon testimony produced to him after his tour of the district had been completed and when he sat in his office for revision and correction, and finally, his addition of names which should of right be on the list, upon the application in person of the bearers of them.

In cases in which, from the nature of things, a personal application was either impossible, as where the voter had died or there was a fictitious naming, or not always obtainable, as where there has been a removal, he was to hear proofs ; in cases in which a man proposed to vote, he was to act only upon the request of the man himself, who, by his attitude, showed his presence in the election division and his intention to remain there, and who accordingly might reasonably be required to present himself for registration.

The 2nd section of the Act of May 16, 1895, contains several indications of the legislative prescription that action in the last-mentioned case must be that of the man himself : "And it shall be the duty of the said assessor to assess from time to time, on the personal application," &c. . . . Again, "if the person claiming to be assessed be naturalized, he shall exhibit to the assessor his certificate," &c. . . . Again, if he designs to be naturalized, &c., &c., "he shall exhibit the certificate of his declaration of intention," &c., &c. . . . Again, "by adding thereto, upon personal application, the names," &c. . . . Again, "and the said original list shall be open for inspection by any qualified elector of the county or ward in which the election district is situated, as well as by the person claiming to be registered," &c.

The wisdom of such demands is apparent without discussion. A resident in a division who desires the list corrected by the addition of his name may well be required to present himself in person. It has been, in effect, said by the Court of Common Pleas of this county, in a consideration of that provision of the Act of Jan. 30, 1874, P. L. 31, which was similar to the requirement under discussion, that no doubt the legislation was broad enough to admit of a man's sending notice by another in the case of his illness or like extremity : Arnold, J., In the matter of the Applications to Add Names, &c., &c., 41 Legal Intell. 5. There is no cogent reason why third parties should volunteer to have a voter's name added when the voter himself does not show diligence in his own behalf, and, from all that appears by his inaction, he has no wish in the premises. On the other hand, the provision that in many instances of removal, and in all instances of death and of fictitious names, the report of third persons might be taken, was the only provision that could be made.

But the argument presented for the petitioners involves a step beyond this, and is to the effect that the court may proceed to hear motions to strike from the lists names of persons added without personal application, as to whom no

Assessor's List of Voters.

appeal was made to the assessors at their public sittings, and that it is immaterial whether or not the petitioners took action at any time after the publication of the lists on the fourth Monday of May up to the hearing at bar. To this we do not assent; but, if it is conceded, it may not follow that the establishment of the fact that there was not personal application in a given instance is to lead to a cancelation upon the list of the name of a man who is in fact a voter. On appeal to this court, the Act leaves it open to us to proceed upon the merits according to law, and does not demand a judgment on the narrow issue of personal application or no personal application. It will be borne in mind that an investigation of that issue is a proceeding of grave importance, and reaches beyond the officer of the law and the citizen who impeaches him to one who may be a lawful voter qualified duly for the assessment attacked. We are "to hear the parties and dispose of the subject in a summary manner as to law and justice shall belong." We advance beyond the mere question of application in person, and determine the qualification of a man to appear on the list independently of how his name got there.

If persons conceiving themselves aggrieved by the act or omission of the assessors may apply to the court without first having appeared before the assessors at their special sittings, the provisions of the statute for those sittings become nugatory at the option of a litigant, and a valuable part of the system of registration is lost. We think that the legislative provisions under review contemplate an appeal to the assessors in all cases in which it might be made by due diligence and in proper character. The system created for Pennsylvania meets all the requirements of a free, full, safe and unprejudiced exercise of the right to vote, and of the right to protect one's vote from the illegal voting of others. Every citizen finds in his immediate vicinage a competent quasi-tribunal in the sittings of the assessors already described, open to him at four sessions in a public place on two days immediately before the lists are filed with the county commissioners, and may there exhibit, according to circumstances, omissions or improper listings. Such sittings are held in every election division, and thus, in this city, there were, on the third and fourth days of September last, more than a thousand public places provided for hearings. The investigation of assessments in this manner must dispose of a large number of contests in a brief period because of the division of labor, and thus accomplish thoroughly a work which this court could not perform for want of time, no matter how active, and which we find it was not the legislative intention that it should perform.

It is mainly from the action of the assessors at these hearings that petition for relief may be presented to this court, and the rare cases in which we may be moved to review assessments that have not been subjected preliminarily to an assessor's scrutiny must arise upon cause duly shown why the petitioner did not go before the officer at the appointed time, or upon the exhibition of fraud. Our jurisdiction as to these is at common law, and also statutory, and we proceed therein as to law and justice shall belong. Fraud would be taken hold of by us in the summary manner which the statute prescribes, and lists would be corrected in avoidance of wrong upon citizens when, without default of their own, they had not had an opportunity to be heard in their division. Any of these who fail to observe the regulation for the special sittings of the assessors, and who do not show an effective excuse for their failure or negligence, and therefore obtain no hearing in the Court of Common Pleas, still have open to them the remedy of a claim to vote or of a challenge at the polls.

I have had the benefit of a consultation with my brethren of this court, and the views herein expressed are concurred in by them. It is ordered that the petitioners have leave to amend forthwith their petition according to the fact, so as to show an application to the assessor of the division for a hearing on

Sept. 3 or 4, 1901, or so as to show cause why such application was not made, and otherwise to exhibit and charge fraud in the premises, if such there be; and it is further ordered that notice be given to any resident in the said division whose name it is moved to strike off on the ground that it was added by the assessor without personal application, the cause to be heard on Monday, Oct. 28, next.

Gable v. Bear.

Justices of the peace—Appeal—Filing appeal nunc pro tunc.

Where a defendant is not in any default, has done all that the law requires, and fails to file his appeal from a justice of the peace because he was misled by the justice, the court will relieve him and permit the appeal to be filed *nunc pro tunc*.

Hence, where the defendant paid the costs and took out an appeal from a judgment of a justice of the peace in proper form, but was handed by the justice a copy of his transcript without the appeal and recognizance, and informed by him that that was the paper he was to get, which he attempted to enter in the prothonotary's office on the last day for entering the same, and, when it was refused, was unable to correct the error until after the return-day, held, that an appeal would be allowed to be filed *nunc pro tunc*.

Rule to allow defendant to enter his appeal *nunc pro tunc*. C. P. Lancaster Co., Trust Book No. 18, page 170.

H. Frank Eshleman, for rule; *Isaac R. Herr*, contra.

LANDIS, J., June 22, 1901.—Whether the goods sold by the plaintiff to the defendant were ever received by the defendant, or whether or not they were according to the contract which had been agreed upon between them in the making of the sale, are not matters which we are now called upon to decide. The defendant admits that he ordered certain goods from the agent of the plaintiff, and the plaintiff says he shipped them, and brought suit for their price before F. W. Miller, Esq., a justice of the peace residing at Elizabethtown, this county. It is admitted that, upon a hearing duly had, the justice, on Jan. 2, 1901, rendered judgment by default against the defendant for the sum of \$99.26, and it is also admitted that, on Jan. 5, 1901, the defendant paid the costs and took out an appeal in proper form, Emanuel L. Bishop becoming security on the recognizance. The defendant, however, asserts that this difficulty has arisen by reason of the justice retaining the appeal and recognizance and giving him only a copy of his transcript, which, he says, the justice asserted was the paper the defendant was to get. The petitioner alleges that he was entirely ignorant as to what was necessary, he never having been before engaged in a law-suit, and that he made an attempt to enter the paper given him in the prothonotary's office on the last day for entering the same, but that it was refused, and that he could not correct the error until after the return-day. He is supported in his statements as to what transpired at the justice's office by Mr. Bishop, and, in fact, the justice does not deny them, though he does say his impression is that he handed the papers to Mr. Bear. This application was made on Feb. 8, 1901.

In the late case of *Henderson v. Risser*, 9 District Reps. 505, it was held by this court, following a long line of precedents, that where the defendant is not in any default, has done all the law requires, and fails to file his appeal because he was misled by the justice of the peace, the court will relieve him and permit the appeal to be filed *nunc pro tunc*. We think that the present case falls within this rule, and that, in the interest of justice, we should permit the error to be made right. For this reason we are constrained to make this rule absolute. Rule made absolute.

From George Ross Eshleman, Lancaster, Pa.

Appointment of Town Clerk for Nether Providence Township.

Town clerk—Refusal, after election, to serve—Authority of court to appoint to office after such refusal—Act of April 15, 1834.

Under the Act of April 15, 1834, § 81, P. L. 552, which provides that "a town clerk shall serve for the term of one year and until a successor shall be duly elected or appointed," and section 83 thereof, which provides that "if any person elected to such office shall neglect or refuse to serve therein, or if any vacancy shall happen in such office, it shall be lawful for the Court of Quarter Sessions to appoint a suitable person to fill such office," *held*, that when the person elected refuses before the beginning of his term to serve, the court has authority to appoint a person to fill the office.

Rule to show cause why the appointment of W. W. Shoe to the office of town clerk, in the township of Nether Providence, should not be revoked. Q. S. Delaware Co., March Sess., 1900.

James Watts Mercur, for rule ; A. B. Geary, contra.

JOHNSON, P. J., Jan. 7, 1901.—At the township election, held in the township of Nether Providence on Feb. 20, 1900, T. Wilson Worrell was elected town clerk. His term of office would have commenced on the first Monday of March following. On Feb. 26 the said T. Wilson Worrell presented to the court, in writing, his refusal to assume the duties of said office. On the same day a petition was presented to the court, setting forth this fact and asking for the appointment of a town clerk. Upon the petition, the court appointed W. W. Shoe to fill the office. On April 9, 1900, upon petition of certain electors of the township, alleging that the appointment was prematurely made, a rule to show cause why it should not be revoked was granted.

The claim of those opposing the appointment is that there was no vacancy at the time of making this appointment, and is therefore void for want of authority in the court to make it.

The term of the office of town clerk is for one year "and until a successor shall be duly elected or appointed." And the Act of Assembly under which the appointment was made is as follows: "If the electors of any township shall fail to choose any township officer other than assessor or constable, or if any person elected to such office shall neglect or refuse to serve therein, or if any vacancy shall happen in such office by death or otherwise, it shall be lawful for the Court of Quarter Sessions of the proper county to appoint a suitable person to fill such office until the next annual election."

A number of authorities have been referred to in other States upon the power of the court to appoint where a "vacancy" exists, and also as to where there is a "vacancy."

The case of *Com. v. Hanley*, 9 Pa. 513, which is the leading authority in this State, is relied upon. In that case Hanley was elected clerk of the Orphans' Court of Philadelphia, and commissioned for three years from Dec. 19, 1845, and until his successor should be duly qualified. On Oct. 10, 1848, O. Brooks was elected clerk of the said court, and died before he was sworn into the office. On Dec. 14 the Governor appointed one Brown to hold the office. Hanley refused to vacate the office, and a *quo warranto* was issued to test this question as to who was entitled to the office.

The provisions of the constitution under which the Governor made the appointment is as follows: "Vacancies in any of the said offices shall be filled by appointments to be made by the Governor, to continue until the next general election and until successors shall be elected and qualified as aforesaid."

The court held that, inasmuch as Hanley was entitled to hold for three years and until his successor was duly qualified, and that the Governor had no

DISTRICT REPORTS.

Appointment of Town Clerk for Nether Providence Township

authority to appoint save in the case of "vacancy," and that no "vacancy" having occurred, there was no power in the Governor to make the appointment.

In that case the officer held for three years until his successor was "duly qualified." A town clerk holds for a year and until his successor is "duly elected or appointed." Under the constitution, the Governor could only appoint in the case of a "vacancy."

In the case of a town clerk, the court has authority to appoint when the person elected to the office "shall neglect or refuse to serve," or "if any vacancy shall happen in such office." This is not the case of an appointment to fill a vacancy, but where a person elected "refused to serve." The condition under which the court is authorized to appoint is where the person elected refuses to serve. He did so refuse. After his refusal, the appointment was made. It is immaterial that this appointment was made prior to the first Monday of March. His predecessor's term of office expired on the first Monday of March, because he had served one year and his successor had been duly appointed. Rule dismissed.

From W. Roger Froncfield, Media, Pa.

Griffith v. Hendler.

Writ—Summons—Contents—Justice of the peace.

All compulsory appearance before a justice of the peace or alderman must be by writ containing information sufficiently clear and explicit to give notice when and where the defendant is commanded to appear.

In cities where the streets are named and the houses numbered, the summons should contain the name of the street and the number of the alderman's office.

Hence, a summons which states the hour, but in which the name of the alderman is omitted from the body of the writ, as follows, "To appear before ———, Esq., one of the aldermen in and for the city of Wilkes-Barre, . . . at his office in the sixth ward," is insufficient and judgment will be reversed.

Certiorari and exceptions. C. P. Luzerne Co., Oct. T., 1900, No. 456.

P. H. Campbell, for plaintiff; *P. A. Meixell*, for defendant.

LYNCH, P. J., April 1, 1901.—A court is defined to be a *place* where justice is judicially administered, and an alderman being a judicial officer must necessarily have his court or place of administering justice: *King v. King*, 1 P. & W. 15. All compulsory appearance before a justice of the peace or alderman must be by writ containing information sufficiently clear and explicit to give notice when and where the defendant is commanded to appear: *Murdy v. McCutcheon*, 95 Pa. 435.

In this case the summons states the hour, but the name of the alderman is omitted from the body of the writ, as follows: To "appear before ———, Esq., one of the aldermen in and for the city of Wilkes-Barre, . . . at his office in the sixth ward." This city contains about 54,000 inhabitants, and is divided into sixteen wards. The streets are all named and the buildings numbered. Comparatively few know the location of wards or the division lines thereof. How is the ordinary person to know, when summoned, as in this case, where the court or alderman's office is? It cannot be the meaning of the law that a person, when commanded to appear for trial, shall go in search of the court or the judicial officer who is to pass upon his rights. To give a defendant information sufficiently clear and explicit of the place, we are of opinion, in cities where the streets are named and the houses numbered, the summons should contain the name of the street and the number of the alderman's office. This imposes no hardship or inconvenience on the officers or plaintiff, and is a matter of simple justice to the defendant in case of judgment by default.

The judgment is reversed.
10 Dist. R.

From Sidney R. Miner, Wilkes-Barre, Pa.

Construction of Sewer on Evans Avenue.

Municipal liens—Sewers—Assessment for cost of construction—Private sewer—Adoption of by city.

The connection by the city engineer of a public sewer with a private sewer and the use of it by the city for two years, without any action by city councils in the matter, is not evidence of such an adoption as will change the private sewer into a public one and make it a part of the municipal sewerage system.

An abutting property-owner is not relieved from paying an assessment for a public sewer because he has had the benefit of a private sewer.

Hence, where the owner of a tract of land abutting on a street built a private sewer in the street, and subsequently the city engineer connected a public sewer with it and the city used it for two years, but city councils never took action in the matter, *held*, that the owners of the lots abutting thereon were liable to an assessment for a new sewer constructed by the city, but that an owner whose property was not located on the line of improvement could not be charged with any part of its cost.

Exceptions to award of viewers. C. P. No. 2, Allegheny Co., Jan. T., 1901, No. 349.

J. D. Douglass, for city of McKeesport.

T. C. Jones and *A. M. O'Brien*, for exceptants.

FRAZER, P. J., July 11, 1901.—On June 29, 1899, the city of McKeesport authorized the construction of a public sewer on Evans avenue, between Huey street and Irwin street, which was completed in June, 1900, and benefits for its construction have been assessed against exceptants, all of whom, except August Erickson, are owners of property abutting on the improvement.

The exceptants deny liability, alleging that they have the benefit of a sewer on Evans avenue, in front of their properties, which, they assert, is a public sewer and ample for all drainage purposes. The city admits the additional sewer in front of exceptants' lots, but claims it is a private one, and that exceptants are not thereby relieved from payment for their proportions of the cost of the public sewer.

The facts agreed upon by counsel are substantially as follows: In 1892, James Evans was the owner of a plan of lots in the city of McKeesport, and, for the purpose of facilitating their sale, constructed a private sewer on Evans avenue, between Huey and Irwin streets, all of which were streets in his plan; that the sewer, which also drained other property of Mr. Evans, emptied into a hollow near the mouth of Irwin street; that subsequently a large public sewer was constructed on Irwin street, with which the Evans private sewer was connected; that, at about the time the private sewer was connected with the Irwin street sewer, a public sewer was completed on Evans avenue, south of Huey street, and connected with the private sewer of Mr. Evans by the city. By this latter connection the drainage from Evans avenue, south of Huey street, and also a portion of the surface drainage of Huey street, passed through the Evans private sewer and was carried off by the Irwin avenue public sewer, until the completion of the public sewer on Evans avenue, between Huey and Irwin streets. Since that time all drainage from sewers and surface has been carried away through the public sewer on Evans avenue.

The exceptants claim that the city, when it connected the Evans private sewer with the Irwin street sewer, and also connected the Evans avenue public sewer, south of Huey street, with it, made it part of the city's general system of sewerage; in other words, that the private sewer thereupon became a public sewer, and that exceptants cannot now be required to pay any portion of the cost of the new sewer.

It does not seem to us that this position is well taken. If there had been such action upon the part of the municipality as to show a purpose and intent to

DISTRICT REPORTS.

Construction of Sewer on Evans Avenue.

adopt the private sewer and make it part of the municipal system, we might possibly be justified in holding that exceptants cannot be required to assist in paying for the construction of the new sewer; but there was no such action. As we understand the facts agreed upon by counsel, the city councils never took action in the matter. True, the city engineer connected the public sewer with the private one, and the city used it without inconvenience to any person for almost two years. Without more evidence of adoption, we are unable to see how that fact alone can change a private sewer into a public one and make it part of the municipality's sewerage system. Whether the city had a right to use the private sewer without appropriating it and making it a part of its general system is immaterial, so far as this case is concerned. Its use of it was but temporary, and continued only until the completion of the public sewer. The sewer constructed by Mr. Evans was never anything more than a private sewer, and the courts have universally held that an abutting property-owner is not relieved from paying an assessment for a public sewer because he has the benefit of a private drain-pipe: *Philadelphia v. Odd Fellows' Hall Association*, 168 Pa. 105.

The exceptions filed in this case are all dismissed, and the viewers' report confirmed as to all the exceptants, except August Erickson, whose exceptions are sustained; his property not being located on the line of the improvement, he cannot be charged with any part of its cost.

From Edwin L. Mattern, Pittsburgh, Pa.

Commonwealth v. Thompson.

Practice of medicine and surgery—Osteopathy—Act of May 18, 1893.

The Act of May 18, 1893, § 14, P. L. 94, is a penal statute, and should be construed to prohibit any one who has not complied with its provisions from entering upon the practice of medicine by the use of drugs or medicines, as commonly understood, or from entering upon the practice of surgery as that word is commonly used. Nothing further was contemplated by the legislature.

Hence, it does not apply to a person practicing osteopathy, a method of treatment which consists merely in the manipulation of the parts.

Nisi prius. Q. S. Venango Co., April Sess., 1900, No. 22.

A. R. Osmer, for Commonwealth; Trax & Parker, for defendant.

CRISWELL, P. J., April 24, 1900.—Gentlemen of the jury: The defendant is charged with the violation of a statute, which provides "that from and after March 1, 1894, no person shall enter upon the practice of medicine or surgery in the State of Pennsylvania unless he or she has or shall have complied with the provisions of this Act, and shall have exhibited to the prothonotary of the Court of Common Pleas of the county in which he or she desires to practice medicine or surgery, a license duly granted to him or her, as hereinbefore provided."

The legal question presented is, what is the meaning of this Act of Assembly? What is comprehended by the language, "shall enter upon the practice of medicine or surgery in the State of Pennsylvania?" This is a penal statute, and therefore should be construed strictly. The rule relative to the construction of statutes should also be observed, that the words used in the Act should be given their popular rather than their technical meaning. There are very many words that have different shades of meaning, and by the general public they are understood to have a certain meaning, while to the professional or educated man it is well understood that they have a different and more

10 DIST. R.

comprehensive meaning. The word "mineral," for instance, commonly is understood to apply to some metallic, hard substance. Technically, however, it comprehends almost everything, even gases and liquids. We are of the opinion that this Act of Assembly should be construed with reference to the common understanding of the terms therein used, and that the term "medicine" as here used refers to drugs or what is commonly understood to be medicines by the common people.

The word "surgeon," as used in this Act of Assembly, should likewise be given its common meaning. The Act, therefore, should be construed, in our opinion, so as to prohibit any one from entering upon the practice of medicine by the use of drugs or medicines as commonly understood, and so as to prohibit any one from entering upon the practice of surgery as that word is commonly used. It does not appear to us that anything more was contemplated, or that the legislature intended to prohibit the treatment which it appears from the evidence the defendant in this case administered to those who called upon him. According to the evidence, his method of treatment is simply that of manipulation of the parts. Whatever may be said in reference to the merits of the system, it certainly may be said it is not dangerous and is not likely to do injury to the individuals treated.

There are no Pennsylvania authorities upon the subject of which we have any knowledge, or to which we have been referred by counsel. Almost all of the States of the Union, however, have enacted legislation for the purpose of protecting the public against quacks and dishonest and disqualified persons. Such legislation has been recognized as valid, and as a constitutional exercise of the power of the State; that is, the State has a right to protect the general public against any evil of that kind. We have, from such examination as we have made, endeavored to gather the trend of decisions in other States, and so far as we have been able to learn, such statutes as that now before us, under which the defendant has been indicted, have never been applied to a person practicing what is known as osteopathy, the system which is being practiced by the defendant. In the State of Ohio, a couple of years since, the question came before a Common Pleas judge. The Ohio statute reads as follows: "Who shall append the letters M. D. to his name, or, for a fee, prescribe or direct any drug or medicine or other agency for the treatment, cure or relief of any kind of infirmity or disease." The Common Pleas court passed upon the question and determined that the words "other agency," which it was alleged on the part of the Commonwealth comprehended the treatment by manipulation, that those words did not comprehend such treatment; that they must be construed with reference to the preceding words, "drugs and medicines," and must refer to similar agencies. Later, however, and more recently, the same question was referred to the Supreme Court of the State of Ohio, and they rendered a decision construing the statute broadly. They conclude that a person who treats by manipulation is not practicing medicine within the broad meaning of that word as contained in the Act; that is, that such was not the intention of the legislature.

The same question arose in the State of Utah, where they have a statute which reads as follows: "Any person practicing medicine or surgery or obstetrics within the State without holding a license shall be deemed guilty of a misdemeanor." It was held that a person practicing and using the method of treatment used by the defendant here was not violating the terms of this statute. This statute is in language the same as ours: "Any person practicing medicine or surgery or obstetrics." In the State of New York it has been held that the New York law of 1874, making it a misdemeanor for any person to practice medicine or surgery, who is not authorized to do so by license or diploma, does

DISTRICT REPORTS.

Commonwealth v. Thompson.

not apply to one who undertakes to cure disease by manipulating parts of the body, and that such person, though unauthorized to practice medicine, is entitled to recover his fees. This language is identical with the language of our statute, and the decision to which I refer is a decision of the Court of Appeals of that State, the highest court of the State. While these authorities are not binding upon us, they are persuasive, and, as we have stated, they show the trend of judicial thought upon the question, and furnish us a guide which we think we should follow. We are, therefore, of the opinion that the defendant, under the evidence, is not guilty of a violation of this penal statute, and so instruct you.

From E. H. Lamberton, Franklin, Pa.

ED. NOTE.—In *Com. v. Pierce*, 10 District Reps. 385, *supra*, Wilson, P. J., in the Court of Quarter Sessions of Beaver county, arrived at a similar conclusion, but held that although osteopathy was not practicing medicine or surgery within the meaning of the Act, yet where an osteopath furnished medicines to patients, or introduced a sound, he was indictable under the Act of May 18, 1893, P. L. 94.

The above charge has been published, contrary to our usual practice, because believed to be of interest, in view of the paucity of authority upon the subject.

Bridge in Centerville Borough.

Bridges—Return of grand jury—Surplusage.

The return of a grand jury approved of a bridge, as reported by viewers, as necessary, but too expensive for the borough to bear, and authorized the county commissioners to expend a specified sum in its construction. On motion to set aside return, *held*, that that portion of the return authorizing the expenditure could be stricken out as surplusage, and the return of approval allowed to stand.

Motion to set aside report of grand jury. Q. S. Washington Co., Aug. Sess., 1899, No. 3.

Parker & McIlwaine, for motion.

TAYLOR, J., Oct. 31, 1900.—The return of the grand jury sitting at the May Sessions, 1900, on the report of viewers finding "that a bridge at the point mentioned is necessary, and would be too expensive for the said borough of Centerville to bear, we therefore lay out and return for public use a bridge, as follows, . . ." is in the following language, to wit: "And now, May 10, 1900, the bridge recommended in the within report of viewers, as petitioned for, after due hearing, is approved by the grand jury, and the county commissioners are authorized to expend the sum of \$400 in the construction thereof. M. C. Burroughs, foreman of the grand jury."

This return of the grand jury contains a legal finding, in that it approves of the bridge as reported by the viewers. The direction to the county commissioners to expend the sum of \$400 in the construction thereof must be treated as surplusage and stricken out, since it is not made to appear in any way, nor can it be inferred, that the approval of the grand jury was obtained on the condition that the county commissioners expend \$400 in the construction of the same; the most that can be said of that portion of the grand jury's return is, that it is a mere recommendation of that body coupled to a legal finding or report, which may be stricken out without vitiating or in any manner impairing their approval of the bridge in accordance with the law and the report of the viewers.

Now, Oct. 31, 1900, motion to set aside return of grand jury refused and dismissed, and that portion of their return authorizing the county commissioners to expend \$400 in the construction of said bridge is stricken out as surplusage, and the return of approval by the grand jury allowed to stand.

From James I. Brownson, Washington, Pa.

The People's Supply Company v. Goff.

Practice, C. P. — Levy — Execution — Fi. fa. — Issuing same on unsigned assessment of damages.

A *fi. fa.* is not improvidently issued where, upon the entry of a judgment entered upon a warrant of attorney to confess judgment, the prothonotary failed to sign the assessment of damages, when the amount of the actual debt is endorsed upon the *fi. fa.*, the amount being made up of money actually in arrear and of that which became due under the terms of the agreement authorizing the entry of judgment.

Contract—Consideration—Bailment—Default in payment of rent—Balance becoming due—Levy on bailee's interest.

It is not the province of the court to measure the relative consideration moving between the parties to a contract, in the absence of some other cause furnishing equitable jurisdiction. Hence, a levy upon a bailee's interest in goods bailed to him under a contract of bailment is good when the contract stipulates that, upon default in the payment of any instalment of rent, the entire balance to be paid by the bailee during the term of the bailment should become immediately due and payable, although the effect of the levy will be to deprive the bailee of the use of the property.

Rule to set aside execution and open judgment. C. P. No. 5, Phila. Co., June T., 1901, No. 2136.

Henry N. Wessel, for plaintiff; A. S. Ashbridge, Jr., for defendant.

MARTIN, P. J., Oct. 21, 1901.—Defendants entered into this contract of bailment:

“PHILADELPHIA, May 3rd, 1901.

“We do hereby lease and rent from The People's Supply Co. the following described articles: Stair & Hall Carpet, Parlor Carpet, Ingrain Cpt., 3 B. R. suits, 1 Looking glass, 1 Hat rack, 1 Rocker, 1 Parlor Suit, 4 Mattresses, 3 Set P. & B., 1 N. W. Spring, 3 Black Springs, for the period of 60 weeks, and agree to pay rent for articles as follows: \$30.00 upon delivery of said articles at the place requested, and the further rent of \$5.00 per week on the Wednesday of each week, and we further agree not to remove any of said articles from the place where delivered without the written consent of the said People's Supply Co., and if default shall be made in the payment of said rent we agree to deliver said articles to The People's Supply Co., upon demand made, and for the better securing of said rent we do hereby empower any Attorney of record to enter judgment against us for the entire rent remaining unpaid, hereby waiving the benefit of any exemption laws now in force or hereafter to be passed, with an Attorney's commission of ten per cent. for collection. We agree that in the event of default made in the payment of any instalment of rent, the entire balance of rent shall become immediately due and payable, at any option of the said People's Supply Co., and judgment may be entered for such sum and execution issued.

“Witness our hands and seal, this 3rd day of May, A. D. 1901.

“Witness—A. SAUERS.

JOHN M. GOFF. [L. S.]

“G. CAMPBELL.

ELLEN GOFF. [L. S.]”

On July 8, 1901, plaintiff's attorney filed the note with the prothonotary, together with a paper endorsed “avermment of default, order for judgment and assessment of damages,” in the following language: “And now, to wit, July 8, 1901, comes The People's Supply Company, by Henry N. Wessel, its attorney, and avers default in payment of rent as agreed under the agreement of defendants, dated May 3, 1901, and that the balance due is \$265.20.

“THE PEOPLE'S SUPPLY COMPANY,

“By Henry N. Wessel, its attorney.

The People's Supply Company v. Goff.

"The prothonotary will enter judgment as above, and will assess damages as follows:

"Amount due under agreement.....	\$265.20
"10 per cent. for collection.....	26.52
	\$291.72

"HENRY N. WESSEL, attorney for plaintiff.

"And now, to wit, July 8, 1901, judgment is entered in favor of The People's Supply Company, and against John M. Goff, Ellen Goff, and damages are assessed at the sum of two hundred and ninety-one dollars and seventy-two cents (\$291.72).

"———, Prothonotary."

The prothonotary entered upon the docket in the case "July 8, 1901, judgment. *Eo die*, Dams. Assd. at \$291.72."

Execution was issued and levy made upon defendants' property, including their interest in the articles bailed to them under the terms of the agreement between plaintiff and defendants.

A rule was entered to set aside the execution and open the judgment upon the ground that the prothonotary having failed to place his signature to the paper which plaintiff's counsel lodged with him, requesting him to assess damages, no assessment had been made, and the *fi. fa.* was improvidently issued.

It was also claimed that a levy upon defendants' interests in the goods held by them under the bailment would deprive them of the use of the property, and that the contract stipulating, upon default in the payment of instalments, the entire balance to be paid by defendants during the term of the bailment should become immediately due, would then be inequitable for want of consideration.

The duty of the prothonotary in the premises is defined by the Act of Feb. 24, 1806, § 28, 4 Sm. Laws, 278, "on the application of any person, being the original holder (or assignee of such holder) of a note, bond or other instrument of writing in which judgment is confessed, or containing a warrant for an attorney-at-law, or other person, to confess judgment, to enter judgment against the person or persons who executed the same for the amount which, from the face of the instrument, may appear to be due, . . . particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed, a judgment confessed by an attorney, or judgment obtained in open court."

In *Lewis v. Smith*, 2 S. & R. 142, it was said by Tilghman, C. J.: "Where judgments are confessed if the plaintiff's demand is in the nature of a debt, which may be ascertained by calculation, whether it arise on a note or other writing, or on an account, it is sufficient to enter judgment generally. The judgment is supposed to be for the amount of damages laid in the declaration, and the execution issues accordingly. But the plaintiff endorses on the execution the amount of the actual debt, and if the defendant complains that injustice has been done, the courts are always ready to give immediate and liberal relief on motion."

In the present case there was endorsed upon the writ of *fi. fa.* the actual debt, which was less than the sum called for by the agreement, payments having been made on account. The amount was made up of money actually in arrear, and of that which became due under the terms of the agreement by virtue of the default on the part of the defendants in not making the payments as stipulated. There was no limitation as to execution in the contract, and the benefit of exemption laws was waived.

10 DIST. R.

It is not the province of the court to measure the relative consideration moving between the parties to the contract in the absence of some other cause furnishing equitable jurisdiction.

"That a consideration should be required to sustain a promise, and yet that the amount of this consideration should be a matter as to which, unless fraud or undue influence be set up, the courts will not adjudicate, seems unreasonable; yet it must be remembered that if the courts were required to determine in each case whether the consideration was adequate, prices would have to be fixed, not by the parties, but by the courts:" 1 Wharton on Contracts, § 516.

Chief Justice Black, in *Harlan v. Harlan*, 20 Pa. 303, said: "A very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to support a contract when made by a man of good capacity, who is not at the time under the influence of any fraud, imposition or mistake."

While it is true plaintiff was entitled, under the provisions of the bailment, to demand a return of the articles, the right to rescind was not exercised, but judgment entered on the agreement.

Rules discharged.

Muir v. Lewis.

Practice, C. P.—Security for costs—Non-resident defendant.

The non-residence of the defendant will not relieve a non-resident plaintiff from entering security for costs.

Rule on plaintiff for security for costs. C. P. No. 1, Phila. Co., June T., 1901, No. 487.

Joseph B. Thomas, for plaintiff; *F. C. Adler*, for defendant.

BEITLER, J., Oct. 7, 1901.—The defendant, having filed an affidavit of defence averring that he has a defence to the whole of the plaintiff's claim, filed an affidavit, setting out that the plaintiff is a non-resident, and asking for a rule on the plaintiff to show cause why he should not enter security for costs. To this the plaintiff has filed an answer admitting that he is a non-resident, but setting up that the defendant is also a non-resident.

The fact appears to be that both are residents of New Jersey, but do business in this city, and the defendant was served with the summons at his office here.

The rule relating to security for costs is: "In cases where the plaintiff resides out of the State at the time suit brought, or subsequently removes therefrom, in *qui tam* actions, . . . the defendant, on filing an affidavit of defence in actions in which an affidavit of defence is required, and, in other actions, on filing an affidavit of a just defence against the whole of the plaintiff's demands, may enter a rule for security for costs; and in default of security being entered at the time named by the court, judgment of non-suit may be entered by the prothonotary."

The rule, itself, makes no exception against a non-resident defendant. The costs to be secured are the costs of the suit, which embrace the costs due the county. If the plaintiff fails in his action, not only may the defendant lose his costs, but also fail to collect the costs which ought to be paid the county.

In *Tyler v. Bannon*, 30 W. N. C. 372, it does not appear upon what ground the rule was discharged. We do not regard it as ruling this case.

The rule is made absolute. Security to be entered in the sum of \$50 within thirty days.

Woods v. Von Bonnhorst et al.

Taxes—Time when lien attaches to real estate—Allegheny City—Acts of Feb. 3, 1824, and Feb. 27, 1860.

Under the Philadelphia Act of Feb. 3, 1824, § 1, P. L. 18, extended to Allegheny City, and the Act of Feb. 27, 1860, § 2, P. L. 85, taxes become liens upon the real estate against which they are assessed whenever the municipal ordinance levying and assessing them for a given year becomes a law. The rates must be fixed and the assessment actually made before their lien attaches.

Case stated. C. P. No. 2, Allegheny Co., July T., 1901, No. 132.

C. A. Woods, for plaintiff; *C. W. Jones*, for defendants.

FRAZER, P. J., June 24, 1901.—The plaintiff, by articles of agreement, dated Dec. 1, 1900, sold to defendants a lot of ground, situate in the city of Allegheny, "free and clear of all liens and encumbrances," excepting a mortgage for \$3500, deed to be delivered Feb. 15, 1901. On Feb. 21, 1901, the city of Allegheny assessed taxes against the property to the amount of \$70.38. The question here is, should the taxes be paid by the plaintiff or by the defendants? The plaintiff paid them under an agreement that the question should be submitted to this court for determination, and, if they were found to be a lien, Feb. 15, judgment to be entered for defendants; if found not to be a lien at that time, judgment to be entered in favor of plaintiff and against defendants for \$70.38 and costs. By Act of April 5, 1844, P. L. 199, the Philadelphia Act of Feb. 3, 1824, § 1, P. L. 18, was extended to Allegheny City. That Act provides that "all rates and levies which may hereafter be lawfully imposed or assessed . . . in the city or county of Philadelphia shall be and they are hereby declared to be a lien on the said real estate on which they may hereafter be imposed or assessed." That Act was followed by the Act of Feb. 27, 1860, § 2, P. L. 85, which provides "that from and after the passage of this Act, all taxes, rates, levies and assessments which may be lawfully imposed or assessed by the city of Allegheny, or by the authority thereof, on any real estate in said city, by the provisions of this or any other Act of Assembly, shall be liens on said real estate," etc. These Acts are the only legislation on the subject to which our attention has been called.

It seems to us that if these Acts mean anything, it is that whenever the municipal ordinance levying and assessing taxes for a given year becomes a law, from that time on taxes provided for therein become liens upon the real estate against which assessed, and not before that time. We see nothing in the Act to indicate an intention upon the part of the legislature to create a lien before the tax is ascertained and assessed. On the contrary, both Acts, and especially that of 1860, clearly indicate that the rates must be fixed and the assessment actually made before the tax becomes a lien upon the real estate. In this case the ordinance levying and assessing the tax became a law on Feb. 27, 1901. At that time the defendants were the legal owners and in possession of the land, and, consequently, liable for the taxes assessed under its provisions.

A conclusion similar to this was reached by the Common Pleas of Philadelphia in *Camac v. Beatty*, 5 Phila. 129. There the court held that taxes became a lien upon the property, under the Act of 1824, at the time of their assessment. That case is cited and approved in *Dungan's Appeal*, 88 Pa. 416.

In accordance with the foregoing, we are of opinion that the taxes in dispute were not a lien on Feb. 15, 1901, upon the property mentioned in the case stated, and accordingly direct that judgment be entered in favor of plaintiff for the sum of \$70.38 and costs.

From Edwin L. Mattern, Pittsburgh, Pa.

Commonwealth v. Clark.

Criminal law—Attempt to commit a crime—Common law indictment—Act of 1860.

Section 50 of the Act of March 31, 1860, P. L. 442, providing that persons indicted for crimes may be convicted of attempts to commit the same, does not prevent an indictment under the common law for an attempt to commit a crime.

Criminal law—New trial—Offer of incompetent testimony—Adverse comment.

An offer of incompetent testimony by the district-attorney, made in the hearing of the jury and not required by defendant's counsel to be made in the hearing of the court alone, is no ground for granting a new trial. Neither is an adverse comment by the district-attorney on the fact that two of the three defendants had failed to testify in their own behalf when their counsel gave an elaborate and plausible excuse for their not doing so, and when the attention of the court was not called to such comment by protest or objection.

Motion in arrest of judgment. Motion and reasons for a new trial. Q. S. Fayette Co., June Sess., 1901, Nos. 101 and 102.

W. E. Crow, district-attorney, for Commonwealth.

R. P. Kennedy, for defendants.

REPPERT, P. J., June 29, 1901.—The reason assigned in support of the motion in arrest of judgment is that the counts in the indictments are drawn under the common law and not under the Act of Assembly in such case made and provided. Each of the bills of indictment contains two counts: The first charges assault and battery with intent to rob; the second, attempting to commit larceny from the person. The first count is drawn under the Act of March 31, 1860, § 102, P. L. 408; the second is a common law count, and there is no Act of Assembly covering the offence charged. Section 50 of the Act above referred to and quoted in support of the reason assigned provides that persons indicted for crimes may be convicted of attempts to commit the same. This certainly does not stand in the way of an indictment under the common law for an attempt to commit a crime. Binding instructions were given to the jury to return a verdict of not guilty on the first count.

A new trial is asked for, because, first, the district-attorney, in the hearing of the jury, made an offer of incompetent evidence. The incompetency of this testimony was not only anticipated by defendants' counsel, but its character was, in part at least, disclosed by the examination immediately preceding the offer, and which led the defendants' counsel to demand a formal offer. We know of no way the court can rule on an offer without hearing it. It was in counsel's power to require the offer to be made in the hearing of the court alone. This he did not do, and he cannot now complain.

The second reason assigned is that the district-attorney, in his closing address to the jury, commented adversely on the fact that two of the three defendants had failed to testify in their own behalf.

There is no record of the adverse comment complained of. The attention of the court was not called to the matter by protest or objection; and while the district-attorney was interrupted in his argument by the defendants' counsel, no exception to anything he may have said was taken or asked for. We are now asked to grant a new trial for an error of speech on the part of the district-attorney not then complained of, and which, it may be added, was invited by an elaborate and plausible explanation and excuse of the failure of two of the defendants to go on the stand, made by their counsel in his argument.

We regard the case as ruled by *Com. v. Weber*, 167 Pa. 153, and the language of Mr. Justice Dean, on page 164, may readily be adapted to this case: "If the Commonwealth had elicited from a witness on the stand irrelevant or incompetent testimony without objection, and there had been no request by defendant to

DISTRICT REPORTS.

Commonwealth v. Clark.

the court to withdraw it from the consideration of the jury, it would hardly have been argued, in view of the settled law, that this court should reverse the judgment. His silence in the court below would have been conclusive against his complaint here. And there is no distinction, in this respect, between improper evidence and improper argument. It is the duty of counsel to aid the court by their learning and fidelity in the administration of justice; any other rule of duty would probably lead to very undesirable results, because, without it, the most effective defence astute counsel could make for criminals with a hopeless case on the evidence would be, by silence, to invite errors of omission and commission by the court and opposing counsel, with the object of securing reversals on review, and thus, by persistent, expensive and vexatious appeals, wear out the prosecution. The attitude of defendant's counsel, as exhibited by the record, is, in substance, this: Counsel for Commonwealth erred in the matter of his address to the jury; I erred by remaining silent when I should have promptly brought his error to the notice of the court by objection; the court committed no error, but its judgment should be reversed because I did not perform my duty."

The verdicts accord with the overwhelming weight of the evidence, and should not be disturbed.

From Luke H. Frasher, Uniontown, Pa.

Ursinus College v. Collegeville Borough et al.

Road laws—Act of May 22, 1895.

The Act of May 22, 1895, P. L. 106, amending the Act of May 16, 1891, § 9, P. L. 75, creates two modes of procedure for a municipal corporation to open, widen, &c., its streets: (1) on petition of a majority of the abutting owners; (2) without any petition of the property-owners when the authorities deem it necessary. The proviso of the Act of May 22, 1895, P. L. 106, does not limit the first method, but imposes restrictions upon the second alone.

Hence, publication of a copy of the ordinance for ten days immediately after its introduction is not required where the ordinance is enacted in pursuance of a petition of a majority in number and interest of the owners of property abutting on the line of the proposed improvement.

Findings of fact and conclusions of law upon final hearing before the court.
C. P. Montgomery Co., March T., 1901, No. 5.

Larzeler, Gibson & Fox, for plaintiff; George W. Zimmerman, for defendant.

SWARTZ, P. J., June 3, 1901.—The borough of Collegeville, by ordinance, widened Main street to fifty-four feet by adding two feet to each side of the existing street of fifty feet. The widening takes two feet along the frontage of the college. The plaintiff resists the attempt to occupy the two feet for street purposes upon the ground that the ordinance was illegally passed, because no notice was given for ten days immediately after its introduction and before its enactment. The defendant borough answers that such notice is not required where the ordinance is adopted in pursuance of a petition by a majority in number and interest of the abutting land-owners. And, for a further answer, the defendants say that the plaintiff, one of the petitioners for the widening, is estopped from interfering with the borough in the occupying of the two feet, even if such notice was necessary to enact a valid ordinance.

Findings of fact.

1. A petition "of a majority in number and interest of the owners of property abutting on the line" of Main street, duly verified by affidavit, was presented to town council before the ordinance was finally adopted as prayed for. Whether all the petitioners had signed before the ordinance was introduced is doubtful.

10 DIST. R.

Ursinus College v. Collegeville Borough et al.

2. The ordinance was introduced on Jan. 1, 1897, and finally adopted on Feb. 5 following. Notice by publication was duly given after the ordinance was finally adopted, but no copies of the ordinance were published for ten days immediately following its introduction in council.

3. The plaintiff college signed the petition for the proposed widening, and the street was widened in strict compliance with the prayer of the petitioners.

4. On May 17, 1897, the borough passed an ordinance requiring the abutting property-owners on Main street to curb and pave. The college owns land on both sides of the street. Nearly all the property-owners laid their pavements as required by the ordinances widening the street and pavements. The college laid pavement on the west side of the street as widened, and put down the curb on the east side of the street as fixed by the ordinance; but the strip of two feet on the east side has not been disturbed. Several notices were served on the college authorities to pave along the east front of its property. The first notice was given as early as May 6, 1899.

5. The bill was not filed until May 8, 1901, and the only attack made upon the ordinance widening the street is the allegation that notice for ten consecutive days was not given before the ordinance was finally adopted.

Conclusions of law.

1. Publication of a copy of the ordinance for ten days immediately after its introduction is not required where the ordinance is enacted in pursuance of a petition by a majority in number and interest of the owners of property abutting on the line of the proposed improvement.

2. The defendants are entitled to an order dismissing the bill of the plaintiff, at its cost.

Reasons in support of our conclusions.

The 9th section of the Act of May 16, 1891, P. L. 75, authorized every municipality to enact ordinances widening streets upon the application of a majority in number and interest of the abutting property-owners. This Act gave councils no power to pass such ordinances without petition by the property-owners. The Act contemplated assessments for benefits against the abutting owners, and therefore gave the people a voice in determining the necessity for the improvement.

The Act of May 22, 1895, P. L. 106, amended the 9th section of the Act of 1891 by enabling the municipality to widen a street without petition from the owners and yet assess the abutting property-owners for benefits. This power, however, was to be exercised under certain restrictions. The owners must have notice before the ordinance can be enacted, and, instead of a majority of town council, the ordinance must receive the approval of three-fourths of the members before it becomes valid. These restrictions are valuable to the property-owners. The publication of notice gives them an opportunity to remonstrate before the ordinance becomes a law and they are made liable for damages. The necessity for such notice is not apparent where for weeks a spirited canvass is conducted among the abutting property-owners to secure a majority favorable to the proposed improvement. Publication of notice is wholly unnecessary after such majority is secured, for every property-owner is fully informed of the proposed change before the ordinance is introduced, or at least before it is finally enacted.

But it is said that the 9th section of the Act of 1891, as amended in 1895, demands such notice and is binding upon the municipality. We cannot so read the amendment. The amended section re-enacts, word for word, all that is contained in the original section. The power given to municipalities in 1891 is not abridged by giving additional powers in the same section. There is no intimation that the grant heretofore given is restricted. All the restrictions named in

Urninus College v. Collegeville Borough et al.

the proviso are wise and proper when applied to the enlarged powers granted to the members of council. If the proviso as to the ten days' notice applies to a widening upon the petition of property-owners, then all the other restrictions control the proceedings by petition. It would follow that the action of council without petition meets with less restrictions than the action taken in obedience to the demand of the property-owners interested, for the 10th section of the Act of 1891 requires notice after the passage of the ordinance to enable the property-owners to contest the fact whether a majority has applied for the improvement. Thus we would have two publications where the proceeding is by petition, and but one where it originates without petition.

The restrictions in the amended 9th section are the same, word for word, as those found in the Act of May 22, 1895, P. L. 105, where cities are given the power to enact ordinances widening streets without petition from the property-owners; and the court, in Greenfield Avenue, 191 Pa. 290, held that these restrictions were introduced as a substitute for the petition, and that the old proceeding remained without modification.

The plain purpose of the amended 9th section is to enlarge the occasions on which the power to widen a street may be exercised. If we read the proviso of the amended section as limiting the power of council only where the proceeding is without petition, we have two modes of procedure, each in its own way carefully protecting the interests of the property-owners. If we apply the proviso to both methods we construe an Act which was intended to give enlarged powers so that it will limit powers already granted.

The Act of May 22, 1895, P. L. 105, is numbered 78, and is followed by No. 79—the Act amending the 9th section of the Act of 1891. It is very evident that the amended 9th section was passed to make it clear that boroughs should enjoy the same powers as cities in the widening of streets. Cities still have the power to widen by petition without the restrictions found in the Act of May 22, 1895, P. L. 105, or in the proviso of the amended 9th section: Greenfield Avenue, 191 Pa. 294.

This case rules the entire question, for the amended 9th section speaks of "every municipal corporation"—that is, of cities as well as boroughs. If cities may widen by petition without the restrictions in the proviso, as declared in the case just cited, it follows that the same power still rests with boroughs.

The re-enactment of the original 9th section of the Act of 1891 is followed by a period, and there is no difficulty in reading the whole new section so as to restrict the proviso to the new power conferred. The existing grant should not be destroyed unless the plain reading of the amendment necessitates such interpretation.

The right of the college to contest the authority of the borough to occupy the strip of ground two feet wide may well be questioned upon another ground.

The college petitioned the borough to widen the street just as it was in fact widened. The college submitted to the ordinance by paving on the west side and curbing on the east side. For more than three years the college recognized the validity of the ordinance. The improvement along the entire line of the street is now almost completed. Even if the ten days' notice was a prerequisite to enact a valid ordinance, how can the college complain of want of notice when the borough simply took the ground which the college demanded should be taken as part of the street?

And now, June 3, 1901, it is ordered, adjudged and decreed that the prothonotary enter a decree *nisi*, dismissing the bill of the plaintiff, with costs; and unless exceptions are filed to our findings and conclusions, as required by the equity rules, he will enter a final decree as of course.

From Montgomery Evans, Norristown, Pa.

Langcliff Coal Company, Limited, v. New York, Susquehanna and Western Coal Company.

Production of books—Practice on return of rule—Act of Feb. 27, 1798.

The Act of Feb. 27, 1798, 8 Sm. Laws, 308, is in force, and its provisions may be invoked in a proper case.

On the return of the rule the court will consider (1) the averments in the petition. Are they made with reasonable certainty? Are the books and papers described with sufficient precision? (2) The materiality and pertinency of the books and papers demanded. (3) Are the books and papers in the possession or under the control of the party upon whom the rule is taken?

Rule to produce books and papers. C. P. Lackawanna Co., Sept. T., 1899, No. 584.

Jessup & Jessup and Welles & Torrey, for rule.

Willard, Warren & Knapp, contra.

EDWARDS, J., Dec. 14, 1900.—On the return of the rule in this case defendant made no formal answer and showed no cause against granting the order other than the argument of counsel against allowing the relief sought by the plaintiff. At the argument, defendant was offered the opportunity of further time to make such answer as it deemed proper, and to show why the books and papers described in plaintiff's petition could not be produced at the trial of the case. This opportunity was declined, and the argument proceeded with on the papers as they were before us. Defendant claims that the petition is defective for want of certainty in the description of the papers desired. We think not. The books and papers are sufficiently described, most of them with unmistakable precision and the others with reasonable certainty. It is claimed that the provisions of the Act of Feb. 27, 1798, are, to a certain extent, obsolete, because of the practice prevailing in the courts by which books and papers in the possession of one or the other of the parties to a suit may be secured by the adverse party at the trial. Reference is made to a subpoena *duces tecum*, to the service of notice on the opposite party to produce books and papers, and to the practice, now quite general, of taking testimony of persons in other States by order of court, without resorting to the cumbersome method of interrogatories and a commission. Notwithstanding all these opportunities of securing evidence, the decisions of the highest court recognize that the Act of 1798 is in full life, and that its provisions may be invoked in a proper case.

It is true that the privilege allowed by this Act of Assembly may be abused, and that the party seeking its aid may undertake what is known as a "fishing excursion" into the enemy's country. But this is no answer to the reasonable enforcement of the provisions of the Act. Indeed, the Act itself provides the means to prevent this. The order to produce books and papers will not be made without giving the adverse party full opportunity to answer. It may be that the papers demanded may have been destroyed by fire or otherwise, and cannot be produced; or that, though in existence, they may be beyond the legal control of the party who is required to produce them; or that they are not pertinent to the issue between the parties to the trial. Such matters should be shown on the return of the rule. The defendant in the case at bar has given us no reason why the order prayed for should not be made, except such reasons as might in law be made on a demurrer to the plaintiff's petition.

Exhaustive briefs have been submitted on both sides. We do not deem it necessary to cite authorities, but we refer to the case of *Megargee v. Insurance Co.*, 15 Phila. 226, in which Judge Finletter, as late as 1881, discusses the practice under the Act of 1798, and cites the Supreme Court cases bearing upon the subject. Summarizing briefly our views as to the practice under the Act, we say that,

Langcliff Coal Co., Limited, v. New York, Susquehanna and Western Coal Co.

on the return of a rule to produce books and papers, the court will consider: 1. The averments in the petition: Are they made with reasonable certainty? Are the books and papers described with sufficient precision? 2. The materiality and pertinency of the books and papers demanded. 3. Are the books and papers in the possession or under the control of the party upon whom the rule is taken?

Our duty in the present case is clear. The rule granted Oct. 17, 1890, upon defendant to show cause why certain books and papers described in the affidavit and petition of the plaintiff should not be produced by the defendant on the trial of this case, or to satisfy the court why they cannot be produced, is made absolute.

From Thomas F. Wells, Scranton, Pa.

Corporation Bonus.

Corporations—Bonus on foreign corporations doing business within this State—Act of May 8, 1901.

The bonus required by the Act of May 8, 1901, P. L. 150, to be paid by foreign corporations, limited partnerships or joint stock associations, is not an annual tax, but is the price paid to the Commonwealth for the privilege conferred of doing business in Pennsylvania, and is to be paid upon the actual capital now invested therein and upon any subsequent increase thereof.

Auditor-General's Department. Letter of instructions.

HARDENBERGH, Auditor-General, Aug. 7, 1901.—All corporations created, organized or incorporated under the laws of Pennsylvania, before obtaining a charter, are required to pay a bonus of one-third of one per centum upon the amount of the authorized capital stock, and a like amount upon any subsequent increase thereof, and, in order to place all corporations doing business or having capital invested in Pennsylvania upon the same basis, the Act under which this report is required, approved on May 8, 1901, was passed, providing that all corporations, limited partnerships or joint stock associations (except foreign insurance companies) chartered or created by or under the law of any other State, or of the United States, or any foreign country, viz.:

- (1) Whose principal office of business is located in this Commonwealth; or
- (2) Which have any part of their capital actually employed wholly within this State.
- (3) In addition to complying with the laws now in force, requiring it
- (4) To pay to the State treasurer for the use of the Commonwealth a bonus of one-third of one per centum upon the amount of their capital actually employed, or to be employed, wholly within the State of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed.
- (5) That they shall not go into operation or transact any business in this Commonwealth without having first made a report as therein provided.
- (6) The bonus (or license) required to be paid is not a tax, but, as has been defined by the courts, is the price paid to the Commonwealth for the privilege conferred to do business in Pennsylvania, and is to be paid upon the actual capital now invested therein and upon any subsequent increase thereof.
- (7) The blank form of report enclosed herewith follows the specific requirements of the Act, and, in addition, requests certain information necessary to enable the auditor-general to justly determine the amount of capital invested and the amount of bonus to be paid.
- (8) That the report for the year 1901, for the reasons stated in paragraph 5, should be made at once and annually thereafter for the year ending Nov. 30.
- (9) Officers of corporations will please notice that this bonus is not an annual tax, claim or demand after the payment of the amount due upon capital now invested, but upon any subsequent increase of capital in Pennsylvania bonus must be reported and paid.

From C. P. Addams, Harrisburg, Pa.

Commonwealth v. Eley.

Husband and wife—Parent and child—Desertion—Support—Wife living in adultery—Children living with her.

A husband is relieved from the legal duty of maintaining his wife when she, during the absence of her husband, lived with and was supported by another man; nor can he be compelled to support his children as long as they remain with their mother and she continues to live with her paramour.

Desertion and non-support. Q. S. Luzerne Co., Nov. Sess., 1900, No. 244.

C. E. Keck and P. A. O'Boyle, for Commonwealth.

H. A. Gordon, for defendant.

LYNCH, P. J., April 29, 1901.—On Oct. 16, 1899, on oath of Bella N. Eley, charging her husband, John S. Eley, with having, since the year 1894, at Hazleton and elsewhere, in Luzerne county, failed and neglected to provide for his wife's support and that of her children, warrant was issued, and, upon hearing before an alderman, defendant was bound over to appear, etc. On Feb. 22, 1900, and Sept. 28, 1900, substantially the same proceedings were had.

The first hearing in court was duly had on April 21, 1900, when the charge, after hearing, was dismissed. It is now contended that, at this hearing, Mrs. Eley was not given a full opportunity to present her case. She was the only witness then examined. The complainant is a bright, intelligent woman, and was given all the time required to make out her case for desertion and non-support.

It is not necessary to draw upon the imagination, or to read between the lines, to reach a correct conclusion on the testimony then adduced. According to this testimony, Eley was dissatisfied with the conduct of his wife. Whilst the husband was absent from home, his wife, most of the time for four years, lived with and was supported by another man. The greater part of this time, she and this man, together with two small children, occupied the house alone; where she went this man was sure to go. It is true that it was claimed that this conduct, instead of showing evidence of guilt, was prompted by motives of benevolence and charity upon the part of the alleged benefactor. Be this as it may, according to the testimony of Mrs. Eley, the fact remains undisputed that these relations left ground for more than suspicion that complainant did not then act the part of a prudent person. After reading the testimony then taken, I remain of the same opinion.

The trial upon the two other charges took place on Feb. 2, 1901. It appears Eley has continued to separate himself from his wife and two children, one eleven and the other thirteen years of age. Since the trial in April, 1900, Mrs. Eley, with her children, has continued to reside in Wilkes-Barre, and her husband lives in Forty Fort.

The claim is that he has left his wife without reasonable cause, and has deserted his children, who are poor and have no means of support whatever, except such as is provided by an uncle and Mr. Hammersley. I am clearly of opinion defendant, by reason of the conduct of his wife, is relieved from the legal duty of maintenance. In a proceeding for divorce, if the facts and testimony now submitted were before the court, it cannot be doubted a decree annulling the marriage would be entered. But the proceeding for enforcing support of the children stands upon substantial ground. As stated, of late years, defendant has contributed little or nothing for their support. He professes willingness to provide a house and such comfort as his means will admit of, provided the children are given into his care and custody. Defendant is a paperhanger and painter, and apparently is able to provide comfortable support and maintenance for his children; but I think it is neither reasonable nor

DISTRICT REPORTS.

Commonwealth v. Eley.

proper he should be forced to provide for them so long as they remain with his wife and she and her husband live apart in the circumstances shown by the testimony. The case is now dismissed. From Sidney R. Miner, Wilkes-Barre, Pa.

Commonwealth v. Ruch.

Criminal law—Costs on larceny less than \$10—Act of May 25, 1897.

Under the Act of May 25, 1897, P. L. 89, authorizing grand juries to dispose of the costs in criminal prosecutions for larceny under \$10, etc., the grand jury are the judges of the fact of value, and are not required to embody their finding of fact in their return.

Hence, where a bill charging the larceny of articles valued at \$10.50 was ignored, and the grand jury certified that the prosecutor should pay the costs of prosecution, but did not certify that the articles alleged to have been stolen were of less value than \$10, *held*, on rule to set aside direction to pay costs, that it would be presumed that the grand jury found the value of the goods to be less than \$10, and the rule was discharged.

Rule to set aside direction to pay costs. Q. S. Carbon Co., Oct. Sess., 1900, No. 28.

E. M. Mulhearn and T. A. Snyder, for rule.

Sittler, district-attorney, and Freyman, Heydt & Nothstein, contra.

CRAIG, P. J., Feb. 6, 1901.—The indictment charges the crime of larceny, and fixes the value of the articles stolen, as follows: "Two carriage wheels, one carriage whip, and one halter strap, of the aggregate value of \$10.50." The grand jury ignored the bill, and returned that Dennis Rex, the prosecutor, should pay the costs. Whereupon, this rule was granted, and the contention is, that the grand jury had no right to put the costs of prosecution on the prosecutor, because they failed to decide and certify in their return, that the goods and chattels, alleged to have been stolen, were of less value than \$10. We are unable to give this construction to the Act of May 25, 1897, P. L. 89. The Act, it is true, limits the jurisdiction of the grand jury in this regard to cases where the value of the goods is less than \$10. And the pleader, in drawing up the indictment in question, fixed the value of the goods stolen at \$10.50. But this value is not conclusive. The Commonwealth, at the hearing before the grand jury, or on the trial before the petit jury, is not confined to this value, but has the right, and is bound to prove the value of any one or more of the articles alleged to have been stolen, whether that value be greater or less than the amount fixed in the indictment. We are not informed what the evidence before the grand jury was as to the value of the goods. The first section of the Act already cited says: "The grand jury returning . . . shall be the judges of the value of the goods so alleged to be stolen." Surely we are not to presume that the grand jury violated the law. Indeed, the presumption is the other way. *Hughes et al. v. Stevens*, 36 Pa. 320; *Campbell v. Finney*, 3 Watts, 84. The law makes the grand jury the judges of the fact of value, and does not require them to embody this finding of fact in their return. Hence, having ignored the bill and "decided and certified" that the prosecutor shall pay the costs of prosecution, we must presume and assume that the grand jury, in their consideration of the case, judged the value of the goods and chattels alleged to have been stolen of less value than \$10. The case of *Com. v. Lore*, 21 Pa. C. C. Reps. 205, practically rules the point. Much that is said by Judge Lindsey in that case is applicable to this. The indictment in that case placed the value of the stolen goods below \$10. But, if the evidence touching the valuation of the goods at \$10 was uncertain, can it be successfully affirmed that the court would have disturbed the verdict of the jury? We think not.

And now, Feb. 6, 1901, the rule is discharged.

From Laird H. Barber, Mauch Chunk, Pa.

Crawford et al. v. Allegheny County Commissioners.

Classification of townships—Words—Meaning of "population"—Act of April 28, 1899.

The word "population" is a word of great variation of meaning, and has been variously construed, its construction being generally governed by the connection in which it is used.

In the Act of April 28, 1899, P. L. 104, providing for the classifications of townships with respect to their population, the legislature in using the word "population" had in view only permanent residents or inhabitants of the township. Hence, it does not include inmates of an insane asylum who are there for treatment for indefinite periods, and whose homes are outside of the township.

Mandamus. C. P. No. 2, Allegheny Co., July T., 1901, No. 235.

James Fitzsimmons, for plaintiff; George P. Murray, for defendant.

FRAZER, P. J., July 27, 1901.—Upon petition of the plaintiffs, taxpayers of Kilbuck township, an alternative writ of mandamus was issued, requiring the defendants to show cause why their designation of the township of Kilbuck to be a township of the first class, under the provisions of the Act of April 28, 1899, should not be decreed illegal and void. To that writ the defendants answered that the United States census returns of 1900 show a population in the township exceeding 300 people to the square mile, and that it thereupon became their duty to designate the township to be a township of the first class. The facts are as follows:

The township of Kilbuck has an area of about three square miles, and within its limits is located the Western Pennsylvania Hospital for the Insane, at which institution are confined, for treatment and for indefinite periods, a large number of insane persons, whose homes are outside of the township, and who were either placed in the hospital by friends, or committed by order of court; that the returns of the last census show a population of 1205 persons, which aggregate number is made up as follows, viz.: Inmates of West Pennsylvania Hospital, 826; employees of West Pennsylvania Hospital, 208; residents of township, outside of hospital, 171. There is no dispute as to the facts. The sole question is, whether the 826 inmates of the hospital are to be considered as part of the population of the township in determining whether it is a first or second class township. If they are part of the population of the township, the action of the commissioners is legal; if not, their action is erroneous.

The Act of 1899 is entitled "An Act to provide for the classification of the townships of this Commonwealth, with respect to their population, into two classes, and to prescribe the form of government for townships of each class," and the preamble recites that, "Whereas, In the more populous townships of the Commonwealth, which are in a large measure devoted to residential purposes, there is need of a form of municipal government having greater powers than are now possessed by the local governments of townships of each class." The first section of the Act divides townships into two classes, and provides that "those townships having a population of at least 300 to the square mile, as shown by the United States census, shall be townships of the first class. All other townships shall be townships of the second class."

It seems to us the determination of this case depends upon the meaning of the word "population." Did the legislature intend that the word should include all persons who happened to be in the township at the time of taking the census, or only those who had permanent places of residence there and were citizens of the township? Population means the whole number of people or inhabitants residing in a locality, and may include temporary as well as permanent residents. It is a word of great variation of meaning, and has been variously construed, its meaning being generally governed by the connection

Crawford et al. v. Allegheny County Commissioners.

in which it is used. In this case it seems to us the legislature used the word in its ordinary and popular sense, and had in view only permanent residents or inhabitants of a township; that inference can be reasonably drawn from the circumstances of this case, such as reciting in the preamble that the populous townships "are in a large measure devoted to residential purposes," and in providing in the 5th section that the commissioners "shall be apportioned among the election districts, in proportion to the population as estimated by the vote cast at the last township election." We find nothing in the Act to indicate a legislative intention that the word "residential," as used, should be construed to include hospitals for the insane and other similar public institutions, and, as the male inmates are not voters of the township, their presence can have no effect upon the apportionment of commissioners. The inmates of the hospital have no interest whatever in the affairs of the township. They are merely and in most cases unwilling sojourners within its limits, liable to depart for their homes at any time, and, in our opinion, no more part of the population of the township, as contemplated by the Act of 1899, than would be temporary guests at a hotel, at the time of taking the census. We think this conclusion is in accordance with the spirit and reason of the Act.

Deducting the 828 inmates of the hospital from the total enumeration of 1205, there remains in the township a population of 379 persons, which is a much less number to the square mile than the law requires to entitle it to be placed in the first class. It therefore follows that the county commissioners erroneously designated the township of Kilbuck to be a township of the first class, and that their action in so doing should be revoked and rescinded, and the township restored to the second class. Let an order be drawn accordingly.

From Edwin L. Mattern, Pittsburgh, Pa.

NOTE.—In *Com. v. Blackley*, 198 Pa. 372, the constitutionality of the Act of April 23, 1899, P. L. 104, was sustained.

Road in Rush Township.

Road law—Acts of March 25, 1873, P. L. 402, May 14, 1874, P. L. 164, and May 2, 1899, P. L. 176—Rule of court—Notice to property-owners—Notice to supervisors—Assessment of damages—Procuring releases.

In the proceeding to view and lay out a public road the viewers posted up in the neighborhood of the proposed road three notices in the following form: "Please take notice and you are hereby notified that the undersigned viewers, appointed to view and lay out a public road in the township of Rush, to lead from the public road at or near the machine shops of J. J. Pie & Co., to a point at the public road leading to the Klondike school-house, at or near the Boynton coal mines, will attend to the duties of their appointment on March 29, A. D. 1901, at 10 o'clock A. M., when and where all parties in interest may attend if they see proper." The same notice, addressed to the supervisors of the township of Rush, was served on one only of such supervisors. On exceptions to the report of viewers, *held*, (1) that the notice, under the Act of March 25, 1873, P. L. 402, the rule of court, and the Act of May 2, 1899, P. L. 176, was fatally defective, because it failed to set forth the place of meeting of the viewers, and because it was served on only one of the supervisors; (2) that the notice so posted up was not such written notice to land-owners and occupants as is contemplated by the said Acts of Assembly and required by the rule of court.

The report failed to set forth that personal notice was given to land-owners and the occupants thereof, and also failed to set forth that the viewers endeavored to procure releases from such owners for damages. *Held*, that the report was fatally defective.

Exceptions to report of viewers laying out public road in Rush township. Q. S. Centre Co., April Sess., 1901, No. 3.

W. E. Gray, for exceptants; *Orvis, Bower & Orvis*, contra.

LOVE, P. J., Oct. 18, 1901.—The exceptions filed to the report of viewers in this case raise the question as to the sufficiency of notices given of the view, and as to its general defectiveness, both as to the view and the assessment of damages 10 Dist. R.

Road in Rush Township.

and failure to procure releases from land-owners over whose land the road was located passes.

The Act approved March 25, 1873, P. L. 402, relating to roads, &c., in Centre county, provides that the viewers are to give public notice by at least three printed or written advertisements, put up in the vicinity of the contemplated route of such road, or location of such bridge, of the *time and place where said viewers will meet* for the purpose of making such view or review, at least five days before such meeting. It also provides that it *shall* be the duty of the viewers to endeavor to procure releases from the persons over whose land said road may be located from all damages, &c., and if they fail to procure releases, then to assess damages. Rule of court No. 170 provides that five days' written or printed notice of the time of all views for the laying out of a road or the assessment of damages shall be given to the owners or occupants of the seated land along the route of the proposed road. The Act of 1874, P. L. 164, imposes upon viewers to lay out a road the same duties as to assessment of damages and the procuring of releases as the Act of 1873, *supra*, relative to Centre county.

The Act of May 2, 1899, P. L. 176, provides that it shall be the duty of the parties making application for such road to give written notice to the supervisors of the territory through which such new road is designed to be laid out and constructed, of the time and place of any views, &c., and a copy of such written notice, properly attested, shall be filed among the records of the court having cognizance of the matter, and a failure to comply with the provisions of this Act shall be sufficient grounds for an application to set aside whatever proceedings may have been taken of which said *supervisors* had no written notice.

The notices put up of this view were in substance and language the same. The one to the supervisors is as follows :

"To the Supervisors of the Township of Rush, Centre county :

"Gentlemen: Please take notice and you are hereby notified that the undersigned viewers, appointed to view and lay out a public road in the township of Rush, to lead from the public road at or near the machine shops of J. J. Pie & Co., to a point at the public road leading to the Klondike school-house, at or near the Boynton coal mines, will attend to the duties of their appointment on March 29, A. D. 1901, at 10 o'clock A. M., when and where all parties in interest may attend if they see proper."

The return of service of said notice shows it to have been served upon Daniel Spittler, one of the supervisors. It does not show that written notice was given to the supervisors, but to only one of them. The notice, under the Act of 1873, the rule of court, and the Act of 1899, is fatally defective, because it does not give notice of the place of meeting of the viewers. The report does not set forth, as required by rule of court, that written notice was given to the owner or occupants of seated land over which it was proposed to locate and construct said road. It is generally ruled and held that you cannot take the land of another for public use without notice or compensation. The fact that the Act of 1873, relative to Centre county, and the Act of 1874, *supra*, make it the imperative duty of the viewers to endeavor to procure releases from the owners of seated or improved lands over which the road may be located and constructed, necessarily implies that such land-owners or occupants shall have personal or due legal notice of the proceeding. This report fails to set forth that any such notice was given to land-owners or the occupants thereof, and fails to set forth that they endeavored to procure releases from damages.

It has been frequently held that a report failing to set forth notice to land-owners of the view and assessment of damages, and a failure to set forth that the viewers endeavored to procure releases, &c., is fatal. See North Union Township Road, 150 Pa. 512.

Road in Rush Township.

The report in other particulars is irregular and informal. We do not, however, deem it necessary to discuss it further in detail. We, however, do suggest that the members of the bar should be more particular in looking after road cases, and see that they do conform to the requirements of Acts of Assembly and rules of court in relation thereto.

We are, therefore, of the opinion that the report in this case is fatally defective, and therefore sustain the exceptions; and the report of viewers is set aside.

NOTE.—Rule No. 170 of Court of Common Pleas of Centre county is as follows: "Exceptions to the reports of road and bridge viewers shall be verified by affidavit, unless the facts appear upon the face of the proceedings, in which event the attorney of the excepting party shall certify that there are legal reasons why the report should not be confirmed; and in all cases the exceptions must be filed on or before the first day of the term next after the filing of the report, or the report will be confirmed, of course. Five days' written or printed notice shall be given to the county commissioners of Huntingdon county and to the supervisors in Centre county of the time of all views for the laying out of a road or the assessment of damages to the owners or occupants of the seated land along the route of the proposed road, or in case of reviews, to the most active of the petitioners, and the report shall state affirmatively that such notice has been given, in default of which the proceedings will be set aside. This rule is, however, not to dispense or interfere with the directions or requirements of any Act of Assembly providing for the giving of notice of views, &c. All testimony in road cases must be laid before the court by depositions, and no oral testimony will be received, except in some particular cases, to inform their conscience. The clerk shall keep a separate road and bridge docket, and all papers, whatever the subsequent proceedings may be, by review or otherwise, shall be filed and docketed to the original number and session of the petition by which the proceeding was commenced."

From Wilbur F. Reeder, Bellefonte, Pa.

Commonwealth v. Stevens.

Conflict of laws—Divorce—Extra-territorial effect of South Dakota divorce.

To entitle a judgment of one State to full faith and credit in another State, it must be rendered by a tribunal having jurisdiction over the person of the defendant or over the subject-matter.

Where the court rendering the judgment has no jurisdiction over the person, the judgment rendered has no extra-territorial effect, and the defendant sued in another State on such a judgment may plead that there was no personal service of the summons, or that he was not served with process within the jurisdiction.

Personal service on a defendant in another State—Jurisdiction.

The proper forum for a divorce proceeding is that of the defendant, unless the defendant has removed from the State which was the common domicile of both. The court of no other State has jurisdiction, unless it has obtained it by personal service upon the defendant within its own jurisdiction, or by the appearance of the defendant, and its decree of divorce has no extra-territorial operation.

Hence, where a husband and wife resided in Pennsylvania and the husband went to South Dakota, where he secured a divorce, after obtaining personal service upon the respondent in Pennsylvania, and returned to Pennsylvania, *held*, on a warrant of arrest for non-support of the wife, that the decree of divorce in South Dakota had no extra-territorial effect, and an order for support was made.

Warrant of arrest for non-support. Q. S. Tioga Co., Nov. Sess., 1900, No. 28.

A. B. Dunsmore, Sherwood & Owlett and H. B. Leach, for Commonwealth.

D. W. Baldwin and Merrick & Young, for defendant.

NILES, P. J., Jan. 28, 1901.—There is no dispute in reference to the main facts of the case. No witnesses were sworn on behalf of the defendant. It appears that Charles C. Stevens, the defendant, and his wife, Jennie L. Stevens, were born and raised in the county of Tioga. They were married at Little Marsh, in Chatham township, by the Rev. Mr. Cole, on Sept. 18, 1888. That from the date of their marriage until some time in December, 1892, they continued to live together as husband and wife on the farm of the defendant in the township

10 DIST. R.

of Farmington. There is no evidence in the case that these parties at any time had had any trouble or personal disagreement.

According to the evidence of Dr. Niles, the defendant's wife, Jennie, gave birth to a child on Sept. 15, 1892. Before that, on March 11, 1892, he was called to see her, and found her pregnant, and then of unsound mind. The doctor and a great number of witnesses describe her strange conduct and insane fancies. This evidence extends from 1892 to the present time; taking the uncontradicted evidence for a guide, the court is of the opinion that from September, 1892, the said Jennie L. Stevens has been of unsound mind, and since that time has not been responsible for her conduct.

In December, 1892, Mrs. Stevens went home to her father's, who lived about one-half mile from the residence of Mr. Stevens. About that time, the defendant went to the residence of her father, Mr. Hotchkiss, and took with him Mr. Clark Gee for a witness. On that occasion Mr. Stevens forbade her father from keeping his wife at his expense. Mr. Gee and other witnesses testify that Mrs. Stevens got down upon her knees and said that she was going back home with her husband. Stevens did not offer to take her back home with him. This must have been early in the year 1893.

Mrs. Stevens, with her young child, continued to live with her father, her mental condition continually growing worse, until Jan. 11, 1897, when she was taken by the county commissioners to the county poorhouse. Here she remained until Feb. 2, 1897, when she was, by the county officials, removed to the State asylum. She remained in the insane asylum some three years and eight or nine months, when she was returned to the county poorhouse. After remaining there a few days she was taken to her father's home in Middlebury township. Her condition was such that she only remained at her father's home for a short time, and was brought back to the county poorhouse, where she now is, in the insane department, and is being supported by the county.

Before the warrant of arrest in this case was issued, one of the county commissioners, Mr. Doumaux, and Mr. Kimball, the superintendent of the poorhouse, visited Mr. Stevens at his home, on the farm where these parties had resided from the date of their marriage in 1888 to December, 1892. Mr. Doumaux, in the presence of Mr. Kimball, asked Mr. Stevens if he would take care of his wife. He replied that he was not liable, as he had a divorce from his wife. He, however, agreed to come and see the commissioners in reference to the matter, but did not come. He admitted to the commissioner that he had another wife, and said in substance that he was not able to take care of Jennie and his present family. Mr. Doumaux testified that Mr. Stevens absolutely refused to support his wife Jennie. Soon after that these proceedings were begun.

The evidence shows that from December, 1892, to the present time, the defendant has not contributed anything to the support of his wife Jennie. On Feb. 4, 1895, the defendant was sworn in his own behalf, in his divorce proceedings then pending in the State of South Dakota. He there testified that he had not, in any way, contributed to the support of his wife or child since their separation.

The evidence of the defendant, as well as that of the Commonwealth, shows that Mr. Stevens remained at his home, in Farmington, until March, 1894, when he went to South Dakota. Stevens testified, in his divorce case, that he had resided in South Dakota since March 14, 1894.

The papers in the divorce proceedings show that Stevens made his application for a divorce, on the ground of desertion, on Sept. 29, 1894; that the depositions of Gerry Niles and Jerome Fish were taken before G. D. Keeney, a justice of the peace in Middlebury, in this county, on Jan. 7, 1895, and that the decree of absolute divorce was granted in the Third Judicial District of South Dakota on Feb. 2, 1895. Jerome Fish testified that Stevens, the defendant, was back in

Farmington in March or April, 1895. The evidence further shows that the defendant has resided on his farm in Farmington since he returned from South Dakota in the spring of 1895.

As already stated, the defendant offered no evidence. Therefore, the evidence of the Commonwealth must be taken as admitted to be true. The defendant, as a defence to the case of the Commonwealth, offers the decree of divorce above referred to. It was objected to by the Commonwealth's counsel as being incompetent and irrelevant. It was admitted, reserving the right to pass upon its competency and validity. For the purpose of this case, we are disposed to say that the papers offered are in proper form and show that a decree, in due and legal form, was granted by the proper court of the Third Judicial District in South Dakota on Feb. 2, 1895, absolutely divorcing and separating from the bonds of matrimony the said Charles C. Stevens and Jennie L. Stevens according to the laws of the State of South Dakota.

The counsel for the defendant have argued with great ability and much force that the Constitution of the United States and the Act of Congress, which provides that "the records and judicial proceedings, authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records were taken." See first Revised Statutes, 905. There is no doubt of the correctness of this legal position, providing that the court giving the judgment ever had jurisdiction of the cause of action or the person to be affected by the proceedings. In this case it is not pretended that the wife of the defendant was ever in the State of South Dakota, or even out of the State of Pennsylvania. It is alleged that there was personal service on the defendant at her home in this county. There are two reasons, in our opinion, why this service is not good: 1. The court of South Dakota had no power to make any order that would be binding upon any of the citizens of this State; that it is void for want of jurisdiction; and 2. According to evidence that is satisfactory to the court, at the time the alleged papers were served upon his wife she was insane and unable to be affected by any proceedings that might be had against her. In fact, if Stevens had proceeded against his wife in this court for a divorce, upon the ground of desertion, he could not have obtained it, if it had been shown that she was insane and unable to protect herself in such proceedings. It is well settled that want of jurisdiction may be taken advantage of in any state of the proceedings. Also, that the Act of Congress does not apply to a judgment recovered against a non-resident debtor, without notice to him, and that such judgment is not entitled to any faith or credit out of the State in which it was rendered.

The case of *Phelps v. Holker*, 1 Dallas, 261, was a case of foreign attachment brought in Massachusetts, in which a judgment was entered against the defendant for the property attached, and action of debt was afterwards brought here upon this judgment. Our Supreme Court held that this was a proceeding *in rem*, and ought not to be extended any further than the property attached.

In the case of *Rogers v. Burns*, our Supreme Court, in an opinion by Lewis, C. J., said: "To entitle a judgment recovered in another State to this degree of credit here it is essential that it be rendered by a tribunal having authority over the person of the defendant or over the subject-matter. Where the State has no authority over the person of the defendant, the judgments rendered by its judicial tribunals, although conformable to its legislative enactments, can have no extra-territorial operation." See *Rogers v. Burns*, 27 Pa. 525.

In the case of *D'Arcy v. Ketchum*, 11 Howard, 185, the Supreme Court of the United States held, that "where a judgment was given in New York against two partners, one of whom resided in Louisiana and was never served with process

and an action was brought against him in Louisiana upon this judgment, a peremptory exception, in the nature of a demurrer, that the judgment sued upon is not one upon which suit can be brought against the defendant in this court, was well founded. Congress did not intend that the Act of 1790 to declare that a judgment rendered in one State against a person of another State, who had not been served with process or voluntarily made defence, should have such faith and credit in every other State as it had in the courts of the State in which it was rendered." In a note in this case on page 165 is the following: "When sued in one State on a judgment obtained in another the defendant may plead that the suit was begun by attachment without personal service of process. So the defendant may plead that he was not served with process within the jurisdiction:" *Farmers' Loan and Trust Co. v. McKinney*, 6 McLean, 1. We think that these cases show that the decree granted in South Dakota, there being no personal service on the defendant and the alleged cause of action arising in this State, is of no validity or of binding force against this first wife. Counsel for the defendant admit that, as far as property rights are concerned, this Dakota divorce cannot affect the wife. That he is not bound to support her, and in that contention he is protected by his divorce, and yet he cannot convey his real estate without her joining in the conveyance, and that at his death, she can take a dower interest as widow. This most certainly puts a married woman in a very peculiar position. She has no husband while living, but she is all right as a widow, if she is fortunate enough to outlive her one-time husband.

The case of *Cheever v. Wilson*, 9 Wallace, 108, has been cited and relied upon by the learned counsel of the defendant as authority for the doctrine that the South Dakota divorce is binding upon the wife of the defendant in this State. We think that the counsel have been misled by the syllabus of the case, which, in part, is as follows: "A decree in divorce, valid and effectual by the laws of the State in which it was obtained, is valid and effectual in all other States."

The facts in that case are very foreign to the one at bar. There the applicant for the divorce made her application in the State of Indiana. She formerly resided in the city of Washington, in the District of Columbia. Her husband appeared to the action, and, by his answer, denied the allegations of the wife's bill, and required proof. He also filed a cross-bill, and concluded his petition with a prayer for a divorce *a vinculo*. To this cross-bill Mrs. Cheever appeared without process, and the cause being called for trial, it was, "by the consent of the parties, submitted to the court without a jury." The record in this case further shows that both parties appeared by counsel, and the case was determined on its merits. The court had jurisdiction of both the wife and the husband, and, as a matter of course, the decree was binding on both parties in all "of the States."

In its opinion, the court said: "His answer denied the allegations of the petition. His cross-petition prayed for a divorce, for the custody of the children, etc. . . . The petition laid the proper foundation for the subsequent proceedings. It contained all the requisite averments. The court was the proper one before which to bring the case. The court had jurisdiction of the parties and the subject-matter."

The case of *Pennoyer v. Neff*, 95 U. S. 714, was cited to sustain the principle that the South Dakota divorce had the effect of so far changing the relations between the defendant and his wife as to relieve him from the burden of her support. The question of a divorce did not arise in that case; but the validity of a judgment rendered against a non-resident was discussed and decided. There the Supreme Court of the United States held that a personal judgment is without any validity, if it be rendered by a State court, in an action upon a

money demand against a non-resident of the State, who was served by a publication of summons, but upon whom no personal service of process within the State was made, and who did not appear, and that no title to property passes, by a sale under an execution issued on such judgment.

The other case outside of this State cited by the defendant is the case of *Cheely v. Clayton*, 110 U. S. 701. We may not understand that case, which is very long, and the facts are involved. It rose under a divorce granted when Colorado was a territory. The divorce was granted in Colorado. The property in question was situated in Colorado, and the Supreme Court held that the divorce was a nullity, for the reason that the Territorial Act had not been complied with. We have no doubt that if the defendant was living in the State of South Dakota his divorce would be held valid in that State, as the Colorado one would have been held valid as to the property located in that State. But we think that no case will be found where a judgment or a decree in divorce has been held to be binding outside of the State giving the judgment or granting the divorce where there was no personal service within the State. The Colorado case would be in point if the parties were in South Dakota, where the defendant obtained his decree. We do not think that either of the three United States cases rule the question now before the court. Neither, as we remember, has this question been decided by our court here in this county.

But there are many decided cases in Pennsylvania, some of which were cited by the learned counsel for the Commonwealth. We will refer to some of them as the foundation for the order that we intend to make. The question here involved is an important one, and one that may affect many of our citizens. It certainly is a question in which the public is vitally interested. It is important that our people should know whether a party can go to a distant State, 2000 miles from the common domicile, and obtain a valid decree from the bonds of matrimony for a cause that is alleged to have occurred in this State.

The first leading case in Pennsylvania is *Colvin v. Reed*, 55 Pa. 375. There the Supreme Court held that a divorce, granted in the State of Iowa, had no binding force in Pennsylvania; that the law of the place of the actual domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local courts, without reference to the law of the place of the original marriage. The law of the domicile implies that it is the actual domicile of both parties or was when the offending party left it.

Where the injured party seeks a new domicile and the domiciles are therefore actually different, there is no greater reason why the husband's new domicile should prevail over the wife's than her's over his. Nothing but the possession of the person of the wife before or at the time of the proceeding can warrant another State to subject her to its jurisdiction: *Colvin v. Reed*, 55 Pa. 378.

The case of *Reel v. Elder*, 62 Pa. 308, we think directly rules this case and determines the issue pending against the defendant. Mr. Justice Sharswood, pronouncing the decision of the court, says that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicile of both. No one who has not shut himself out by flight from justice can be condemned without hearing, or an opportunity of being heard. If the court has not jurisdiction, neither notice nor process duly served can give vitality to its judgments. Such judgment is void, at least as to any extra-territorial effect. This was a case where the courts of Tennessee had granted a divorce, where the common domicile of both parties had been in this State, and where the wife had never been a resident outside of this Commonwealth.

As to the extra-territorial effects of a decree in divorce, see *Van Storch v. Griffin*, 71 Pa. 240. The same question was decided in *Platt's Appeal*, 80 Pa. 501.

Commonwealth v. Stevens.

The case *In the matter of Fyock's Estate*, decided in 1890, followed *Reel v. Elder*, and *Colvin v. Reed*, and held that a foreign divorce had no extra-territorial effect. In that case the husband and wife were married in Pennsylvania. In 1878, the husband having deserted his wife, a divorce *a mensa et thoro* was granted to the wife by the court of the domicile in that State. In 1881, a decree of absolute divorce was granted to the husband by a court in Nebraska, the wife still living in Pennsylvania. In this case, the husband having returned to Pennsylvania, where he died intestate in 1899, and the court of Nebraska granting the divorce having no jurisdiction, neither decree was effective to take away the right of the wife to receive letters of administration upon the estate of her deceased husband: *Fyock's Estate*, 135 Pa. 522. Also, see *Wetherby v. Wetherby*, 11 W. N. C. 154. This latter case refers to the case of *Cheever v. Wilson*, cited by the defendant's counsel in 9 Wallace, 108, and says: "These broad expressions must be read in view of the facts of the case, which showed that the husband had appeared in the proceedings and submitted to the jurisdiction. Both parties, therefore, being before the court, were bound by the decree everywhere they might subsequently go:" 11 W. N. C. 154.

In the case of *Com. v. Shuler*, 2 District Reps. 552, it is held that a decree of divorce in a foreign jurisdiction against a respondent, upon whom no personal service was had, and to whom no service was given, other than publication, has no extra-territorial effects. The appearance of such respondent after the entry of the decree in the foreign tribunal, asking for a hearing and alleging want of notice, does not make her a party to the record when the motion was denied on the ground that the original service by publication was sufficient and final.

As bearing directly upon this case we cite the case of the *City of Philadelphia v. Moore*, 19 Phila. 540, decided in 1888, in an opinion by Judge Thayer. This was a proceeding for desertion under the Act of 1836, upon which a warrant of seizure had been issued. Judge Thayer said that a divorce granted in another State, it appearing that no summons was served upon the respondent, that she did not reside in that State, and had no notice of the proceedings, will be of no validity in this State. That a judgment or decree obtained in one State of the Union, where the court had no jurisdiction of the party whose rights are affected, has no extra-territorial validity, and is of no binding force in another State.

In the case of *Com. v. Maize*, 23 W. N. C. 572, it was decided that a court in another State has no jurisdiction to grant a divorce where the defendant resides in Pennsylvania and has not removed from what was the common domicile of both parties. Neither notice or process, duly served, can give vitality to its judgment, which is void, at least, as to extra-territorial effect.

In the case of *Com. v. Steiger*, 2 District Reps. 493, decided in 1892, Judge Livingston held that where a divorce is granted in a State where one of the parties is domiciled and the other party has always been a non-resident, and has made no defence, the decree will only be valid in the State where it is granted.

In the case of *Com. v. Bolich*, 18 Pa. C. C. Reps. 401, Judge Pershing held that in a proceeding in divorce the injured party must seek redress in the forum of the defendant, unless the defendant has removed from what was the common domicile of both.

The case of *Com. v. Ainsworth*, 6 District Reps. 707, decided in 1897, is nearly like ours. It arose in desertion proceedings in Allegheny county. There, as in our case, the husband had gone to the State of North Dakota and obtained a divorce under the laws of that State. Soon after he obtained his decree in divorce he returned to Pennsylvania, where he was arrested, under the Act of 1867, for the purpose of compelling him to support his wife and child. Judge Frazer held that the wife was entitled to an order for support in desertion pro-

ceedings, although her husband had obtained a divorce in Dakota, where it appeared that the wife was never domiciled in Dakota, and the evidence shows that the husband merely went to that State to secure a divorce, and left immediately after he obtained it.

A large part of the cases cited above were cases of desertion like ours, where the husband was arrested for neglecting to support his wife and children.

The only Pennsylvania case cited by the counsel for the defendant to show an extra territorial effect to a decree in divorce is *Hull v. Hull*, 8 District Reps. 420. We think that a careful consideration of that case shows no authority for the contention of the defendant. The evidence and pleadings (so said the judge) showed that the parties were married in Kentucky, lived in Ohio until the fall of 1896, where the cause of the complaint arose; that complainant was a citizen of Pennsylvania at the time the decree was entered, and had been so for nearly two years; that respondent moved to Tennessee in the fall of 1896, shortly after the complainant came to Pennsylvania, and that no personal or constructive notice was served upon her. It will be observed that here the wife left the common domicile of both parties, where the injury complained of was committed, which is a very different case from ours. There was no question before Judge Thomas as to whether the decree was binding outside of Pennsylvania. It was, is the decree good in the State where granted? The same as though we were in the State of Dakota and trying to set aside the decree of their court. But, to show that Judge Thomas did not, for a moment, believe that his divorce had any extra-territorial force, we will quote what he said on page 423 of the report: "But while it may, by proper judicial proceedings, adjudge the status of its citizens toward a non-resident, it may not extend the effects thereof beyond its own boundaries, and fix a status upon a non-resident without notice or consent, nor may it, without notice or jurisdiction of the person, affect the vested property rights of said non-resident."

If the defendant's wife Jennie had removed from Pennsylvania before he had made his application in Dakota, our case would be more like the case in 8 District Reps. 420. Unless we are mistaken, for more than twenty years, the courts of Tioga county have uniformly held that, in order to give it jurisdiction, there must be either personal service within the State, or that the cause of action must have occurred within the Commonwealth. In other words, that the court must have jurisdiction of either the person or the cause of action. It has been many years since the law as laid down by Judge Thomas has been held to be good law in this county.

We have gone over the facts and the decided cases at some length, for the reason that, so far as we know, no case just like this has been before our court and been decided.

In our opinion, the divorce of Charles C. Stevens from his wife, Jennie L. Stevens, granted by the court of South Dakota, is void for want of jurisdiction. And that this divorce does not relieve him, as far as the laws of Pennsylvania are concerned, from his legal obligation to support his wife, imposed upon him by the laws of Pennsylvania.

In accordance with these conclusions, we make the following order and decree:

And now, Jan. 28, 1901, the court, having heard the parties in the above case, their proofs and allegations, thereby orders that Charles C. Stevens, the said defendant, pay the sum of \$1 per week to the commissioners of Tioga county toward the care, maintenance and support of his wife, Jennie L. Stevens, to be computed from and after Jan. 1, 1901; that he pay the costs, and that he give security to the Commonwealth, to be approved by the court, in the sum of \$500, for the faithful performance of this order, and that he stand committed until this order is complied with.

From F. H. Rockwell, Wellsboro, Pa.

10 Dist. R.

Commonwealth v. Allport.

Desertion—Justification—Morphine habit—Foreign divorce.

The fact that a wife has become addicted to the morphine habit is not in itself a justification for desertion by the husband, so as to relieve him from the duty of supporting her.

Where the marriage ceremony was performed in Pennsylvania and the parties lived together as man and wife in that state, and that state only, and any injury sustained or suffered by the husband as ground for divorce was sustained in that state, and the wife, ever since the marriage, has been domiciled in that state, the husband cannot, by removing to Kansas, give the courts of that state jurisdiction to decree a divorce, and a divorce granted by the courts of Kansas, under such circumstances, is no bar to an action by the wife for desertion and non-support.

Arrest for desertion and non-support. Q. S. Blair Co., June Sess., 1901, No. 114.

W. L. Hicks, district-attorney, and W. I. Woodcock, for Commonwealth.

T. H. Greevy, for defendant.

BELL, P. J., Sept. 16, 1901.—The defence in this case is two-fold: 1. That defendant was justified in leaving his wife because she had become addicted to the morphine habit. 2. A divorce in the State of Kansas was offered as a bar to the right of support.

As to the first ground, defendant offered to prove that the wife, Mrs. Winifred Allport, was addicted to the use of morphine, and, while under the influence of that drug, had struck him and acted cruelly toward him and annoyed him. I overruled this offer because I deem the morphine habit a disease. Possibly the use of morphine, in connection with other grievances, might be cause for a divorce, but, until an appellate court rules otherwise, I will not consider it justification for desertion so as to relieve a husband of the duty of support. As to the Kansas divorce: The evidence showed that the parties were married in 1897 in Pennsylvania and lived together in this State until the spring of 1899. At that time the defendant left his wife in Hollidaysburg, Pa., telling her that he was going to Phillipsburg to see after some expected interest in the estate of an aunt. He never communicated again with her, and she was ignorant of his whereabouts until the spring of 1901, when, having returned to Pennsylvania, he was arrested in this desertion proceeding.

He testified that, immediately after leaving Hollidaysburg, he went to Texas. He remained there only two weeks, then he went to Wichita, Kansas. He was there eighteen months, then he went to Helena, Montana, where he remained one week. He came to Pennsylvania on Dec. 1, 1900, and has been in this State ever since. He attended Lehigh University last winter, and intends to go to the same institution this coming winter, an aunt, in her will, having made provision for his education. While I was writing this opinion, defendant and his counsel both claimed that defendant was still a citizen of Kansas. If, however, that was a material question, I would find from his evidence given prior to such claim that he is now a citizen of Pennsylvania.

Defendant produces an absolute divorce granted in Sedgwick county, Kansas, on May 12, 1900. Assuming that the proceeding is regular in accordance with the laws of Kansas, I think it is entitled to no weight in Pennsylvania.

The marriage ceremony was performed in Pennsylvania. The parties lived together as man and wife in this state and in this state alone. Any injury sustained or suffered by the defendant, as grounds for divorce, was sustained in Pennsylvania. Ever since the marriage the wife has been domiciled in this state. She has not been in Kansas. Under such a state of facts, defendant could not, by removing to Kansas, give the courts of that state jurisdiction to decree a divorce. A divorce granted under such circumstances would be invalid, because the courts of Kansas had jurisdiction over neither the defend-

ant nor the subject-matter. The authorities on this subject are most ably and elaborately reviewed by Judge Niles in *Com. v. Stevens*, 10 District Reps. 652, and I deem it necessary to cite no other authorities. The wife swears that she had no notice of or knowledge of the divorce.

Now, Sept. 16, 1901, defendant is adjudged guilty and ordered and sentenced to pay the costs and to pay to his wife, Mrs. Winnifred Allport, for her support, the sum of \$12 per month, to commence Sept. 1, 1901. Defendant is further ordered to give bond, with at least one good surety, to be approved by the court, in \$300, conditioned for his compliance with this order.

From Robert W. Smith, Hollidaysburg, Pa.

Lansdowne Borough v. Hoffman.

Roads—Vacation of—Boroughs.

Borough authorities have power to vacate roads, but the mere adoption of a plan locating its streets by a borough, after its incorporation, will not vacate the public roads running through the borough, if they shall happen not to be adopted as streets.

Trespass for personal injuries. *C. P. Delaware Co.*, March T., 1899, No. 292.

F. T. Pusey, for plaintiff; *A. L. Smith*, for defendant.

JOHNSON, P. J., Jan. 21, 1901.—In the year 1899 Rebecca Nudd brought suit against the borough of Lansdowne for injury received by her falling into a hole on the west side of Burmont avenue, and recovered a judgment against the borough for \$1200. This judgment the borough paid, and now it brings suit against Jacob Hoffman, alleging that the accident was caused by reason of a defective sidewalk in front of lands owned by him, and claims the right to recover from him on this account the money paid Mrs. Nudd, with interest and costs.

The verdict was for the defendant. Quite a number of reasons for a new trial have been filed, but the main reasons relied upon are those relating to the effect that the adoption of the plan of the streets of the borough have upon the questions in controversy. Prior to the incorporation of Lansdowne borough, Burmont avenue was an old road leading from Baltimore avenue to Burmont station, and is joined at Baltimore avenue by a road known as the Mathue Hollow road. These roads overlapped each other about their junction with Baltimore avenue. Burmont avenue at this time was a narrow way, and there was some dispute whether it was a public road or not. In 1885 or 1886 a jury was appointed by the Court of Quarter Sessions and laid out a fifty-foot road, from the Baltimore pike to Burmont station, over the Burmont road.

Part of the defence was that the place where the accident happened was in the middle of the roadway of the fifty-foot road and not on the sidewalk. The great question at the trial on this point was whether the road had been visibly opened at this place by the township authorities, and whether the place where the accident happened was in the roadway or sidewalk. The court left both of those questions to the jury.

The plaintiff claims that this was error, and contends that after the borough of Lansdowne was incorporated, it made a plan of streets, one of which it laid out over the Burmont road. This street does not cover all of the fifty-foot road, but the claim is that the adoption of the plan has the effect of vacating this fifty-foot road and all other roads and parts of roads in the borough not on the plan.

I have no doubt of the power of the borough authorities to vacate streets, but am not ready to concede that after the incorporation of a borough, and the borough adopts a plan and locates its streets, that the mere adoption of its plan

Lansdowne Borough v. Hoffman.

has the effect of vacating the public roads running through the borough if they shall happen not to be adopted as streets.

Wetherill v. Pennsylvania R. R. Co., 195 Pa. 156, is relied upon. In that case the councils of the city of Philadelphia passed an ordinance authorizing the department of public works to revise the city plans in such a way as to strike therefrom a part of Wheat Sheaf lane. The department of public works did strike a part of Wheat Sheaf lane from the plan, and the Supreme Court said the department had the right, in obedience to the authority and direction of council, to do it. This case is not authority for plaintiff's contention. The borough of Lansdowne never, by any act of council, vacated this fifty-foot road.

Carpenter v. Pennsylvania R. R. Co., 195 Pa. 161, is also referred to. In that case a city ordinance authorized the department of surveys to revise the lines, grades, &c., in a certain part of the city. They struck off Tacony road. The Supreme Court said it was in the province of the authority conferred upon the department by councils.

Neither of these cases, as I read them, rule that the ordinance of Lansdowne borough, in adopting its plan, had the effect of vacating this fifty-foot street. Being of the opinion that the instruction to the jury and the ruling upon the question were correct, the rule for a new trial must be dismissed.

Rule dismissed.

From W. Roger Fronefield, Media, Pa.

Hull's Estate.

Insolvency—Act of June 4, 1901—Constitutionality of.

The Act of June 4, 1901, P. L. 404, relating to insolvency, is constitutional. It is essentially a bankrupt law, and can only operate in subordination to the Federal law on the same subject. Until the paramount jurisdiction of the Federal law is called into operation upon the particular subject-matter, the State law is operative.

While, under Federal law, a voluntary deed of assignment is an act of bankruptcy, yet it is not for this reason void, but creates a trust so far valid that, unless superseded by adverse proceedings in the Federal courts within four months next following its execution, it will result in an entirely legal conversion and distribution of the estate assigned to and among the beneficiaries.

The Act contemplates an entire transfer of the property into the custody of the assignee for purposes of conversion and distribution, unembarrassed by adverse legal process, whenever it is possible or practicable for this to be accomplished through the intervention of the court. It is not a question for the court, in any case, whether such intervention will promote or prejudice the interests of any concerned. Hence, when a writ of *fi. fa.* is issued against a judgment debtor at the instance of a judgment creditor, and a levy made upon the real and personal property of the debtor, and, pending the writ and subsequent to the levy, the debtor executes and delivers a voluntary deed of assignment in trust for the benefit of his creditors, a rule to show cause why the *fi. fa.* should not be vacated and set aside as to the personal property and stayed as to the real estate will be made absolute.

Rule to show cause why execution should not be vacated as to personal property and stayed as to real estate. *C. P. Franklin Co.*, Sept. T., 1901, No. 35, *fi. fa.*

Sharpe & Elder, for rule; *W. Rush Gillan*, contra.

STEWART, J., Sept. 2, 1901.—A writ of *fi. fa.* to No. 35, September Term, 1901, was issued at the instance of Elamina Snider, a judgment creditor of John S. Hull, and the property of the defendant, both personal and real, has been levied upon in satisfaction. Pending this writ and subsequent to the levy, the said John S. Hull executed and delivered to W. K. Sharpe, Esq., a deed of voluntary assignment, in trust for the benefit of his creditors. This deed having been duly recorded, Mr. Sharpe, the assignee, who had duly qualified, presented his petition, setting forth, among other things, that he had given notice to the lien

creditors of the assignor of his intention to apply on the first day of our next regular term, for an order to sell the real estate assigned, discharged of liens, and praying that the writ of *fi. fa.* under which said real estate had been levied upon be stayed by order of the court, and that said writ, so far as it had been levied on the personal property of the assignor, be vacated in accordance with the provisions of section 16 of the Act of June 4, 1901, entitled "An Act relating to insolvency," etc. Thereupon a rule was ordered to show cause. Answer is made, in which the right to the relief prayed for is denied, for the following reasons: (1) that the Act of June 4, 1901, relating to insolvency, is unconstitutional; (2) that even though it be constitutional, yet, being a bankrupt law, it is not presently operative, inasmuch as there is at this time in force a Federal bankrupt law; and (3) that, without this, the Act in question does not require that the court stay proceedings against the assigned real estate, and that no sufficient reason has been shown why this power in the court, if it does exist, should be called into exercise in this particular case.

The writ we are asked to stay is about being executed, and the return-day is close at hand. We regret the exigency that prevents a fuller examination of the questions raised, since they seem to be properly in the case, and are difficult as well as important. We can only state the conclusions we have reached, without attempting, except in the briefest way, an argument in their support. They are the result of as careful investigation as we have been permitted to make.

1. The Act of June 4, 1901, is essentially a bankrupt law. Differing in some of its features from the Federal law on the same general subject, it is in entire correspondence with it in its objects and purposes, and not materially different in its methods.

2. This Act is not violative of any constitutional rule or principle, and is operative as existing law.

3. It can, however, only operate in subordination to the Federal law on the same subject; that is to say, the Federal enactment is the superior law, and whenever the jurisdiction of the Federal courts is asserted on any subject-matter, person or rights, within the purview of the Federal enactment, the State law ceases to operate; and even though the State court has taken cognizance of the subject, it being at the same time within the purview of the State law, and has proceeded somewhat in the settlement of the bankrupt's estate, yet such court is at once ousted of its jurisdiction the moment the Federal law is put into operation with respect to the bankrupt or his estate. Until, however, the paramount jurisdiction is actually called into operation upon the particular subject-matter, the State law operates.

4. No attempt having been made to subject this assignor or his estate to the operation of the Federal law (and, so far as we are advised, none is contemplated), there is no reason why the estate may not be converted and distributed under the State law, subject, of course, to interruption when, if ever, the superior jurisdiction is asserted.

5. While, under Federal law, a voluntary deed of assignment is an act of bankruptcy, yet it is not for this reason void, but creates a trust so far valid that, unless superseded by adverse proceedings in the Federal courts, within four months next following its execution, it will result in an entirely legal conversion and distribution of the estate assigned to and among the beneficiaries.

In reaching these conclusions, we have not overlooked the many cases in which the doctrine is asserted that the existence of a Federal bankrupt law, *ipso facto*, works immediate and absolute suspension of all State laws upon the same subject. This doctrine is supported by most eminent authority, which, under ordinary circumstances, we would not presume to disregard,

Hull's Estate.

except as we could find warrant for such course in an authoritative decision of our own Supreme Court. We have in mind especially the decisions in *Parmenter Manufacturing Co. v. Hamilton*, 172 Mass. 178, and *Harbaugh v. Costello*, 184 Ill. 110, which refer specifically to the existing Federal bankrupt law, and are the most recent adjudications on the subject. But our Supreme Court has never as yet asserted this doctrine. It was asked to do so in *Beck v. Parker*, 65 Pa. 264, but it declined to make any deliverance, because, as is said in the opinion, "the important question which has been agitated, whether the enactment of a uniform law on the subject of bankruptcy by the Congress of the United States, *ipso facto*, suspends the operation of the insolvent laws of the different States, does not arise in the case." The same thing again occurred, with like result, in *Barber v. Rogers*, 71 Pa. 364. If there has been a nearer approach to the question by our highest court, we have failed to find it. There is nothing that we can discover requiring uniformity of decisions throughout the States on this subject; there may be contrariety without confusion. Such contrariety has existed with respect to the force of every Federal bankrupt law we have had to a greater or less degree. Where supremacy is yielded to the Federal law, when it is sought to be applied, there can be no conflict. If in Pennsylvania we choose to administer insolvent estates in our own way and in our own courts, when Federal authority has not actually attached the person or property of the bankrupt, we are strictly within our rights, and within these limits our State laws may operate without infringing in the slightest degree upon the Federal supremacy. Allowing the Act of June 4, 1901, to be constitutional, there are cogent reasons, aside from the pure logic of the case, why it should be regarded as operative. We do not say despite the logic of the case, but in support of the logic that would sustain the Act. If the Act be held to be suspended and inoperative, it is difficult to see how an assigned estate for the benefit of creditors can be safely and properly administered here. That such assignments are valid, independent of any statute, is beyond question. If it be an assignment by one not a trader it is not within the purview of the Federal law; if by a trader, and not assailed within the four months next after its execution, it is exempt from attack. How are trusts such as these to be administered if not under and according to the provisions of this Act of June 4, 1901? By the last section of the Act all prior legislation with respect to deeds of assignment and the administration of the trusts thereby created is repealed. This would leave us without any established system or rules for the settlement of assigned estates. A whole system was thought necessary to secure a wise, honest and equal administration of such trusts; but by the repealing clause of this Act this has been swept out of existence, unless, indeed, by a stretch of judicial authority which would approach perilously close to the legislative function, the doctrine of suspension is to be here again applied, and we be required to hold that the repealing clause becomes operative only when the Federal bankrupt law ceases.

Regarding the State law as presently operative, at least upon the assignment of John S. Hull as it now stands, the question arises, What is its fair intentment as to the power and duty of the court in the matter of staying executions levied upon assigned real estate? As regards process under which the personal property of an assignor has been seized, the Act requires the court, upon application of the assignee, to vacate and set it aside; but with respect to executions issued on liens upon the assigned real estate, it is provided in section 19 that these "may be stayed by the court to enable the property to be sold by the assignee." The language thus used would seem to invest the court with a discretionary power; but the question at once arises, if discretionary, a legal and not arbitrary discretion being intended, what considerations are to determine the

judicial action? Upon this subject the Act is silent. The earlier Act of 1876, which gave the courts power to stay process and order a sale of the real estate divested of liens, restricted its exercise to cases where it was uncertain whether the property would sell for an amount sufficient to pay the liens. Neither that Act, nor the adjudications thereunder, can reflect any light upon the question we are now considering. The present Act is to be interpreted by its own terms, and we can derive no help from any other quarter. The expressed purpose of this particular provision is "to enable the property to be sold by the assignee." Having regard to the Act as a whole, establishing, as it does, a complete scheme or system of rules for the settlement of assigned and insolvent estates, we are of the opinion that it contemplates an entire transfer of the property into the custody of the assignee for purposes of conversion and distribution, unembarrassed by adverse legal process, whenever it is possible or practicable for this to be accomplished through the intervention of the court. It does not seem to be a question for the court, in any case, whether such intervention will promote or prejudice the interests of any concerned. We find no suggestion of such an idea in any part of the Act. Notwithstanding the language is that the court may restrain, we are of opinion, from the general purpose of the Act and the absence of all reference to the legal considerations which could operate upon a discretionary power, that this provision in the Act is mandatory and requires the court, whenever the occasion arises, to exercise the power conferred. The rule of interpretation, where permissive words are used in an Act, is thus stated by Judge Endlich, in his work on the Interpretation of Statutes, § 312: "The result seems to be that, when a public power for the public benefit is conferred in enabling terms, a duty is imposed to exercise it whenever the occasion arises. These terms are then, in effect, invariably invested with a compulsory force, and when a judicial discretion is found to be involved in the exercise of the power, this is not owing to the circumstance that the power is couched in the language of authorization only and not of command, but because, according to the construction of the Act, it is intended by the legislature that the power shall be exercised only when some fact is found to exist which can, from its nature, be ascertained only by the judicial discretion. Since, therefore, a direction contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional, where the good sense of the entire enactment requires its provisions to be deemed compulsory, it is evident that the question is, in every case, one of intention. And the intent is to be judged of by the purposes of the statute. Where those purposes are to provide for the doing of something for the sake of justice, something which concerns the public rights or interests, and for the doing of which the public has a claim *de jure*; something which concerns and subserves third parties, and for the doing of which they have a claim based upon existing rights, and, of course, where the thing to be done concerns and subserves rights both of the public and individuals—in all these cases an intent to be inferred, that, in using a permissive phrase, the legislature really meant to enjoin an imperative duty."

We derive much help in the interpretation of the Act under consideration from the rule thus stated, but we regard the fact that the law makes no mention of the circumstances or conditions upon which judicial discretion is to be based as of itself conclusive that no discretionary power was intended.

For the reasons stated, however inadequately expressed, the rule in this case must be made absolute.

And now, Sept. 2, 1901, the writ of *fi. fa.*, No. 35, September Term, 1901, is vacated and set aside as to the personal property levied upon thereunder, and as to the real estate levied upon it is stayed.

From William Alexander, Chambersburg, Pa.

Lyndall v. The Board of Public Education et al.

Schools—Power of Board of Education to suspend teachers—Vaccination.

The Board of Public Education of Philadelphia has power to suspend and dismiss teachers who refuse to obey an order of the board requiring teachers and other employees to produce a certificate of successful vaccination within five years.

Motion for an injunction. C. P. No. 4, Phila. Co., Sept. T., 1901, No. 1886.

C. Oscar Beasley, for plaintiff.

John L. Kinsey, city solicitor, and *Ernest Lowengrund*, for defendants.

ARNOLD, P. J., Nov. 14, 1901.—As school directors may, in the exercise of a sound discretion, exclude from the public schools pupils who have not been vaccinated, as was decided by the Supreme Court in the case of *Duffield v. The Williamsport School District*, 162 Pa. 476 (1894), so may they exclude teachers and other employees for the same reason. The protection which vaccination is believed to afford must be reciprocal; teachers and pupils are alike entitled to protection against contagious disease. Whether vaccination is a preventive of small-pox this court has no power to investigate and decide. The legislature has authorized, and the Supreme Court has sustained regulations requiring vaccination, and therefore a court of the first instance is prohibited from inquiring into the efficacy of vaccination as a preventive of small-pox: *Field v. Robinson*, 198 Pa. 638 (1901). The opinion of the plaintiff that vaccination is not a preventive, and that it would be dangerous to her health, is not a sufficient reason to exempt her from obedience to the order of the Board of Education requiring vaccination. Hence the offer of the plaintiff to show that she considered it dangerous to her health was irrelevant and immaterial, and was properly rejected.

The plaintiff having refused to obey the order of the Board of Education to produce a certificate of successful vaccination within the last five years, the chairman of the Girls' High School had full authority to suspend her and report his action to the committee for ratification, which has been done. In all cases of this kind requiring prompt action, authority to act in the first instance resides in the chairman or other visiting member of the committee, subject to the approval or disapproval of the whole committee.

The contention of the plaintiff that she cannot be suspended except for incompetency, cruelty, negligence or immorality, under the Act of May 8, 1854, P. L. 622, if that were the only Act bearing on the subject, is not sustainable. Under the Act of March 3, 1818, 7 Sm. Laws, 53, which, by section 50 of the Act of 1854, was declared to be concurrent with the provisions of that Act, the Board of Public Education of the First School District has the general superintendence over all the schools established under and by virtue of that Act in the said district, and may make such rules and regulations for their own government and for the general regulations of the district as may be deemed necessary for carrying the Act into complete effect. Even if the Act of 1854 were the only statute on the subject, we have no hesitation in saying that disobedience of the reasonable orders of the Board of Education is an act of negligence. There are, however, other causes for which a teacher may be suspended or dismissed. Thus, incurable disease, loss of reason or hearing or sight or limbs may result in the loss of employment by a teacher, yet it is not necessary that these causes should be written in the laws or rules of the school. The law applicable to cases of this kind is the ordinary law of master and servant. If a servant disobeys the reasonable orders of his employer, he may be suspended or discharged. In the present case the plaintiff is "too self-opinionated," as has been said in the books: See *Wood on Master and Servant*, § 116; *Cassidy v. Janauschek*, 17

Lyndall v. The Board of Public Education et al.

Phila. 325. She has set up her own opinion against that of the Board of Education. She has refused to comply with a lawful regulation of the Board. Therefore, she is subject to suspension and dismissal.

Having thus disposed of her application for an injunction, we would add that we have no power to put her back into the Girls' High School as a teacher, and that if she had been improperly suspended, her remedy would be a suit for the salary due to the occupant of the place she held. But as the case was fully tried upon its merits, we decide that she has been properly suspended.

Injunction refused. Bill dismissed.

The Rector, etc., of Christ Church v. Bala Golf Club et al.

Waste—Injunction—Landlord and tenant.

The attempt of a tenant to grant a license to construct a temporary railroad, with cuttings and fillings, across the leasehold, and occupy the same within the tenant's term under the lease, the railroad not being constructed for the tenant's use, is a waste of the freehold and will be restrained by injunction.

Landlord and tenant—Lease—Use not authorized.

The tenant of a piece of real estate leased for the purposes of a golf course cannot use it or license its use for other purposes inconsistent with the lease, nor grant a license for the construction of a temporary railroad not constructed for the use of the tenant or the purposes of the lease.

Railroads—Golf terms.

A railroad is neither "a natural hazard" nor a "rub of the green."

Bill for injunction and other relief. C. P. No. 3, Phila. Co., June T., 1901, No. 835, in Equity.

William White, Jr., and Charles Henry Jones, for complainants, cited: As to waste, *Devlin v. Snellenburg*, 132 Pa. 186 (1890), *Per Cur.* (Judge Finletter's charge); *Lewis v. Jones*, 17 Pa. 262 (1851), *Lewis, J.*; *Jones v. Whitehead*, 1 *Parsons*, 304 (1847), *Parsons, J.*; *Deney v. Brunson*, 29 Pa. 382 (1857), *Woodward, J.*; *Real Estate Trust Co. v. Hatton*, 194 Pa. 449 (1900), *McCullom, J.*; *Allison's Appeal*, 77 Pa. 221 (1874), *Williams, J.*; *Baughner v. Crane*, 27 Md. 36 (1867), *Crain, J.*; *Maddox v. White*, 4 Md. 72 (1853), *Eccleston, J.*; *Pratt v. Brett*, 2 *Maddock's Ch. Rep.* 62 (1817); *Pulteney v. Shelton*, 5 *Vesey, Jr.*, 147 (1799); *Taylor's Landlord and Tenant*, § 345. As to a use not authorized by the lease, *Lewis v. Jones*, 17 Pa. 262 (1851), *Lewis, J.*; *High on Injunctions* (3rd ed., 1890), vol. 1, § 434.

John G. Johnson, for respondent.

MCMICHAEL, J., June 24, 1901.—This case was tried before me on June 14, 1901; *William White, Jr., Esq.*, and *Charles Henry Jones, Esq.*, appeared for the plaintiffs, and *John G. Johnson, Esq.*, for the defendants.

The case had been originally set down for hearing upon application for preliminary injunction. Mr. Johnson filed the answer of the defendants at bar, and by agreement of all parties testimony was taken and the cause heard upon bill, answer, replication and proofs.

The plaintiff called Mr. R. Winder Johnson and Mr. Richard Maris as witnesses. The defendant called as witnesses Mr. Frederick Jardin, Mr. Charles P. McCully and Mr. Edward H. Hanson.

The controversy which was tried before me was, in brief, as follows: The trustees for Christ Church Hospital had made an agreement leasing to *James A. Logan* and *George H. Strawbridge* property owned by the Christ Church 10 DIST. R.

The Rector, etc., of Christ Church v. Bala Golf Club et al.

Hospital trustees, known as the Christ Church Hospital Farm, situated adjacent to the Bala station of the Schuylkill and Juniata Railroad Company, which railroad is owned or leased by the Pennsylvania Railroad Company. The lease was subsequently transferred to the Bala Golf Club, which is a corporation formed for the purposes of playing golf and other out and in-door games and amusements. The lease was for five years from the first day of April, 1901, at a rental of \$600 for the first year, \$650 for the second year, \$700 for the third year, \$750 for the fourth year, and \$800 for the fifth year. The Bala Golf Club entered into possession of the land, and, subsequently, either executed or were about to execute a license to Daniel J. McNichol to construct a single-track railroad across a portion of the Christ Church Hospital Farm, the leased premises, from a point on the line of the Schuylkill and Juniata Railroad, immediately southeast of and not more than 100 feet from the bridge carrying City avenue over said railroad to a point on Conshohocken avenue intermediate between City avenue and the lane leading from Conshohocken avenue to The Rabbit and the club-house of the said Bala Golf Club, all in the city of Philadelphia. For this license or permission, McNichol agreed to pay the Bala Golf Club \$2250 for one year, and other consideration mentioned in the so-called license.

The Schuylkill and Juniata Railroad Company and the Pennsylvania Railroad Company formally disclaimed any interest in the matter.

It appeared from the testimony that, in order to construct this branch road, siding or railroad track, it would be necessary to make certain cuttings and fillings, which would, to a certain extent, inconvenience other tenants of the trustees of the hospital, and would seriously damage and interfere with the sale of any of the property of Christ Church Hospital trustees. The railroad was to be used for the convenience of a contractor with the city of Philadelphia, who was about to construct filter plants at some distance from the railroad. The testimony showed that there was another location which could be made use of for the railroad track, but that it would not be so convenient to the defendant, McNichol, as the one across the lands of the Christ Church Hospital trustees.

After the hearing of the testimony, I directed the issuance of an injunction to prevent the defendants from executing the license contemplated, or from building the railroad track upon the land of the Christ Church Hospital trustees.

I am of opinion and so find that the contemplated use by the Bala Golf Club of the premises leased by them from the Christ Church Hospital trustees would be an act of waste, and should be restrained by injunction. And I further think and so find that there is no authority in the charter of the Bala Golf Club in any wise enabling or authorizing it to license the construction of a railroad track over the lands of its lessors. I do not think that it is necessary to elaborate the reasons for the conclusions at which I have arrived. It seems to me quite clear that both the lessor and lessee had in contemplation the use of the leased premises for a golf club, and, although it was humorously contended by the counsel for the defendants that a railroad track would constitute a very good "bunker," I cannot find that such an obstruction would be either a "natural hazard" or a "rub of the green." It was further contended by the counsel for the defendant that the lessee had a right to sub-lease the land for any purpose, but it does not seem to me that the agreement made by McNichol with the Bala Golf Club was a sub-lease. It was, as it appears to be, a mere license or permission to McNichol to use the land with his railroad track, the Bala Golf Club in no way yielding possession to McNichol. But whether it was a sub-lease or not, I think it was unauthorized and an act of waste on the part of the tenant.

Stroheim & Romann v. Pack & Sons Manufacturing Co.

Practice, C. P.—Foreign notaries—Authority to take affidavit—Presumption of—Denial of same—Affidavit of defence.

In the absence of proof to the contrary, it will be presumed that a notary of another State has power to take an affidavit, and the certificate of a notary public under his notarial seal is *prima facie* evidence that the person who uses it and signs the certificate is a duly commissioned notary. Hence, an affidavit of defence which does not deny that the statement was duly sworn to before a notary public, or that he was authorized to administer the oath, but only alleges that his authority does not appear, is insufficient.

Practice, C. P.—Affidavit of defence—Necessary averments—Collateral security—Obtaining judgment thereon without receiving satisfaction for the debt.

An affidavit of defence which merely avers that judgment has been obtained by plaintiff on a note held as collateral security, without also averring that the amount of the debt has been realized therefrom, is insufficient.

Rule for judgment for want of a sufficient affidavit of defence. C. P. No. 5, Phila. Co., June T., 1901, No. 3427.

John Sparhawk, for plaintiffs; Joseph A. Culbert, for defendants.

MARTIN, P. J., Nov. 4, 1901.—Suit was brought upon a promissory note, executed by defendant to the order of plaintiffs, for \$221.73.

An affidavit of defence was filed, setting forth that "It does not appear that plaintiff's statement is supported by an affidavit of its truth as required by the law of Pennsylvania and the rule of court. A writing which purports to be an affidavit of its truth is attached to the statement and made part thereof, but the said affidavit purports to be made before one 'Edward McCarthy, Notary Public No. 6, New York county,' in the State of New York and the county of New York. No certificate from the president judge or from any court of New York is attached, showing that the said Edward McCarthy is a notary public for the State of New York, duly qualified to administer oaths, in accordance with the Act of Congress, nor is said certificate on file in this court. It nowhere else appears that the said Edward McCarthy is a notary public of the State of New York and qualified to administer oaths."

It was further alleged that defendant placed in the hands of plaintiffs' attorney, as collateral security, a note, signed by the American Novelty Advertising Company, for \$235, to the order of B. E. Bassford, and endorsed by him, and also endorsed by A. A. Lowry, Paul G. Garber and by plaintiffs themselves.

It was averred that judgment had been obtained on said note, but, although the affidavit states that plaintiffs make no accounting for money received on the collateral note, there is no allegation that they received anything upon said note except the sum of \$40, which defendant avers, on information and belief, was paid by the payee and first endorser to the agents of plaintiffs, who held the note, to apply towards its payment.

The affidavit does not deny that the statement was duly sworn to before a notary public, or that he was authorized to administer the oath, but alleges that his authority does not appear.

In the absence of proof to the contrary, it will be presumed that a notary of another State has power to take an affidavit: *Champion v. Harthill*, 1 W. N. C. 331; *Lavelle v. Prudential Ins. Co.*, 2 Lack. Jur. 306; and the certificate of a notary public under his notarial seal is *prima facie* evidence that the person who uses it and signs the certificate is a duly commissioned notary: *Browne v. Philadelphia Bank*, 6 S. & R. 484. Nor is it sufficient defence to this action to allege that plaintiffs hold collateral belonging to defendant, upon which they obtained judgment. It was said by Rice, P. J., in *Historical Publishing Co. v.*

10 Dist. R.

Strohelm & Romann v. Pack & Sons Manufacturing Co.

Hartmanft, 3 Pa. Superior Ct. 59, a plaintiff "has a right to hold on to all his securities until he obtains satisfaction."

Rule absolute for amount of claim in excess of \$40.

Hoffman's Estate.

Wills—Construction—Annuity—Time of beginning.

Where a testator authorizes the executors to expend so much of the income as may, in their judgment, be necessary to maintain certain annuitants, and, upon settlement of their accounts, directs the transfer of the estate to trustees, and the entire income to be distributed among the annuitants during their joint lives, the annuities so given do not begin to run at the death of the testator.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 359.

Bernard Gilpin, for exceptant; *A. Lewis Smith*, contra.

PENROSE, J., Nov. 2, 1901.—The general rule that an annuity given by will begins to run from the death of the testator has, of course, no application where express provision is made to the contrary; and here the second item of the will declares that until "the settlement of my affairs by my executors" they shall "expend so much of the income of my estate as shall in their judgment be necessary to support and maintain" the exceptant and the two nieces there named. The third item directed that after the estate shall have been transferred to the trustee, which is not to be until the executors "shall have settled my affairs, including the conversion into cash of such of my securities" as they may think judicious, the entire income shall be distributed, by the trustee, in equal shares, between the exceptant and the nieces, during their joint lives, &c., &c. The first codicil revokes only so much of the "third item" as directs equal distribution by the trustee, and in lieu of an equal share of the income gives the exceptant the annual sum of \$500, increased by the second codicil to \$600, to be paid to her by the trustee, not the executors, during all the term of her natural life. No change is made in the provisions of the *second* item of the will, and both the first and second codicils ratify and confirm, by express declaration, all other provisions of the will except the part so altered, viz., the *third* item.

The auditing judge was clearly right in his ruling. The exceptions are dismissed and the adjudication confirmed absolutely.

Peters's Estate.

Statute of limitations—Tolling same—What constitutes.

Where decedent owed claimant an old account barred by the statute of limitations, and wrote him a letter, in which he said, "I will pay you the balance, \$558.07," held, that the statute was tolled.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 423

Edward Brooks, Jr., for exceptant; *James W. Laws*, contra.

FERGUSON, J., Nov. 2, 1901.—It is settled in this State by so many cases that it is unnecessary to cite authority, that to take a claim out of the statute of limitations there must be a clear and definite acknowledgment of the debt, a specification of the amount, or something by which the amount could be definitely or certainly ascertained, and an unequivocal promise to pay.

In this case, the claimant had for many years been working as a painter for the decedent, who was a builder. There was an old, unsettled account that the decedent owed him, which was barred by the statute. Notwithstanding

Peters's Estate.

the non-payment of this account, the claimant continued to work for the decedent down to a certain time, when he quit, apparently, from the letter which follows, because this money was not paid. To induce him to return to work, the decedent wrote him as follows :

"Phila., Feb. 25, 1896.

LEWIS F. HENIG, Esq.

My dear sir: I told you, when you were here, you could go to work. If you do not want to do so please let me know. I have been looking for you ever since. I will pay you the balance, \$553.07.

Respectfully, E. PETERS."

Is there sufficient in this letter to toll the running of the statute? There is a clear, unequivocal acknowledgment by the decedent that he owed the claimant a balance of \$553.07, and he promised to pay it. What more is needed?

The exceptions are dismissed.

Armstrong's Estate.

Wills—Construction—Gifts for a particular purpose.

There being doubt whether, under a bequest "to M. L. S. in trust, \$100, to be used as she may think necessary in buying clothes or necessities for my cousin, A. W., during her life," the money not expended at the death of the legatee should belong to her estate or fall into the residue of the estate of the testatrix, the question will be resolved in favor of the latter proposition when no claim is made by any one representing the deceased legatee, who appears to have left no other estate, and the amount is so small as scarcely to justify the expense of administration.

Wills—Construction—Debts and funeral expenses—Exonerating personal estate.

Testator, after directing "all my just debts and funeral charges to be paid out of my estate," devised his real estate for life, to be sold at the death of the life-tenant and proceeds to be distributed "after paying all charges against my estate." Held, insufficient to charge the realty in exoneration of the personality.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 655.

William Drayton, for exceptant; M. V. Simpson, contra.

PER CURIAM, Nov. 2, 1901.—While the principle that "where there is a bequest of money to, or in trust for, legatees absolutely, but with a direction for the enjoyment or application of the money in a particular mode, for their benefit . . . the legatees will be entitled to receive the capital moneys immediately, regardless of the particular modes directed for the enjoyment or application" (Williams on Executors, 1397; Beck's Appeal, 10 Wright, 527), does not, of course, apply where the total amount of expenditure is to be determined by the discretion or judgment of a trustee, it is by no means clear that this qualification applies to the present case. The gift is of a specified sum, \$100, to be used during the life of the legatee as the trustee "may think necessary in buying clothing or necessities" for her. It is totally severed from the general estate, with no limitation over in the event of death before it has all been consumed; and it would seem, therefore, to fall within the other rule, "that where a legacy is given but the application of it is prescribed by the testator himself, or left by him to the discretion of some other person, if that discretion is not exercised, or an accident happens which prevents the employment of it in the way . . . contemplated, the gift prevails. The mode of application may fail, but that will not interfere with the substance of the gift." Williams on Executors, *supra*.

The question, however, is not free from doubt, and as no claim is made by any one representing the deceased legatee, who appears to have left no other

10 DIST. R.

Armstrong's Estate.

estate, and the amount is so small as scarcely to justify the expense of administration, the first exception of the residuary legatee is sustained and the adjudication modified accordingly.

The other exceptions are dismissed. It cannot be doubted that a testator may exonerate his personal estate from payment of debts and funeral expenses and throw the burden upon his realty; but the intention to do this must be clear and free from reasonable doubt, while here, not only is it directed that "all my just debts and funeral charges be first paid out of my estate," but the real estate is specifically devised for a life which might last—though it did not—for many years. That the distribution of the proceeds, when sold at the death of the first taker, was to be among the designated charitable institutions "after paying all charges against my estate," falls far short of showing the intention contended for by the exceptant. The payment is to be of "all charges," not, as in the previous provision, of "all debts and funeral charges," and the term is fully satisfied when applied to taxes, water rent, &c., &c. Moreover, it is to be by the trustee, at the termination of an estate of indefinite duration; while debts and funeral charges, which are always payable by the executor before parting with the personal estate, are here, in express terms, directed to be "first" paid,—that is, within the year allowed for administration and before the payment of any legacies.

The exceptions other than the first are dismissed, and the adjudication, as now modified, confirmed absolutely.

Notes of Treasury Department Decisions.

From September 21 to November 7, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Beerine.

Special tax. No. 429, November 1, 1901. 4 Treasury Decisions, No. 45, page 20.

Bonds.

Stamp tax. Concerning the right of the United States to require a stamp tax on the bonds of administrators and executors. No. 414, September 27, 1901. 4 Treasury Decisions, No. 40, page 9.

Construction of Paragraph 7, Act of June 13, 1898.

Construction of paragraph 7, Act of June 13, 1898, as amended, imposing stamp tax on bonds, and liability of bonds of administrators and executors thereunder. No. 432, November 7, 1901. 4 Treasury Decisions, No. 48, page 21.

Essence of Jamaica Ginger.

Special tax. No. 428, November 1, 1901. 4 Treasury Decisions, No. 45, page 19.

Executor Selling Liquor.

Special tax. No. 419, October 7, 1901. 4 Treasury Decisions, No. 41, page 16.

Exportation of Distilled Spirits.

No. 427, November 1, 1901. 4 Treasury Decisions, No. 45, page 19.

Fifty per cent. Penalty—Failure to make Return.

No. 424, October 24, 1901. 4 Treasury Decisions, No. 44, page 22.

DISTRICT REPORTS.

Notes of Treasury Department Decisions.

Legacy Tax.

Legacies under a nuncupative will subject to tax. Such a legacy cannot be considered as a debt. No. 411, September 24, 1901. 4 Treasury Decisions, No. 39, page 20.

It is not the intention of the office to require returns and the payment of tax on reversionary interests where estates have been settled prior to July 1, 1901, in accordance with rulings then in force. No. 420, October 17, 1901. 4 Treasury Decisions, No. 43, page 29.

For purpose of ascertaining its taxable value, an estate should be settled as of date of death of decedent. No. 422, October 22, 1901. 4 Treasury Decisions, No. 44, page 21.

Where a legacy exceeds \$10,000, but by deduction of debts and legal expenses it appears that such legacy would be reduced to \$10,000 or under, the executor must make a return and file copy of the will and schedule of assets and liabilities. No. 431, November 4, 1901. 4 Treasury Decisions, No. 45, page 21.

Liquor Dealers.

Exemption of druggists from special tax as liquor dealers by provisions of Section 3246, Revised Statutes. Sale of malt extracts, bitters and tonics. No. 421, October 18, 1901. 4 Treasury Decisions, No. 43, page 29.

Playing Cards.

No. 410, September 21, 1901. 4 Treasury Decisions, No. 39, page 19.

Porto Rico.

Distilled spirits shipped to the United States from Porto Rico in bottles. No. 430, November 2, 1901. 4 Treasury Decisions, No. 45, page 21.

Porto Rico—Permit for Release of Goods.

No. 413, September 24, 1901. 4 Treasury Decisions, No. 39, page 21.

Refund of Taxes.

Claims for refund of taxes must be presented within two years after payment of the tax. Payment under protest not regarded as a claim. No. 423, October 24, 1901. 4 Treasury Decisions, No. 44, page 22.

Regulations Governing the Preparation and Disposition of the Receipts, Forms 23½ and 476, Modified.

No. 426, October 30, 1901. 4 Treasury Decisions, No. 44, page 23.

Retail Liquor Dealer—Compounding Liquors.

No. 418, October 5, 1901. 4 Treasury Decisions, No. 41, page 15.

Retail Malt Liquor Dealer—Retail Liquor Dealer.

Special tax. No. 415, September 30, 1901. 4 Treasury Decisions, No. 40, page 10.

Shares of Stock.

Stamp tax. No. 417, October 4, 1901. 4 Treasury Decisions, No. 41, page 14.

Special Tax.

A trustee of a retail liquor dealer can sell the stock of such dealer at the dealers' place of business at retail without payment of another special tax. No. 412, September 24, 1901. 4 Treasury Decisions, No. 39, page 21.

Theaters.

Special tax. No. 416, October 4, 1901. 4 Treasury Decisions, No. 41, page 13.

Vermuth.

Stamp tax. No. 425, October 24, 1901. 4 Treasury Decisions, No. 44, page 23.
10 DIST. R.

Sitzman v. Heikel et al.

Nuisance — When deposit of garbage on one's land is such—Rights of neighboring property-owners—Equity.

A property-owner has the right to put his property to any proper use, but the use of land, tying near a public road and in close proximity to a number of dwelling-houses, as a dumping-ground for garbage and refuse, which throw off offensive odors sufficient to cause nausea and deprive residents of the neighborhood of the full use of their homes by obliging them at times to close their doors and windows, is not such a "natural use and enjoyment" as the law guarantees, but such a nuisance as will be restrained by injunction at the instance of neighboring property-owners.

Equity—Jurisdiction of—Continuous injury—Remedy at law inadequate.

The injury being continuous, the remedy at law would be inadequate, and therefore equity has jurisdiction.

Motion for injunction. C. P. No. 2, Allegheny Co., July T., 1901, No. 491.

Joseph McClure, for plaintiffs; *W. D. Grimes*, for defendants.

FRAZER, P. J., Oct. 9, 1901.—The bill in this case was filed for the purpose of restraining the defendants from depositing garbage and decayed vegetable matter in the vicinity of the dwelling-houses of plaintiffs. From the bill, answer and proofs we find the following facts and conclusions of law:

Findings of fact.

1. The plaintiffs are respectively the owners of properties situate in Lower St. Clair township, on which they now reside and have resided with their families for more than three years past.

2. That the defendant, Hazelbarth, is the owner of a tract of land in the immediate vicinity of the properties of plaintiffs, containing about eleven acres, upon which he resides, and upon which there is a pond of water about 50 feet in width by 150 feet in length, made by constructing a dam or embankment across a small stream which flows through the land.

3. That about Aug. 1, 1900, the defendant, Hazelbarth, leased his entire property, except a small lot upon which the dwelling-house and out-buildings are erected, to the defendant, Heikel; that Heikel has contracted with the borough of Knoxville to collect and dispose of the garbage which accumulates upon the premises of the residents of that borough; that, under his contract, he collects from five to six two-horse wagon-loads each week, which he hauls to the Hazelbarth property, in Lower St. Clair township, and deposits the same on the low ground near the banks of the pond on that land; that about one-half of the garbage deposited there is covered with a slight quantity of earth, while the balance remains uncovered and exposed to the elements.

4. That the garbage so deposited by Heikel consists of the refuse accumulation of animal and vegetable matter incident to the preparation and cooking of meats and vegetables, and also unsalable, tainted and spoiled meats, fruits and vegetables; that there is almost constantly an offensive and disagreeable odor or stench emitted from the deposits made upon the Hazelbarth land, which is carried by the winds to and beyond the dwelling-houses of plaintiffs, its intensity and presence in the different parts of the neighborhood depending upon the distances from the deposits, the condition of the atmosphere and the direction of the winds; that at times the odor is exceedingly offensive at the houses of the plaintiffs, causing members of their families to suffer from nausea and sickness of the stomach, necessitating the closing of windows and doors and interfering with plaintiffs' full use and enjoyment of their premises.

5. That portions of the garbage are washed into the pond by rains and carried by the water down the run, where it lodges upon other property and decomposes, to the great discomfort and annoyance of the owners thereof.

Sitzman v. Heikel et al.

6. That the neighborhood in which the garbage is deposited is — miles from the borough of Knoxville, is a residence locality, although not thickly populated, and contains no manufacturing establishments.

Conclusions of law.

The defendants' contention is (1) that the use to which the property is put is not an improper one, and (2) that plaintiffs have a remedy at law. The defendants undoubtedly have the right to put their property to any proper use, and what is proper use depends upon the circumstances. The use of land as a dumping-ground for garbage might be "natural use and enjoyment" of it, if located remote from habitations and public roads; but when the land used for that purpose is near a public road and in close proximity to a number of dwelling-houses, and the deposits throw out offensive odors sufficient to cause nausea and sickness of the stomach and deprive residents of the neighborhood of the full use of their homes by obliging them at times to close their doors and windows, such use is not a "natural use and enjoyment" within the meaning of that phrase, but a nuisance and an injury to every property-owner in the neighborhood.

The contention that this bill will not lie because plaintiffs have a remedy at law is not sound in our opinion, as such remedy cannot be made effective, the injury being continuous, except by a multiplicity of suits. It seems to us this is clearly a case for equitable relief.

The defendant, Hazelbarth, having merely leased his land to Heikel, and having no interest whatever in the contract for collecting and hauling the garbage, the bill as to him is dismissed, and it is ordered that an injunction issue against the defendant, Heikel, restraining him from depositing garbage upon the ground in the vicinity of the plaintiffs' residences in Lower St. Clair township, as described in the bill. Let a decree be drawn accordingly.

From Edwin L. Mattern, Pittsburgh, Pa.

Pringle v. The Second National Bank of Wilkes-Barre.

Weak-minded person—Act of June 25, 1895—Proper tribunal—Injunction.

A petition for a guardian for the estate of a weak-minded person, under the Act of June 25, 1895, P. L. 300, must be presented in the Court of Common Pleas of the county in which the person to be cared for resides and has resided for more than one year prior thereto. The court of no other county has jurisdiction in the matter.

Where the person alleged to be weak-minded has removed out of one county into another county of the State within one year from the time of filing the petition, under the Act of June 25, 1895, P. L. 300, the Court of Common Pleas of the first county, although it has no jurisdiction to entertain a petition under said Act, will, nevertheless, under section 8 thereof, on bill for injunction, restrain the payment of a check of such person, alleged to have been procured by undue influence, so that the plaintiff may proceed elsewhere for a guardian under the Act.

Motion to dismiss proceedings and bill in equity and to dissolve preliminary injunction. C. P. Luzerne Co., May T., 1901, in Equity, No. 11.

Wheaton, Darling & Woodward, for plaintiff.

H. W. Palmer and Rodney A. Mercur, for defendant.

LYNCH, P. J., June 4, 1901.—On April 27, 1901, Nelson Pringle, of Kingston, Luzerne county, Pennsylvania, nephew of Samuel Pringle, eighty-three years 10 DIST. R.

Pringle et al. v. The Second National Bank of Wilkes-Barre.

of age, filed his bill, and on the same day preliminary injunction was awarded, restraining the Second National Bank of Wilkes-Barre, Pennsylvania, from paying any part of a deposit of money of about \$7000 in said bank, the property of said Samuel Pringle, until final hearing, or until the court shall appoint a person caretaker of said Pringle.

The bill is based upon the assertion that Samuel Pringle was "in feeble health and weakened in mind, so that he is unable to take care of his property and estate," and that one May H. Kline, without any consideration, has procured from Pringle a check for the sum of \$6000 upon said bank, and that she is, by undue influence, endeavoring and intends to get into her possession all the estate of Mr. Pringle.

The bill and affidavits in support of the injunction aver Mr. Pringle is a resident of Sayre, Bradford county, Pennsylvania, and that plaintiff has personal knowledge of these facts. On May 14 plaintiff amended his bill by averring Samuel Pringle resides and has resided in Luzerne county for more than one year prior to the beginning of these proceedings.

At the argument, the answer of Samuel Pringle was filed, wherein he swears that he is a resident of Sayre, and has been since Jan. 1, 1901, and that he is well pleased and satisfied with his present home.

All papers filed or sworn to by counsel or plaintiff, in the earlier steps taken, declare Mr. Pringle's home was in Sayre, and it was asserted proceedings to have a guardian for him appointed were about to be instituted in said county.

Upon petition and affidavit of plaintiff, this court, on May 11, granted a rule to show cause why a guardian of the estate of Samuel Pringle shall not be appointed, and on May 21 court appointed a commissioner to hear the testimony and report. It was after all these steps Mr. Pringle appeared by counsel in this court and objected to each step as unwarranted by law or equity.

The motion of the defendant, Pringle, is to dissolve the injunction, dismiss the bill and to revoke the appointment of the commissioner.

Before the appearance of counsel for Mr. Pringle, it was agreed by the bank that the injunction might be continued, and that the rule in equity requiring the bill printed should be waived.

The proceeding to appoint a guardian is under the Act of June 25, 1895, P. L. 300, entitled "An Act for the protection of persons unable to care for their own property."

It is admitted Mr. Pringle is a citizen of this State. Plaintiff claims he is a resident of Luzerne county, and Mr. Pringle (defendant) contends he resides in Sayre.

Section 1 provides . . . the petition for a guardian may be presented by the next of kin or any other person as the next friend, in the Court of Common Pleas of the county in which the said person to be cared for resides and has resided for more than one year prior thereto.

The petition for a guardian and all proceedings had thereon are filed as part of the equity case, and therefore we are bound to take notice of what has been done by both parties in the whole proceedings. In view of the affidavits made and filed by both Pringles as to the place of residence of Samuel, it is manifest he does not now reside in Luzerne county, and did not for several months before this suit was begun. I am therefore of opinion this court has no power to entertain the petition to appoint a guardian or to adjudge such person to be unable to take care of his own property. This view of the case makes it unnecessary for the court to pass upon the question of the authority of the court to appoint a commissioner. It may, however, not be out of place to notice the language of the 3rd section of the Act: "Upon the day fixed for the hearing, the court shall require the personal presence in court of the party against whom

DISTRICT REPORTS.

Pringle v. The Second National Bank of Wilkes-Barre.

the petition is presented, unless there is positive testimony to the effect that such party cannot be brought into court with safety to himself." It would seem the legislature thought that, in a proceeding so easy of abuse as this may be, it is best for all parties concerned that the trial shall take place, not even before a judge, but in court.

Under a liberal construction of section 8 of the Act of 1895, we shall permit the bill and injunction to remain in force for the purpose of permitting plaintiff, if he deems best, to proceed elsewhere.

1. The motion to dismiss the proceedings asking for the appointment of a guardian is allowed and the petition is dismissed.

2. The motion for dismissal of the bill in equity and the dissolution of the preliminary injunction is denied, without prejudice.

From Sidney R. Miner, Wilkes-Barre, Pa.

Forestry Reservation Commission.

Forestry—Reservation commission—Control of waters—Act of Feb. 25, 1901.

The Act of Feb. 25, 1901, P. L. 11, confers upon the Forestry Reservation Commission the right to control the water supply on forest lands as well as timber and minerals, and it can grant the privilege of using the waters on these reservations for private purposes, with such limitations and restrictions as may protect the interests of the Commonwealth.

Attorney-General's Department. Letter to Dr. J. T. Rothrock, Commissioner of Forestry.

ELKIN, Att'y-Gen., Oct. 15, 1901.—Your communication of recent date, addressed to this department, asking whether it is within the purview of the power conferred upon the Forestry Reservation Commission to grant the privilege of using the water on such lands for private purposes, has been received and considered.

The Act of Feb. 25, 1901, P. L. 11, confers upon the Forestry Reservation Commission very general powers in reference to the management and control of lands purchased by the State for forestry purposes. The Act gives the commission the right to sell timber, to lease minerals and to make all contracts necessary for these and other purposes. It is true the Act does not expressly confer upon the commission the right to grant water privileges, and I doubt whether it would be within the power of the commission to grant any permanent water rights to persons or corporations. But it was the intention of the legislature, in providing for the purchase of forest lands, to protect and cultivate the forest lands of the State and provide protection for our water supply. There could not be much sense in providing protection for the water supply if the water could not be made use of.

Under all the circumstances, it is my opinion that your commission has a right to control the water supply on forest lands as well as timber and minerals. This power is fairly implied from the provisions of the Act. I can see no good reason why your commission should not grant the privilege of using the water on these reservations, with such limitations and restrictions as may protect the interests of the Commonwealth.

From Guy H. Davies, Harrisburg, Pa.

Haines's Estate.

Books of original entry—Physician's visiting list.

A physician's visiting list or memorandum book is not admissible as a book of original entry.

Statute of limitations—Tolling statute—Evidence.

A part of a physician's bill barred by the statute of limitations is not sufficiently identified to toll the statute by declarations made by decedent, in the absence of the claimant, to her nurse four days before her death, in which the long period of her acquaintance with the claimant, his kindness, the fact that he was her physician, that his bill would be large, and would be paid under the provisions of her will relating to her just debts, etc., were referred to, but the amount due was not specified.

If no bill was ever rendered, it proves nothing to show payments made on account while the statute was running.

Evidence—Book entries made from memoranda.

Book entries made by a clerk from memoranda furnished at the time of making them are admissible as evidence.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 34.

Hopple & Buckman, for exceptant; *Meredith Hanna*, contra.

PENROSE, J., Nov. 2, 1901.—That a physician's visiting list or memorandum book is not admissible as a book of original entries has been settled, so far as this court is concerned, by the decisions in *German's Estate*, 16 Phila. 318, *Kelley's Estate*, 5 District Reps. 263, *Foreman's Estate*, 7 District Reps. 214, &c., &c.; but even if the claim in the present case, which is for medical services and medicines from 1870 to April, 1900, could thus be proved, it is evident that so much of it as accrued more than six years before its presentation as a legal demand is barred by the statute of limitations unless, within that time, the entire debt was clearly and distinctly recognized by the debtor as an existing obligation. The only testimony upon this point was that of the nurse in attendance during the last illness, as to declarations made four days before the decedent's death, in which the long period of acquaintance with the claimant, his kindness, the fact that he was her physician, that his bill would be large, and that it would be paid under the provision in her will relating to her just debts, &c., &c., were referred to: but apart from the fact that the declarations were not made to the claimant or his agent, which is essential to their efficacy in relieving the bar of the statute (*Kyle v. Wells*, 5 Harris, 286; *McKinney v. Snyder*, 28 P. F. Smith, 497), there was no mention of the amount due, and "the require (*Allison v. James*, 9 Watts, 380; *Senseman v. Hershman*, 1 Norris, 83), was wholly wanting.

It is conceded that no bill was ever rendered, and the payments on account, therefore, even if shown, as they were not (*Shaffer v. Shaffer*, 5 Wright, 51), to have been made while the statute was running, prove nothing. To toll the statute it must appear, unequivocally, that the payment was made on the claim in suit, which was thus recognized. The entire claim was for \$783, beginning in 1870 and ending in April, 1900, of which all that accrued within six years prior to its presentation to the auditing judge (May 13, 1901), including services during the last illness, \$19, amounted, according to the statement exhibited, to \$143. The account shows that the services in the last illness were paid for by the accountant, so that the amount still due is but \$124. Payments are credited, in December, 1895, December, 1896, and January, 1899, which would reduce this still more, but they may properly be applied to earlier items of the bill not yet barred by the statute at the time of payment.

Haines's Estate.

If the portion of the claim not barred by the statute rested only on the memorandum book of the claimant, it would have to be rejected as not sufficiently proved; but we think the book entries made by the clerk from the memoranda furnished at the time of making them are admissible as evidence: *Kline v. Gundrum*, 1 Jones, 242, 248-49; *Schollenberger v. Seldonridge*, 13 Wright, 83; *Ingraham v. Bockius*, 9 S. & R. 285; *Hoover v. Gehr*, 12 P. F. Smith, 136.

The exceptions are sustained except to the extent indicated by this opinion, and the adjudication corrected by reducing the amount to be allowed for medical services, &c., to \$134, with interest from the death of the testatrix and costs, \$5.25.

Schleicher's Estate.

Wills—Construction—Charitable trust.

A clause of testator's will provided as follows: "A full one-third part of all the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath to my executors hereinafter named, or the survivor, to be by them or him paid over, in such amounts and to such uses as they may, in their best judgment, determine, to such German charitable institutions and German societies in the city of Philadelphia as they may, in their discretion, select; said discretion to be by said executors, or the survivor, exercised without any right, claim, dictation or control of any other person or power whatsoever, I having full confidence, both in their judgment and that they will faithfully carry out my wishes in regard to the proper disposition of said fund." *Held*, that a valid charitable trust was created.

Exceptions to adjudication. O. C. Phila. Co., July T., 1900, No. 252.

T. S. Gates, Jay Gates, G. Remak, Jr., F. P. Prichard and G. E. Schlegelmilch, for exceptants.

H. S. P. Nichols, M. Dittmann and W. H. Staake, contra.

ASHMAN, J., Nov. 2, 1901.—We shall not, perhaps, subject the testator's language to any violent strain if we shall hold that he vested his executors with a power which, inasmuch as its exercise was subject to no review whatever, amounted, as in *Beck's Appeal*, 118 Pa. 547, to an absolute gift of the subject-matter. If it be objected that the power was indefinite and incapable of enforcement by any of its possible objects, the answer is that the testator so intended it; he reposed in his executors a discretion "to be exercised without any right, claim, dictation or control of any other person or power whatsoever," and he assigned as the reason for this latitude of action, his "full confidence in their judgment," and his belief "that they will faithfully carry out his wishes in regard to the disposition of the fund." With this sweeping delegation of authority, founded wholly upon his personal confidence in the donees, the testator's reference to certain classes of objects was simply an expression of desire that they would carry out what he declared were his "wishes." A different question is presented if the words to which we have alluded were not precatory and if a trust was created. Indefiniteness in a trust for charitable uses will not vitiate the gift, and the sole point to be here settled is whether this trust, assuming it to be a trust, can be perverted in whole or in part to other objects than charities. The testator's primary intention was to aid German charities; his words were "to such German charitable institutions and German societies in the city of Philadelphia as they may select." It is very clear that if he had used the phrase "German charitable institutions and societies" the word "charitable" would have qualified both classes of beneficiaries. Is its effect destroyed because the testator has chosen to describe both classes as German? The answer to this inquiry need not be rested upon the rule that the court will

Schleicher's Estate.

solve, when practicable, in favor of a charity, a seeming ambiguity in the testator's language. That the societies were to be charitable as truly as the institutions seems to be a grammatical necessity. The matter is, indeed, less open to doubt than the gift in *Pickering v. Shotwell*, 10 Pa. 23. There the trust was of a residue "to be applied under the direction of the Monthly Meeting of Friends as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or to the support of an institution or free school in or near Philadelphia." It was taken for granted that the institution intended was to be charitable in character, and the trust was upheld.

Exceptions dismissed.

Caldwell's Estate.

Statute of limitations—Tolling—Death of debtor without leaving property and the subsequent accretion thereof.

The statute of limitations, if running at the death of a debtor who died without leaving any property whatever, does not cease to run between the date of the death and the subsequent accretion of property to the estate.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1901, No. 504.

William O. Armstrong, for exceptions; *E. G. Hamersly*, contra.

ASHMAN, J., Nov. 2, 1901.—*Yorks's Appeal*, 110 Pa. 69, abrogated the doctrine which had theretofore prevailed, that simple contract debts became, at the death of the debtor, the subjects of a trust in the hands of his legal representatives against which the ordinary operation of the statute of limitations was suspended. The rule had nothing in the way of legal analogies to support it, and owed its origin, perhaps, to the vague notion that after death a man is more impressed than he was when living with the propriety of paying his honest debts. Be this as it may, death does not toll the running of the statute, and the creditor must make his claim in legal shape within six years after the maturity of the contract or of the subsequent promise to pay. The fact that no letters testamentary or of administration have been taken out upon the estate of the debtor, and that there is therefore no accredited party upon whom the creditor can claim, will not absolve him from this requirement, because it is within his own power to compel the issue of such letters. The question which is now presented differs from the ordinary in the circumstance that, at the time of her death, the debtor possessed no property, and that hence no necessity existed for the grant of letters. It is urged with some plausibility that between the death and the accretion of property the statute ceased to run, because the creditor had been guilty of no delay which the statute was intended to prevent. The difficulties which would attend a departure from the customary procedure are, however, a sufficient answer to this argument. The statute of limitations has worked beneficently in curtailing the opportunities for fraud which are so profusely furnished by stale and forgotten claims. In the present case, thirteen years elapsed after the decedent's death before the fund in question fell into her estate; in the next case which may come before us twenty years may have passed between the two events. Within a shorter time than either of these periods, vouchers may have been lost and witnesses may have died, and the estate may have been left practically defenceless. Hardships may be wrought by the strict enforcement of the statute, but they are as nothing when compared with the mischiefs which would ensue by evading its provisions. The rule now laid down prevails in England. Lord Jessel, M. R.,

Caldwell's Estate.

decided, in *Boatwright v. Boatwright*, 43 L. J. Ch. 12, where the testator died in 1857 and his will was not proved until 1870, in which latter year the creditor filed his bill for the administration of the estate, that the cause of action having accrued in the testator's lifetime, it was immaterial whether the will was proved or not.

The exceptions are dismissed.

Samson's Estate.

Wills—Construction—Separate use-trust.

Where the words in any written instrument are free from any ambiguity in themselves, such instrument is always to be construed according to the strict, plain, common meaning of the words used.

Testator devised and bequeathed to his wife, who died in his lifetime, all his estate for life. His will provided, "At her death, it is my will and desire that it be divided among my children, share and share alike, with the condition that the shares flowing to my daughters shall be protected as their separate estates, free from any claim that their said husbands may have or make, and the fee simple to their children." *Held*, (1) that a separate use-trust was created; (2) that the legal effect of the language was not affected by the fact that such construction would vest in the daughters an equitable estate, under their father's will, in certain real estate in which they already held a legal estate under their mother's will, and that testator knew of their interest therein under the latter will.

Exceptions to adjudication. O. C. Phila. Co., April T., 1900, No. 99.

D. P. Corcoran, for exceptant; *John P. Gibbs*, contra.

FERGUSON, J., Nov. 2, 1901.—Testator devised and bequeathed to his wife, who died in his lifetime, all his estate for life. "At her death, it is my will and desire that it be divided among my children, share and share alike, with the condition that the shares flowing to my daughters shall be protected as their separate estates, free from any claim that their said husbands may have or make, and the fee simple to their children."

It was stated that this will was written by the testator himself. Be this as it may, he could not have used more apt words to create a separate use-trust. Where the words in any written instrument are free from any ambiguity in themselves, such instrument is always to be construed according to the strict, plain, common meaning of the words used. In this case there can be no doubt but that the testator intended to create a separate use-trust for his daughters.

It was contended, however, that he could not have so meant, because, by reason of the lines in their respective deeds being disregarded in building, and the encumbrances thereon, some of the real estate which passed under his will was complicated with other real estate which passed under the will of his wife to his children absolutely; and that, as the wife had been dead for some time, and as the testator knew of the condition of affairs with reference to this real estate, he could not have intended to further complicate matters by having his children have an estate which is partly legal and partly equitable. *MacConnell v. Wright*, 150 Pa. 275, was cited as authority for the position assumed. It is true that the Supreme Court there held that the creation of a separate use is always a question of intention to be gathered from the will, the surrounding circumstances and the condition of the estate and family. But that case was exceptional, and decided upon the peculiar and extraordinary circumstances therein existing. We see nothing in this case, however, to lead us to depart from the established rules with regard to the construction of wills.

The exceptions are dismissed.

10 DIST. R.

Barnes's and Heydrick's Nominations.

Elections—Names of political parties—Acts of July 9, 1897, and June 10, 1893—Socialist-Labor Party.

Under the Act of July 9, 1897, § 1, P. L. 223, amending the Act of June 10, 1893, P. L. 419, the filing of the affidavit with the prothonotary of the proper county, and his certificate, showing compliance with the Act, in the office of the secretary of the Commonwealth, gives an exclusive right to the use of the political appellation therein adopted. Hence, where the "Socialist-Labor Party" complied with the statute in these respects, *held*, that it became entitled to the exclusive use of that name, and objections were therefore sustained to the nomination papers filed by the "Socialist Party," because the appellations were so akin to each other that the voter might easily be misled or confused in casting his vote.

Objections to nomination papers. C. P. Dauphin Co., Jan. T., 1902, No. 77.

Snodgrass & Snodgrass, for objectors; *Charles Heydrick*, for respondents.

WEISS, J., Oct. 18, 1901.—On Sept. 9, 1899, five persons, claiming to be electors and to be authorized by the Socialist-Labor Party, filed in the office of the prothonotary of this county, to No. 491, September Term, 1899, an affidavit, desiring to have the exclusive and continued right to use the name or title of Socialist-Labor Party, and filed nomination papers for candidates for State offices pursuant to the provisions of the Act of Assembly of July 9, 1897, P. L. 223, amendatory to the Act of June 10, 1893, P. L. 419.

By the records of the office, it is made to appear that on July 21, 1900, the Socialist Party filed an affidavit of like import to No. 172, September Term, 1900. On Aug. 1, 1900, the Socialist-Labor Party filed an affidavit to No. 199, September Term, 1900, in the office named, claiming to have the exclusive right to use the name or appellation for the election for which nominations were then made. On Nov. 8, 1900, five persons, claiming to be qualified electors and members of a political organization known as the Socialist-Labor Party, filed an affidavit in the proper office to No. 298, January Term, 1901, adopting the name or political appellation of Socialist-Labor, and declaring their intention to nominate candidates for the several State offices under that title to be voted for at the election to be held the first Tuesday after the first Monday of November, 1901, and that this was done to secure the exclusive use of that political name.

Objections were filed to the nomination papers, purporting to nominate J. Mahlon Barnes for State Treasurer and Charles Heydrick for Justice of the Supreme Court, by certain qualified voters and members of the Socialist-Labor Party, setting forth, among other things, that the use of the name Socialist in the nomination papers, purporting to nominate J. Mahlon Barnes for State Treasurer and Charles Heydrick for Justice of the Supreme Court, as candidates for said offices, was in derogation of the right to the exclusive use of the appellation or name of Socialist-Labor, and that the name Socialist in said nomination papers was illegal and void, and that the said candidates are not entitled to have their names certified on the official ballot as such candidates.

The clause of the Act which relates to the matter under consideration reads as follows: "That if five of the electors composing any political body making a nomination by nomination papers shall file with the prothonotary of the county in which the nomination paper or papers are to be filed an affidavit, setting forth that they have adopted a certain political appellation to designate their policy, subject to the limitations of this Act regarding the selection of names, that thereafter such political body shall have the exclusive right to use the said name or appellation for the election for which such nominations are made: Provided, that a certificate from the prothonotary, setting forth such a

Barnes's and Heydrick's Nominations.

compliance with the Act, be filed with the nomination papers filed by such political body."

It is shown that no certificate from the prothonotary was filed in the office of the secretary of the Commonwealth with the nomination papers by the Socialist Party for the ensuing election, and we are of the opinion that this is a prerequisite at every election at which candidates are put in nomination and an exclusive right to the use of a political appellation is sought to be secured. The proviso to the Act makes the right to the exclusive use of the name depend upon the filing of the certificate setting forth a compliance with the Act.

In *Nominations of Seward et al.*, 9 District Reps. 656, we say, that "a way had been provided by another Act of Assembly by which a group or party can protect its name; and if it does not use this method, we think we are powerless to aid it."

The Socialist-Labor Party made and filed its affidavit shortly after the election in 1900, setting forth its intention to nominate candidates for State offices to be voted for at the election to be held in 1901, and stating that its purpose in doing so was to secure the exclusive use of that appellation, and caused the required certificate to be filed with the nomination papers.

The Socialist Party filed no affidavit claiming an exclusive right to use that name or appellation for the election for which these nominations are made, nor did it file with the nomination papers a certificate from the prothonotary that such affidavit was theretofore made and filed by it or in its behalf, and the preference or exclusive right to use this political appellation vanishes with this omission.

The objectors to the nomination papers adopted the name or political appellation of Socialist-Labor Party to designate their policy; complied with the terms prescribed by the proviso to the 3rd section of the amended Act, and are entitled to the exclusive right to use said political appellation. The dominant characteristic in the political appellation of the contestants is manifestly socialist.

It is altogether probable that at one time they were united in a common cause, that dissension arose, that each faction desired to retain the patronym socialist, and that the term labor was added or taken away by one of the dissenting bodies. Evidently the term socialist was intended to be expressive of the aims and purposes of the organization, and the term labor was explanatory rather than fundamental.

At all events, the appellations Socialist-Labor Party and Socialist Party are so akin to each other that the voter may easily be misled or confused in casting his vote, and that is what the ballot law aims to avoid. The Socialist-Labor Party having the exclusive right to the use of that political appellation, and the Socialist Party being so closely allied to it in designation of name as to misguide rather than instruct the voter, we are obliged to sustain the objections filed to the nomination papers of the Socialist Party, purporting to nominate J. Mahlon Barnes for State Treasurer and Charles Heydrick for Justice of the Supreme Court.

The conclusion reached is based upon the proviso to the 3rd section of the Act of July 9, 1897, and nothing is predicated upon clause 3 of section 4 of that Act. What we decide is that the nomination papers objected to are defective because the parties who filed the same are not entitled to use the appellation socialist. And therefore these nomination papers cannot be declared valid unless they be amended by substituting some other appellation, and leave to so amend on or before Monday, Oct. 21, 1901, is hereby given, and the prothonotary is directed to certify this judgment to the secretary of the Commonwealth.

From William M. Hargest, Harrisburg, Pa.

Commonwealth v. Reber.

Juror—Prejudice—Waiver.

Utterances by a juror to defendant's counsel in defendant's presence, during the trial of a case, deprecating the fact that he was drawn as a juror in the case because certain relatives of his were likely to be called as witnesses, and their evidence would have great weight with him, without intimating that he knew what their testimony would be, do not point to that sort of prejudice against the defendant in a juror's mind which is held to be a ground for setting aside a verdict.

The failure of the defendant to bring such matter to the attention of the court during the trial constitutes a waiver of the right to assail the verdict on that ground.

Juror—Knowledge of juror of facts—Duty of juror—Duty of party.

Knowledge of the facts of a case does not disqualify a juror. In such case it is his duty to disclose the facts in open court; but if a party has reason to suppose that a juror has such knowledge it is his duty to put him on the stand, and failure to do so is a waiver of the right to assail the verdict upon that ground.

Reasons for new trial—New matter—Practice.

Under Rule 41, § 1, of the Rules of Court of Berks county, it is necessary for the applicant for a new trial to file all the reasons therefor within four days after verdict. Yet if the introduction of new matter not specified in the reasons filed is not objected to on that ground, if there has been ample time for the opposing party to meet it or no effort on his part to obtain an opportunity to do so; and if the new matter is of so grave a nature as to challenge the attention of the court, there is no reason why it should not still be allowed to be added, or be considered as having been added.

Motion for new trial—Misconduct of juror—Statement by juror—Proof by juror thereof.

The testimony of one juror cannot be received to impeach the verdict on the ground of the misconduct of other jurors. Hence, where, on rule for new trial, it was shown to the court by a deposition of one of the jurors that, while the jury were deliberating on the verdict, another juror said that the defendant, some years before, had committed an act similar to that for which he was on trial, *held*, that although such matter was sufficient, if established, to set aside the verdict, yet no proof of such matter was before the court which the court was at liberty to accept.

Rule for new trial. Q. S. Berks Co., March Sess., 1901, No. 116.

A. H. Rothermel, district-attorney, and W. J. Bechtel, for Commonwealth.

C. H. Ruhl and Rothermel Bros., for defendant.

ENDLICH, J., Oct. 7, 1901.—1. The only one of the reasons specifically assigned in support of this rule which calls for any comment is that which alleges utterances on the part of one of the jurors, out of court, during the progress of the trial, indicative of a bias against the defendant. It may well be questioned whether what he is shown to have said is sufficient to invalidate the verdict joined in by him. It would seem to point merely to his possession of some previous information concerning the case on trial, viz., that certain persons, who were relatives of his, were likely to be called as witnesses, and to a very natural feeling on his part that their testimony would have great weight with him. He did not intimate, it seems, that he knew what their testimony would be, but deprecated the fact of his having been drawn as a juror in the case because of the probability of these persons appearing as witnesses in it. The remarks, therefore, do not point to the existence of that sort of prejudice against defendant in the juror's mind which is held to be a ground for setting aside a verdict he helped to render, as explained in *Thomps. & Merr. Juries*, § 385 (4), and *Com. v. Sam Kee*, Q. S. Berks Co., No. 106, June Sess., 1900. But even if they ought to be looked upon as establishing such prejudice, no relief could on that ground be granted the defendant at this time. They were made to the defendant's counsel in defendant's presence after an adjournment of court, while the trial was going on and before it was half finished. There was ample

opportunity to bring the matter to the notice of the court before verdict, and the failure to do so constitutes a waiver of the right to assail the verdict on that ground: *McCorkle v. Binns*, 5 Binn. 340. And, again, if they were to be accepted as pointing to the juror's possession of knowledge of the facts of the case, it is to be remembered that that circumstance by itself would not disqualify him to sit as a juror in it. Virtually that is decided in *Harper v. Kean*, 11 S. & R. 280, per Tilghman, C. J., as it is impliedly declared to be the law in section 160, Act of April 14, 1834, P. L. 369, directing that "every juror empaneled in any cause who shall know anything relative to the matter in controversy in such cause, shall disclose the same in open court, before the jury shall retire to consider their verdict." It may be that the juror referred to in defendant's application for a new trial, through unfamiliarity with this precise duty, failed in performing it; and had the defendant been without reason for suspecting such failure, it may also be that the same would constitute a ground for setting aside the verdict. But he was not without such reason, and therefore the rule applied to him which is stated in *Thomps. & Merr. Juries*, § 216, as follows: "If a juror is supposed to have any information or knowledge respecting the facts of a case which may become material to the decision of such facts by the jury, the proper practice is to put the juror on the stand." Having neglected to observe that rule, the defendant now comes too late with any objection of this kind.

2. The depositions taken by defendant in support of his rule introduce a matter not specified in the reasons. Rule XLI, § 1, of the rules of this court, requires the applicant for a new trial to file, within four days, "the" reasons, not some reasons, therefor. (See, as to the significance of the definite article, *Brownfield v. Brownfield*, 12 Pa. 136; *Bakes v. Reese*, 150 Pa. 44.) In a proper case leave may, of course, be granted to add further reasons, but it is only fair to the opposing party that he should be advised of every reason intended to be relied on. In strictness, therefore, the introduction of matter not specified in the reasons filed must be regarded as irregular; yet, since the object of legal proceedings is to administer justice (*Waln v. Beaver*, 161 Pa. 605), if its introduction is not objected to on that ground, if there has been either ample time for the opposing party to meet it or no effort on his part to obtain an opportunity to do so, and if the new matter is of so grave a nature as to challenge the attention of the court, there seems to be no sound reason why it should not still be allowed to be added or be considered as having been added.

The allegation here in question, supported by the deposition of one of the jury who tried the case, is that the juror charged with having made the statements already discussed told the jury, while deliberating on the verdict, that the defendant, some years ago, had committed an act similar to that for which he was on trial. It needs no argument to show the impropriety of a jury being furnished with facts, or considering facts, as tending to prove one side or the other of the issue to be decided, which form no part of the evidence submitted to them by the court, or the utter inadmissibility of their being influenced by facts which not only were not, but could not have been legally, admitted in evidence at all. If, therefore, this allegation were established with certainty and in such a manner as entitled the court to treat it as established, there could be no escape from the conclusion that the verdict must be set aside. But it rests solely upon the deposition of a fellow-juror, and though there are cases in which such testimony has been received and acted upon, apparently without objection, yet the explicit rule of our law, as laid down in a multitude of decisions from *Cluggage's Lessee v. Swan*, 4 Binn. 150, to *Stull v. Stull*, 197 Pa. 243, forbids the reception of the testimony of one juror to impeach the verdict on the ground of misconduct of other jurors. It could serve no purpose at this late

Commonwealth v. Reber.

date to examine the reasons for the rule or attempt its justification. All the inconveniences possibly resulting from it have been fully considered in the adjudged cases and pronounced to be insufficient to balance, not to say outweigh, the certain disastrous consequences of its abrogation. Under it there is, upon the matter now under discussion, no proof before the court which it is at liberty to accept. The rule for a new trial is discharged.

From D. N. Schaeffer, Reading, Pa.

Jefferson County v. Summerville Borough Poor District.

Poor laws—Inmate of State insane hospital—Agency of county in making payments for support—Right of county to be relieved from such payments—Right barred by limitation.

A county, in paying for the support of an inmate of a State insane hospital, placed there pursuant to the Act of April 20, 1869, P. L. 78, acts as the agent of the poor district or person ultimately liable and not of the Commonwealth.

To recover from the poor district the sums of money paid by the county for the support of such insane person, it is necessary that the poor district be certified as the last place of legal settlement, and failure on the part of the county for more than nine years to have the poor district so certified will bar its right to maintain an action for the recovery of the sums expended by it for such support.

Rule for judgment for want of a sufficient affidavit of defence. C. P. Jefferson Co., Aug. T., 1900, No. 341.

Alexander C. White, for rule; Carmalt & Strong, contra.

REED, P. J., April 15, 1901.—The plaintiff's statement of demand filed in this case, perhaps, is defective in not setting forth that the plaintiff, Nov. 30, 1896, obtained and served a rule on the defendant district to appear and show cause, if any it had, why it should not be certified as the last place of legal settlement of John Jacox, the person declared insane, to the end that said district should be chargeable with the expense of his care and maintenance in the hospital, and that this rule, April 21, 1897, was made absolute by the court, and a decree entered accordingly. It was agreed by counsel, however, that the plaintiff's statement of demand should be treated as so amended.

It was also admitted, on the argument, that the said John Jacox was placed in the State Hospital for the Insane at Warren, Pennsylvania, pursuant to a proceeding instituted under section 6 of the Act of April 20, 1869. He was committed to the asylum Sept. 8, 1887, where he was maintained, at the expense of Jefferson county, until Aug. 31, 1894. The bills for his care and maintenance were rendered to said county quarterly and paid by it. The last payment was \$3.28, made Aug. 31, 1894, and is the only payment made within six years prior to the bringing of the present action. The defence interposed is the bar of the statute of limitations.

The contention that the county of Jefferson was acting as the agent of the Commonwealth in making payments to the hospital, or that the Commonwealth is in any way interested in the recovery of the moneys so paid, cannot be sustained. It will not be denied that said insane person was confined in a hospital which is largely maintained and supported by the State, but the moneys paid, for which a recovery is sought in this action, were paid in discharge of a liability primarily fixed by Act of Assembly upon the county, with remedy over against the poor district or person "legally bound to maintain such insane person." The county, therefore, was acting as the agent of the poor district or

Jefferson County v. Summerville Borough Poor District.

person of ultimate liability, and not of the Commonwealth. It is clear to my mind that the right of the Commonwealth, as against the statute of limitations, cannot be asserted in this action. That the statute runs against a county cannot be doubted: *Evans v. Erie County*, 66 Pa. 222. But as it only affects the remedy and not the merits, it does not begin to run until the right of action accrues or until the right to bring suit is complete. By section 9 of the Act of April 20, 1869, it is provided that when it appears that an insane person is manifestly suffering from the want of proper care or treatment, the court "shall order such person to be placed in some hospital for the insane, at the expense of those who are legally bound to maintain such insane person; but no such order shall be made without due notice of the application therefor shall have been served upon the persons to be affected thereby and hearing had thereon." Under a similar provision in the Act of April 11, 1845, P. L. 440, it was held that an action could not be maintained by the county against the poor district until such district had been duly certified, in the manner provided by said Act, as the place of legal settlement of the insane person at the time of his commitment to the hospital: *Danville and Mahoning Poor District v. Montour County*, 75 Pa. 35. It would, therefore, seem that the plaintiff's right of action was not complete until the defendant district was certified, by the court, as the last place of legal settlement of the said John Jacox, which certification was not made until April 21, 1897. This action was brought Aug. 1, 1900, and, consequently, was brought within six years after the plaintiff's right to bring it was complete. But can a plaintiff defer the running of the statute by his own laches? I think not. In this case there never was any doubt about Jacox's place of legal settlement. It was well known to the plaintiff, and upon the plaintiff rested the duty to have the proper certification made that would have relieved it from liability. It failed to do so for a period of almost ten years, and, as a result of this inexcusable delay, has lost its right to call upon the defendant district to reimburse it for the moneys paid by it. The poor district chargeable with the maintenance of an insane person placed in a hospital by an order of the court has some rights to be guarded. It should be moved against promptly. In that event, it might be able to relieve itself from liability by showing a settlement elsewhere; it, at least, should have this opportunity before its evidence has become effaced by the mouldering effects of time. Moreover, if certified as the last place of legal settlement, it has a remedy over against the property of the insane person if he possesses any; if not, then against the relatives of such person who are legally bound to maintain him. But these remedies may be rendered entirely valueless by delays such as have occurred in this case. Neither is it right nor just for the county, without any excuse whatever, to accumulate a large bill against a poor district, in a case of this kind, before calling upon it for payment. Hence, the law is pregnant with equity which requires a plaintiff, who has it in his power to make his cause of action complete, to do so within a reasonable time. He may not, in the circumstances of this case, voluntarily delay the operation of the statute of limitations. It will begin to run from the time when he could have perfected his cause of action, and not from the time when he actually does perfect it: *Steele's Administrators v. Steele*, 25 Pa. 154. If he delays perfecting his cause of action for an unreasonable length of time, the right to do so will be thereby lost; *Morrison's Administrators v. Mullin*, 34 Pa. 12. What is a reasonable time in which the plaintiff is required to make his cause of action perfect may be determined by analogy to the term prescribed by the statute of limitations: *The Pittsburgh and Connellsville Railroad Co. v. Byers*, 82 Pa. 22. Where there is no excuse for the delay, the statute will begin to run after a reasonable time allowed for instituting proceedings: *Rhines's Administrators v. Evans*, 66 Pa. 192.

Jefferson County v. Summerville Borough Poor District.

If the plaintiff could have maintained an action without first having the defendant district certified as the last place of legal settlement, then an action accrued as each payment was made for the recovery of the same. In that event, the plaintiff's right to recover is barred by the statute of limitations as to all of its claim except the sum of \$8.28. See *Overseers of the Poor of Harmony Township v. Forest County*, 91 Pa. 404; also *Danville Hospital v. Bellefonte Borough Overseers of the Poor*, 163 Pa. 175.

The plaintiff having delayed for more than nine years to take any steps to have the defendant district certified as the last place of legal settlement of said Jacox, and no excuse whatever being offered for this gross negligence on the part of the county officials whose duty it was to act, it seems clear, under the authorities cited, that the plaintiff now, after the lapse of thirteen years, has lost its right to maintain this action.

And now, April 15, 1901, rule discharged.

From George W. Means, Brookville, Pa.

Petition of Certain Taxables of York Township School District.

Schools—Directors—Removal—Proper accommodations for scholars—Sanitary conditions and playgrounds—Acts of June 6, 1893, P. L. 330, and June 6, 1895, P. L. 339.

The Act of June 6, 1893, P. L. 330, relating to the reasonable and convenient accommodation of school children, does not mean that all the school children who may be in attendance or desire to attend any one school-house in the district must be comfortably seated in one particular school-house in their immediate neighborhood, but that there must be capacity for their reasonable and convenient accommodation at some convenient and proper school-house or houses near the residence of the pupils desiring to attend the public schools. And when such appears to be the case in a proceeding for the removal of school directors, under the provisions of the Act, a rule to show cause why they should not be removed from office will be discharged.

A delay on the part of school directors to comply with the Act of June 6, 1893, P. L. 330, relating to sanitary conditions and playgrounds, is inexcusable, and ground for their removal from office.

Rule to show cause why certain of the school directors should not be removed and others appointed in their stead. C. P. York Co.

J. S. Black, for petitioners; *J. R. Strawbridge*, for respondents.

BITTENDER, P. J., Oct. 7, 1901.—The petition in this proceeding was filed by taxables of the school district of York township, residing in the vicinity of the school-house, in the village of Spry, and not of Spry school district, as erroneously stated in the petition.

It avers that the school directors of said district have willfully neglected and refused to provide a suitable house, room or building in the said neighborhood of the petitioners, with ample room and seating capacity for the reasonable and convenient accommodation of all the school children there residing who desire to attend the said school as pupils; describing the school-house there used as an old building, giving its dimensions and stating that at the last term of the school there were fifty-nine pupils enrolled, and that there is a probability of the number being increased at the ensuing term of the school; and that said building is full of crevices, through which cold air in the wintry weather is constantly admitted, and the inmates made to suffer from the cold. Other matters are complained of, which are not such as are embraced in the terms of the Act of Assembly, and need not be now considered.

DISTRICT REPORTS

Petition of Certain Taxables of York Township School District.

The application is made under the Act of June 6, 1893, P. L. 330, and prays for the appointment of an inspector as provided in said Act. An inspector, B. F. Koller, Esq., was promptly appointed, and after hearing the parties, their proofs and allegations, reported to the court that a majority of the directors, to wit, Franklin Hovis, Emanuel Hartman, George Ness, John A. Burger and John Markey, have refused, neglected and failed, without valid cause for such refusal, neglect or failure, to provide and maintain suitable and adequate accommodations for the school children of the Spry school district as the law requires. Thereupon, on filing the said report, the court granted a rule on the said directors to show cause why they should not be removed from office, and other directors appointed in their stead, as provided by law.

To that rule, the said school directors filed an answer, denying the neglect and refusal to provide ample room and seating capacity for the reasonable and convenient accommodation of all the school children residing within the said district who attend or desire to attend the schools therein, and specifically setting forth their defence. No replication has been filed under oath, or evidence taken in support of the rule, and, consequently, the averments of the answer are to be taken as facts in this case.

We are confined to the consideration alone of the alleged neglect or refusal of said directors to perform their duties in regard to the specific matter referred to in the said Act of Assembly, viz., the failure to furnish ample room and seating capacity for the reasonable and convenient accommodation of all school children residing within the district who may be in attendance or desire to attend the schools therein.

We construe this Act to mean, not that all the school children who may be in attendance or desire to attend any one school-house in the school district must be comfortably seated in one particular school-house in their immediate neighborhood, but that there must be capacity for their reasonable and convenient accommodation at some convenient and proper school-house or houses near the residence of the pupils desiring to attend the public schools.

If the school children in the village and vicinage of Spry can be accommodated at convenient school-houses of the district, then the school directors cannot be held to be amenable to removal for a neglect of duty or refusal to discharge their proper duties.

The inspector has not reported that there are not school-houses of sufficient capacity and facilities for the comfortable seating and accommodation of the school children attending or desiring to attend in any other school-house in that part of the school district. The answer, which is conclusive, avers that the school-house in question is now in good repair; that there are fifty-six desks and additional seats, without desks, for sixteen more pupils in the Spry school-house, whereas, at the last term there was only an average attendance of forty-five. It further appears from the answer that there are three other school-houses in the neighborhood, in the said district, distant, respectively, from the village of Spry, one mile, and one mile and a-quarter, and one mile and a-half; two of them on the Chanceford pike and the other on a good road, where there is ample room for any of the pupils lately attending the Spry school, or who may become pupils in the public schools, and that they intend to distribute a portion of said pupils among the other schools so situated, or two of them, in the neighborhood of the petitioners. This may be lawfully and properly done.

On such roads the distance for the scholars to go to these other school-houses in the district cannot be held to be inconvenient or unreasonable and involving any hardship. Doubtless, some of the pupils live much nearer to the said neighboring school-houses, and if any expediency is manifested to require a decrease in the number of pupils in the school at Spry, which is much larger

Petition of Certain Taxables of York Township School District.

than the average attendance at the other school-houses mentioned, and, in our opinion, too large for one teacher, a goodly number can be received, seated and taught in the other three conveniently situated school-houses mentioned in the answer.

The directors, recognizing the claims of the taxpayers of Spry for better school accommodations there, promise the erection of a double school-house in time for the school term of 1902, and thus, by a little patience, the wants of this portion of the school district will have the great advantage of a modern and capacious school building, with a graded school. It is too late in the season to build and furnish a school-house for the current term. The intention of the school directors, expressed under oath, shows a commendable spirit of public interest and a desire to keep the schools abreast with the development of that important section of the county and the times in which we live.

The office of school director is, unfortunately, without any emolument. Its importance imperatively requires that some compensation should be provided for the care for and responsibility on behalf of the youths of the Commonwealth attending the public schools, where knowledge is instilled into their youthful minds and principles inculcated which cannot fail to make them useful and respectable members of society. Too much time and attention cannot be given to the care for and conduct of the public schools. Their influences are all in favor of good government. Anarchy and wrong cannot prevail against the christian truths, morality, patriotism and intellectual development and advancement afforded in the schools of the land. It is only the best men of all political parties, intellectually and morally, irrespective of party, who can be elected to this important office, or who will accept its arduous and responsible duties. Such men, we personally know these accused directors to be, and we are not convinced of any case being made out against them by competent proof, requiring their condemnation and humiliation, by their removal by the court.

We may properly add that, although the site of the present school-house, the spring from which the children obtain water, the playgrounds and the closets, are not matters for consideration in this case, they will be of vast importance when the new school-house comes to be built. There should be, then, the choice of the most eligible site, with a view to sanitary conditions, ample playgrounds and closets built and arranged as provided in the Act of June 6, 1893, P. L. 339, entitled "An Act to require boards of school directors and controllers to provide for the better protection of the health and morals of school children." For a neglect or refusal to comply with the terms of said Act, the directors may be removed from office. This Act has not been heretofore complied with by the directors of the district of York township. Any delay in this respect is inexcusable and will make trouble for the directors. The spring, also, which is doubtless contaminated by drainage from closets, was most probably the cause of the epidemic of diphtheria among the children last term. It should at once be abandoned as a source of supply for drinking water in the school. Its water should not be tolerated in the school by the directors or the teacher, nor should the pupils be permitted to visit the spring or drink the water.

From the evidence, including the answer of the respondents, this proceeding appears to have been taken without warrant of law, under a misconception of the Act of Assembly invoked and the facts in the case, and cannot be sustained.

And now, Oct. 7, 1901, the rule is discharged, at the costs of the petitioners, including the inspector's fee, which is fixed at \$15, also the stenographer's fee.

From Richard E. Cochran York, Pa.

Bethlehem Borough Extension.

Boroughs—Annexations—Requirements of petition—Acts of April 3, 1851, and April 28, 1899—Words “freehold,” “land”—Appeal—Practice—Acts of June 2, 1871, and April 6, 1899.

The word “land” when used in a grant denotes freehold estate.

Hence, where an ordinance, annexing adjacent territory to a borough, under Act of April 3, 1851, as amended by the Act of April 28, 1899, P. L. 115, recites that the action was taken upon the petition of “the majority of land-owners” of such territory, it is a sufficient compliance with the requirements of the Act, which requires that the petition be “of a majority of the freehold owners of lots,” &c.

The designation of freeholders as petitioners, under Act of April 3, 1851, P. L. 320, and its supplements, does not imply that they must be such as have an unencumbered estate, and are entitled to the privileges of stay of execution or exemption from arrest.

Under the Act of June 2, 1871, § 4, P. L. 283, amended by the Act of April 6, 1899, P. L. 83, an appeal from the ordinance of town council annexing such territory must be taken within thirty days of the filing of the plot or plan in the office of the Court of Quarter Sessions by the borough authorities. Hence, where the appeal was taken within that time, but the specifications in support of it, by way of exception, were not filed until after its expiration, *held*, that the appeal was in time and must be heard.

Such appeal can be referred to an examiner to take testimony, but the expenses are not taxable as costs.

Motion to quash ordinance filed and all proceedings for extension of borough limits. Q. S. Northampton Co.

W. E. Doster, for exceptants; *George R. Booth*, for Bethlehem borough.

SCOTT, J., June 10, 1901.—The borough of Bethlehem purposes to extend its limits, under the Act of April 3, 1851, and supplements. It adopted an ordinance Feb. 4, 1901, reciting that action was taken upon the petition of “the majority of land-owners of the adjoining and adjacent territory:” Act of April 28, 1899, P. L. 115. The ordinance, pursuant to requirement of the statute of June 2, 1871, § 4, P. L. 283, was filed in the office of the Court of Quarter Sessions on Feb. 22. The present motion challenges the jurisdiction of the borough, because the record shows that the petition was not signed by a majority of “freeholders” within the limits to be annexed.

Where proceedings are entirely statutory, it is generally advisable to follow in pleading the phraseology employed, but this is not essential if the matter be otherwise sufficiently stated according to its legal effect: 1 Chitty Pl., 312; *Mitchell v. Welch*, 17 Pa. 339.

The designation of freeholders as petitioners does not imply that they must be such as have an unencumbered estate and entitled to the privileges of stay of execution or exemption from arrest. It is intended to describe the quantity of interest which the tenant has in the tenement, measured by its duration and extent, according to its technical and common law signification, indicating a permanency of tenure to be affected by the proposed change. A freeholder has either an estate for life or in fee, and a person who has an interest less than this is not a land-owner. The word “land” (*Franciscus v. Reigart*, 4 W. 109), when used in a grant, denotes a freehold estate: 2 Blackstone's Comm., 18; *Shep. Touch.* 88; *Pond v. Bergh*, 10 Paige Ch., N. Y., 156. So it does in a devise: *Rooke v. Rooke*, 2 Vern. 461; *Chester v. Chester*, 3 P. Wms. 56; 2 Bouvier's Law Dict., Rawle's Rev., 105; and no minor interest would have passed by its mention until the statute of 1 Victoria, ch. 26, § 26, provided otherwise: *Beach on Wills*, § 286. An owner of land is one who has a freehold estate and is embraced within this requirement of the statute.

An appeal from the municipal action was taken on March 18, 1901, which was within thirty days from the date a copy of the ordinance was filed in the Quarter Sessions: Act of April 6, 1899, P. L. 33.

10 DIST. R.

Bethlehem Borough Extension.

Specifications in support of it, by way of exception, were not filed until April 1, 1901. But the period of limitation in the statute is solely upon the right of appeal. If that be in time, it must be heard by the court. The extent of it is defined by the objections made, the practice concerning which, in the absence of an Act of Assembly or a rule of court requiring them to be stated forthwith, follows the analogy of pleadings after suit brought or a bill of particulars upon a rule.

The exception here relates to a matter of fact, and traverses the recital that a majority of freeholders in the territory to be annexed signed the petition upon which the municipal ordinance was enacted. If desired, reference can be made to an examiner to take the testimony (not to make a report as master): *Wayne Borough Incorporation*, 12 Pa. Superior Ct. 363; *Middleton v. Middleton*, 187 Pa. 612; but the expenses so incurred are not taxable as costs: *Weckerly's Appeal*, 12 Pa. Superior Ct. 372.

Now, June 10, 1901, motion to quash proceedings dismissed and overruled.

From Henry D. Maxwell, Easton, Pa.

Wilkes-Barre Times v. City of Wilkes-Barre.

Taxation—Newspaper plant—Acts of April 15, 1834, and April 29, 1844.

Machinery used for printing and publishing a newspaper is not a "factory" or a "manufactory," under the Acts of April 15, 1834, § 4, P. L. 509, and April 29, 1844, § 82, P. L. 486, and is not subject to taxation thereunder.

Machinery, the property of the tenant, is personalty, although attached to the building, and is not liable to taxation as "real estate," under the Acts of April 15, 1834, § 4, P. L. 509, and April 29, 1844, § 82, P. L. 486.

Appeal from the board of revision and appeals of the city of Wilkes-Barre. C. P. Luzerne Co., Feb. T., 1901, No. 255.

J. G. Jayne and W. A. Reynolds, for plaintiff; *C. F. McHugh*, for defendant.

LYNCH, P. J., May 8, 1901.—The only matter in contest is the validity of the tax assessed upon "machinery" used for printing and publishing the *Times*, a daily newspaper, in the city of Wilkes-Barre. The building occupied by the corporation is owned by and assessed to Liddon Flick, from whom the *Times* leases the building. This appeal was taken by the *Times*, and filed, as provided by law, on Feb. 5, 1901: Act of May 23, 1895, § 5, P. L. 122.

By the provisions of the Act of May 23, 1889, P. L. 286, under title "Corporate Powers," the powers granted are to be exercised in manner therein provided. The city (section 3) is empowered to enact ordinances, to levy and collect taxes for general revenue purposes on real and personal property taxable according to the laws of the State for county purposes. It is claimed by the city that this property is subject to taxation under the provisions of the Acts of Assembly of April 15, 1834, § 4, P. L. 509, and April 29, 1844, § 32, P. L. 486.

In *Sewickley Borough v. Sholes*, 118 Pa. 165, Mr. Justice Green said: "Prior to the Act of 1874, the rule was that nothing was subject to taxation except that which was expressly taxed by some law. Under this Act everything is taxable except that which is exempt. So radical a change as this, which subjects to taxation many kinds of property never before taxed, must certainly be regarded as new legislation upon a subject of the gravest importance, and therefore plainly within the constitutional requirements we are considering:" Art. III, § 3.

The above is quoted at length to show how reluctant the highest court in the Commonwealth is to extend the power of taxation beyond what is expressly given by the laws enacted for this purpose.

Wilkes-Barre Times v. City of Wilkes-Barre.

The facts agreed upon show the *Times* is "engaged in the business of printing and publishing a daily newspaper." If we accept the definition of the words "factories" (Act of 1834), or "manufactories" (Act of 1844), given by Webster, appellant cannot be taxed: "*Factory*—a building or collection of buildings appropriated to the manufacture of goods," &c. No one, save those who feel aggrieved, for a time, at articles published in newspapers, speaks of a newspaper establishment as a factory. To manufacture is the operation of making wares of any kind: Webster. *Byers v. Franklin Coal Co.*, 106 Mass. 131, holds that publishing a newspaper is not manufacturing.

In *Franklin Fire Ins. Co. v. Brock*, 57 Pa. 74, Mr. Justice Read said: "A mill within the meaning of the prohibition is not merely a place where something might be ground, nor a manufactory merely where something may be made by hand or machinery, but what common usage recognizes as a mill or manufactory respectively." The language in the policy of insurance in above case and that in the Acts now under consideration is substantially identical.

The property in this case is not assessed as a machine shop, a factory or a manufactory, or as real estate, but as machinery, followed (in the agreement) by an enumeration of the machines and the uses to which the whole is put, viz., printing and publishing a daily newspaper. At present, all factories and manufacturing establishments, no doubt, use machinery, but there is much machinery not used in either.

In *re Capital Publishing Co.*, 3 McArthur, 412 (1879); a well considered case, is in line with the above view; also *Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. L. 36.

As stated in the excellent and exhaustive argument of counsel for appellant, it is a significant fact that in no Act of Assembly is printing referred to otherwise than as the business of "printing and publishing." See Act of 1897, P. L. 30, where the distinction between manufacturing and "printing offices" is emphasized.

The case is made clear by many authorities cited by counsel for appellant, but we are of opinion those cited are sufficient to show what has been decided and the trend of judicial opinion.

The fact agreed upon shows that the machinery assessed with taxes is attached to the building in which the paper is printed and published, but this building and the ground upon which it stands are owned by Mr. Flick and assessed in his name. The corporation is a tenant at present occupying this building. From the very nature of the tenure and business enterprise therein conducted, it is manifest the relation of landlord and tenant may at any time cease, the machinery be removed by the tenant and set up elsewhere. In other words, the property in question is personal.

Patterson v. Delaware County, 70 Pa. 381, is based upon the admitted fact that the factory and machinery therein (owned by the same person) was one plant, and therefore real estate liable to taxation. Here there is a place at which a line can be easily drawn, designating where the building ends and the newspaper establishment commences.

So far, nothing has been said concerning the omission from the agreement to state that the city enacted an ordinance authorizing it to levy and collect the tax in question. The Act of 1889, P. L. 286, directs in what manner the power to tax shall be exercised by the city, to wit, by ordinance. There is nothing in this case averring that the city complied with this mandate of the legislature. As the case is presented, it is a grave question whether this omission alone is not sufficient to authorize the court to declare the assessment invalid.

The appeal is sustained, and the assessment appealed from is declared invalid.

From Sidney R. Miner, Wilkes-Barre, Pa.

Brown v. Southwest Pennsylvania Railway Company.

Practice, C. P.—Appeal from report of viewers—Docket entry of appeal—Amendment.

In an appeal from a report of viewers, assessing damages sustained by reason of the location and construction of a road, the provisions of the Act of April 9, 1856, § 3, P. L. 288, are sufficiently complied with by having the prothonotary note upon the docket within the statutory period the fact that an appeal is taken; a formal paper is unnecessary.

The court will permit a defective appeal, taken in good faith and within the proper time, to be amended.

Motion to strike off appeal. C. P. Fayette Co., Sept. T., 1900, No. 135.

Robinson & McKean, for plaintiff; *W. H. Playford*, for defendant.

REPPERT, P. J., Feb. 25, 1901.—This is a motion by the plaintiff to strike off the appeal of the defendant from the report of the viewers assessing damages sustained by reason of the location and construction of the defendant's road, for the reason that the appeal was not taken according to law. The statute provides: "Upon the report of said viewers, or any four of them, being filed in said court, either party, within thirty days thereafter, may file his, her or their appeal from said report to the said court." The docket entries show the following notation: "Sept. 19, 1900, the defendant company appeals from the report of the viewers in this case to the court." The record shows that no paper was filed authorizing the notation quoted, and it is admitted that the entry was made and written by the prothonotary as dictated by counsel for the defendant. This, the plaintiff contends, is, at best, but a noting or recording of the act of taking the appeal, and that, no appeal having been taken in the manner provided by the statute, the act of the prothonotary in making this entry was unlawful and cannot take the place of the statutory provision permitting either party to file an appeal. That is, that the words which now appear on the continuance docket should have been written on a separate paper, the paper delivered to the prothonotary and by him received. This contention would be more meritorious if the virtue lay in the filing of the paper and not in the words quoted—or if the statute had chiefly in view the filing of a paper and not the securing of a privilege and right to the parties.

"Statutes giving or extending a right of appeal are always liberally construed in furtherance of justice, and the courts will endeavor to avoid putting upon them such a construction as would work a forfeiture of the right in the particular case." Black on Interp. of Laws, 311.

In condemnation proceedings, as in suits before a justice of the peace, the appeal involves the right of trial by jury. Referring to appeals of the latter class, Mr. Justice Paxson, in *Womelsdorf v. Helfner*, 104 Pa. 4, says: "The law favors the right of appeal. It involves the right of trial by jury. Where an appeal has been taken in good faith, and within the time prescribed by law, it is usual to allow a defect to be amended; in other words, to perfect the appeal. So, where a recognizance is defective, it is usual to allow it to be perfected when it produces no delay and does the other side no injury."

In the case at bar, there is no doubt that the appeal was taken in good faith and within the proper time, and even if we regarded the manner in which it was taken as defective, we would allow the appeal to be perfected, as such amendment would cause no delay and do no injury to the plaintiff.

It is very true that statutory provisions and requirements regulating appeals must be complied with, particularly where the right of appeal is conditional, and depends upon a compliance with conditions requisite to a due administration of the law, for such provisions go to the jurisdiction. This, however, is not in conflict with the principle above stated, and which is also clearly expressed

DISTRICT REPORTS.

Brown v. Southwest Pennsylvania Railway Company.

in *Shelton v. Wade*, 51 Am. Dec. 722: "Laws regulating the exercise of the right (of appeal) are intended to afford the party every possible facility in its furtherance consistent with a due regard to rights of the opposite party, and they should be so construed as most certainly and effectually to attain this object."

Believing that the defendant has brought itself within a reasonable construction of the statute, the motion to strike off the appeal is overruled and dismissed.

From L. H. Frasher, Uniontown, Pa.

Dolan et al. v. Lackawanna Township School District et al.

School district — Increase of indebtedness — Constitutional limitation — Injunction.

Where it is clearly shown that a school district has increased its indebtedness beyond the constitutional limitation, an injunction will be allowed, however small and insignificant the margin may be.

In calculating the assets and liabilities of a school district to determine whether certain contracts authorized by the district are unlawful by reason of their increasing the indebtedness of the district beyond its constitutional limitation

(a) The commissions and exonerations must be deducted from the amount claimed as an asset due the district from taxes.

(b) The value of certain lots of the school district, estimated at the amount of allowance which one of the contractors offers to make for them, if the school district will let them go at that price, is too problematic an asset to be considered as such.

(c) The right of a new board to levy a tax for building purposes is not an asset.

(d) Money due the school district from another school district, on an adjustment of the assets and liabilities between them, is an asset, although the exact amount thereof has not been determined by the auditor appointed for that purpose.

There is no principle of law which would exclude evidence in the case at bar as to the indebtedness of one district to another, after a division of the territory, because the same subject-matter is to come before the court in another form.

Injunction. C. P. Lackawanna Co., May T., 1901, No. 12, in Equity.

John P. Quinan, W. S. Diehl and H. L. Taylor, for plaintiffs.

D. J. Reedy, M. J. Donahoe and A. D. Dean, for defendant.

EDWARDS, P. J., May 9, 1901.—Notwithstanding the numerous allegations in the plaintiffs' bill of complaint, the evidence at the hearing of the rule for a preliminary injunction was confined, and properly so, to the one question, whether the school district of Lackawanna township, by the awarding of certain contracts for the erection of a school building, had increased its indebtedness to an amount exceeding two per centum of the assessed valuation of the taxable property of the district. This is the only contention, and, excepting two or three controverted points, the solution of the question would be a mere matter of mathematical calculation.

We shall briefly state the facts as disclosed by the evidence:

1. On April 6, 1901, the school district of Lackawanna township, having determined to provide a new school building for the district, and having received bids from various contractors, awarded the following contracts:

Mulherin & Judge Lumber Company.....	\$13,500.00
Donohoe & O'Boyle.....	2,978.00
M. J. Eagan.....	3,984.00
G. F. Barker, for removal of old building.....	300.00
Total.....	\$20,762.00

On the same date the bonded indebtedness of the district was \$14,000, and the cash in the treasury amounted to \$14,320.84. There is also due the school district on the tax duplicate of 1900, after deducting exonerations and commissions 10 Dist. R.

DISTRICT REPORTS.

695

Dolan et al. v. Lackawanna Township School District et al.

estimated at \$400, the sum of \$4381.98. The assessed valuation of the property in the district for 1900 was \$751,598, two per centum of which is \$15,031.96. The assessment for 1901 is not yet completed.

2. With the above figures the attorneys on both sides have submitted certain calculations. The defendants make their estimates in this manner:

Two per cent. of the valuation	\$15,031.96
Cash in treasury April 6, 1901.....	14,320.84
Due from tax collector.....	4,781.98
Value of Gibbons's lots.....	1,000.00
	\$35,134.78

Liabilities.

Bonded indebtedness.....	\$14,000.00
Contracts of April 6, 1901, less Barker's contract..	20,462.00
	\$34,462.00
Balance in favor of district.....	
	\$672.78

There are three items of this calculation which are disputed:

(a) No allowance is made for exonerations and commissions estimated at \$400.
 (b) The Gibbons's lots, \$1000. These are lots that are discarded by the school board, but have a market value of \$1000 or more. Mulherin & Judge Lumber Company, in their contract for the building of the school-house, agree to take the lots as part payment of \$1000, unless the school board disposes of them in some other way.

(c) The Barker contract of \$300. This is one of the contracts awarded April 6, with the others, although there seems to be no written agreement in regard to it. The subject of the contract is the removal of a school building to another lot.

If these three items are taken out of the defendant's calculation, the balance against the school district on the two per cent. limitation will be about \$1000. The plaintiffs' figures differ from the defendants' only to the extent of leaving out the three items mentioned.

3. As we view the matter, there can be no question as to the Barker contract and the commissions and exonerations. The awarding of such a contract on April 6, 1901, added \$300 to the indebtedness of the district, and there is just as much reason for leaving this contract out of the calculation as there would be for ignoring any one of the other larger contracts awarded on the same day. Neither can there be any doubt as to the commissions and exonerations. They must always be taken into consideration in estimating the amount of money to be realized from a tax duplicate. The item of the Gibbons's lots may not be so clear on first impression. This item may reduce the Mulherin & Judge Lumber Company contract from \$13,500 to \$12,500, and it may not.

While the contractors are bound to take the lots at \$1000, the option is left to the school board to let them go at that price. The board may sell them at a higher price, or they may use them for some other purpose and not sell them at all. The incoming board may have different views on the matter. The value of such an item as an asset is too problematical to be considered by us now. By eliminating these items from our calculation it will be readily seen that the debt of the school district has been increased about \$1000 beyond the two per cent. limitation. It is not necessary to give further figures in detail to explain this conclusion. Defendants claim that the margin is so small and insignificant that the right of the plaintiffs to an injunction is at best doubtful on their own showing; but we hold that once it is clearly shown a school district has increased its indebtedness beyond the constitutional limitation an injunction must be allowed. Whether the excess is \$100 or \$1000 or more makes no difference.

Dolan et al. v. Lackawanna Township School District et al.

If there were no other matters in this case than those disclosed by the facts as far as we have discussed them, it would be our duty to grant a preliminary injunction as prayed for; but we are confronted with two questions, the determination of which has an important bearing in this case.

4. One of the questions which the defendants claim is conclusive against the plaintiffs is the right of the school board, in about two months from this time and after the organization of the new board, to levy a tax for building purposes not to exceed thirteen mills. This is a kind of potential asset which we cannot consider now. Whether the school board will levy a one-mill or a thirteen-mill building tax, or whether they will levy any, are matters entirely beyond our knowledge. It is possible that if the board, when the proper time comes, fail to provide a building fund to meet the indebtedness of the district, they may be compelled by mandamus to levy a tax so as to pay a debt which they had authority to create; but if the creation of the debt itself was without authority in law, we know of no method to enforce the collection of it. The authorities cited by counsel, *Com. v. Allegheny*, 37 Pa. 277, *Com. v. Pittsburgh*, 34 Pa. 496, and others along the same line, do not decide that the collection of an illegal debt may be commanded by mandamus or in any other way. If the increase of indebtedness caused by the awarding of the contracts on April 6, 1901, was unconstitutional then, it is unconstitutional now, and no levy made by the incoming school board can cure it. And the contractors cannot complain, because the law is, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract, and a contract beyond the scope of the corporate power is void.

5. The remaining contention is decided in favor of the defendants. It appears that the borough of Moosic has been created out of territory formerly a part of Lackawanna township. The decree of our court incorporating the borough of Moosic was made Nov. 28, 1898. An order of *supersedeas* was secured from the Superior Court, but the action of the court below was affirmed in January, 1900, when the decree of incorporation became effective. The Act of April 11, 1862, P. L. 474, provides that in such cases there shall be an adjustment of liabilities and assets between the two school districts on the basis of the assessment of taxable property therein, taking into consideration the relative value of the school properties. The assessment of Moosic borough for 1900, the first one made, was about one-third of that of Lackawanna township for the same year. The territory constituting the borough had been more fortunate in the matter of school buildings than had the territory constituting the township as it remained after the division. According to the evidence, the value of the school property in the borough was \$22,150; in the township, \$7750.

The indebtedness of the whole district, as above stated, was \$14,000, and the cash on hand about \$14,000. In our calculation, these two items may be allowed to offset each other. Taking the most conservative estimate, the school district of the borough of Moosic owed the school district of Lackawanna township, in January, 1900, at least \$9000, which leaves the school board of the township a safe margin within the two per cent. limitation. Counsel for plaintiffs contend that this is not such an asset as can be considered now. They claim that the matter of the indebtedness of the one school district to another is now before an auditor appointed in pursuance of the provisions of the Act of Assembly; that he has not yet made his report, and that there is no indebtedness owing by the one district to the other until it is ascertained by the final confirmation of the auditor's report. We think that this position is clearly untenable. What was the auditor appointed to do? He was appointed to adjust the property rights of the two school districts, and to ascertain how much, if any, either district owed the other at the time the Moosic school district came into being.

10 DIST. R.

Dolan et al. v. Lackawanna Township School District et al.

It is true that he has not yet filed his report, but when he does report, he will report the amount of the indebtedness of one district to the other as it existed before the awarding of the contracts complained of in this case on April 6, 1901. Notwithstanding the appointment of the auditor, we know of no principle of law which would exclude the evidence offered in the case at bar as to the indebtedness of either district to the other, because the same subject-matter is to come before us in another form. The evidence shows that the Moosic school district, when it became a fact, was in debt to the old school district. This was a tangible asset existing at that time, and just as much of a debt owing to the Lackawanna school district as any one of the unpaid tax items on the duplicate of 1900.

Holding these views, we discharge the rule in this case and a preliminary injunction is refused.

From William A. Wilcox, Scranton, Pa.

Stancliff & Co. v. Taylor Township School District.

School board—School directors—Term of office—Act of April 22, 1863—When term commences and ends.

The Act of April 22, 1863, P. L. 523, provides "that the term of office of school directors, from and after Jan. 1, 1864, shall commence on the first Monday of June in each and every year," and that the organization of the new board shall be within ten days of the first Monday in June in each year.

The term of office of two school directors elected in February, 1897, commenced on Monday, June 7, 1897, while the term of office of the two directors who were succeeded by those so elected in February expired on the day preceding June 7, 1897.

The fact that the law provides for the prompt and summary removal of school directors and the appointment of others by the courts shows the clear intent of the legislature that when the term for which a director has been elected has expired, he at once ceases to be a director, and is therefore without any power or authority to take any action that would bind the district.

Plaintiff brought *assumpsit* on a warrant for supplies alleged to have been furnished the school district, signed by the president and secretary of the school board, without authority from the board. On the trial, plaintiff offered to show a ratification of the purchase and the issuing of the warrant at a meeting of the old board held on the first Monday in June, at which the old secretary acted, although he was one of the retiring directors, and at which meeting there had not been organization of the board, nor did the new members qualify or take any part. On objection to the proposed evidence, *held*, (a) that the term of two members of the old board had expired on the day preceding June 7, 1897 (which was the first Monday in June), and on that day they were *functus officio*, and when the old board met, it was not a board that could take any action which would bind the district: (b) that there was no provision in the law that members of school boards should hold over until their successors duly qualified; (c) that the secretary of such meeting, by whom the minutes were kept, was no longer secretary or a member of the board.

Rule to take off compulsory non-suit. C. P. Centre Co., April T., 1900, No. 46.

Orvis, Bower & Orvis, for rule; *Clement Dale and Reeder & Quigley*, contra.

LOVE, P. J., Oct. 18, 1901.—This is a rule to show cause why the non-suit granted upon the trial of the cause should not be taken off. The suit in this case was founded upon an alleged contract entered into by the school board of Taylor township for the purchase of a series of blocks to be used in the teaching of arithmetic in the public schools. The contract was signed April 4, 1897, by five members of the school board. The signatures were procured by the agent of S. M. Stancliff & Co. going around and seeing the individual members of the board, and thus procuring their signatures to the contract in their individual capacity. The contract price was \$162.50. Subsequently, May 6, 1897, an order was procured for the amount, signed by the president and secretary of the board, in the same manner. Upon the trial of the cause, D. B. Fink was called as a witness. He testified that he was secretary of the board of directors; that his

DISTRICT REPORTS.

Stancilff & Co. v. Taylor Township School District.

successor and that of another member of the board were duly elected at the spring election in February, 1897; there was no meeting of the school board prior to June 7, 1897, at which any action was taken by the school board as such, either as to making said contract, ratifying the same or authorizing the issuing of said order for the amount thereof to the plaintiff. Upon the trial, after the foregoing facts were established by the testimony of D. B. Fink, who was secretary of the board in 1897, the plaintiff proposed to prove by him that at the meeting of the board, Monday, June 7, 1897 (which was the first Monday of June), the old board took action upon the said contract and ratified the same; that he, as secretary, made a minute of it on a slip of paper, but it was mislaid and not recorded in the minute-book of the board. Fink testified that the board met to settle accounts with the auditors; that the two directors who were elected in February preceding were present, but were not qualified, and the new board did not organize that day; that they did not organize until June 19, and that he turned over to Mr. Warner, his successor, the minute-book.

Objections were made by defendant to the admission of the proposed testimony of D. B. Fink to supply the minutes of the action of the old board at the said meeting of June 7, 1897, because, as a board, it could not meet and take action to bind the township; that D. B. Fink, at the time of the meeting, was no longer a member of the board nor its secretary. We sustained the objections and excluded the testimony, and a compulsory non-suit, on motion, was granted.

The Act of April 22, 1863, § 1, P. L. 523, provides "that the term of office of school directors, from and after Jan. 1, 1864, *shall* commence on the first Monday of June in each and every year," and that the organization of the new board shall be within ten days of the first Monday of June in each year.

The school law provides, further, that if the board fail or refuse to organize, upon petition to court, their offices may be declared vacant, or they be removed from office and the court appoint to fill such vacancies. It is very clear that the commencement of the term of office of the two school directors elected in February, 1897, commenced on Monday, June 7, 1897. The two whose office terminated at that time were not members of the board. Their term expired the day preceding June 7, 1897. They were *functus officio*, and when the old board met, it was not a board that could take any action that would bind the township. There were present at the meeting, with the old members whose term had expired, eight members of the board. There is no provision of the law providing that members of the board shall hold over until their successors duly qualify. And the fact that the law provides for the prompt and summary removal of school directors and the appointment of others by the court shows the clear intent of the legislature that when the term for which a director has been elected has expired, he at once ceases to be a director, and is therefore without any power or authority to take any action that would bind the district. It was conceded, upon the trial, that without the alleged action of the old board in its attempt to ratify said contract on June 7, 1897, there was no liability shown on part of the defendant district.

We have not been persuaded that we erred in excluding the offer. The witness by whom it was proposed to prove the minutes as kept by the secretary was no longer secretary or a member of the board. The meeting of the old board to take action to bind the township was without authority. Nor was it proposed to show that the four who voted to ratify were school directors, but we gathered from the trial that two of the votes were given in favor of the ratification by two members of the board whose term of office had expired. We therefore see no reason for taking off the non-suit.

The rule is therefore discharged, and motion to take off non-suit refused.

From Wilbur F. Reeder, Bellefonte, Pa.

Smith & Son v. Speakman.

Insolvency—Act of June 4, 1901.

The Act of June 4, 1901, P. L. 404, relating to insolvency, is not retroactive.

Rule to show cause why a receiver of an insolvent's estate should not be appointed under the Act of June 4, 1901, P. L. 404, the object being to have a judgment confessed by the insolvent and entered before the passage of the said Act inure to the benefit of all the creditors. C. P. Chester Co., Miscellaneous, No. 2421.

William M. Hayes and J. Carroll Hayes, for rule.

Joseph H. Baldwin, for demurrer.

HEMPHILL, P. J., Oct. 7, 1901.—The defendant, being insolvent, did, on April 19, 1901, execute a promissory judgment note to his wife, Mary H. Speakman, for \$500, and had the same entered on the same day in the Court of Common Pleas of Chester county, in Judgment Docket E. 3, page 34, with intent to give her a preference over other creditors.

On Aug. 17, 1901, upon the petition of the plaintiffs under the provisions of the 7th section of an Act of Assembly approved June 4, 1901, P. L. 404, a rule was granted upon defendant "to show cause why a receiver should not be appointed for the estate of said William H. Speakman, the alleged insolvent, and all proceedings, if any, there against vacated and set aside." To this rule defendant demurred, assigning as cause of demurrer that the Act of June 4, 1901, "has no other than a prospective operation."

The question then is, was it the intention of the legislature that the Act of June 4, 1901, should be retroactive or only prospective in its operation?

The general presumption is against retroaction, and "no statute is held to operate retroactively unless its language admits of no other construction:" Neff's Appeal, 21 Pa. 247.

The rule deduced by Judge Endlich, "from the comparison of a vast number of judicial utterances upon this subject," is, "that a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute, taken by themselves and in connection with the subject and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention:" Interpretation of Statutes, § 271.

The Act under consideration contains no clear and unequivocal legislative mandate giving it a retroactive effect, nor does its language indicate such to have been the intention, but, on the contrary, an intention to make it prospective only. It is: "That if any person, firm, &c., &c., being insolvent or in contemplation of insolvency, with a view to give a preference, &c., &c., shall procure, suffer or permit (future tense) any judgment to be entered by confession, &c., &c., such judgment, &c., &c., shall inure to the benefit of all the creditors of such insolvent, if an assignment for the benefit of creditors be made or proceedings in insolvency be commenced within four months after such judgment, &c., &c., shall have been entered, &c., &c."

Moreover, to give the Act retroactive effect would be to ignore another rule of interpretation and without benefit to the plaintiffs. That rule is: "That the court, if possible, must give the statute such a construction as will enable it to have effect:" Cooley on Const. Lim., *184. That we have done by construing the Act of 1901 to be prospective in its operation, while to have held it to be retroactive, we would have been compelled to declare it, or at least a

DISTRICT REPORTS.

Smith & Son v. Speakman.

portion of it, unconstitutional, as violating the 10th section of art. I of the Constitution of the United States, prohibiting States from passing laws impairing the obligation of contracts.

In this case the contract or agreement between the parties, the defendant and his wife, is evidenced by the promissory judgment note, by the entry of which she obtained at the time a legal preference over other creditors by lien upon his real estate.

Now, the obligation of that contract is, that the maker of the note, the defendant, shall pay to the obligee, his wife, \$500 on demand, and pledges to her for the payment of the same whatever real estate he might hold in the county. To hold the Act of 1901 to be retroactive would be to release him from a part of this obligation, or, in other words, impair it and deprive the obligee of a portion of her rights under it, by making her judgment inure to the benefit of all the creditors of the insolvent, thus destroying her preference: See *Sturges v. Crowninshield*, 4 Wheaton, 197.

Consequently, to construe the Act as retroactive in its operation could be of no possible benefit or advantage to the plaintiffs, and, under either construction, we would have to discharge the rule.

The demurrer is therefore sustained and rule discharged.

From Gibbons Gray Cornwell, West Chester, Pa.

Muir v. Baker.

Justice of the peace—Subsequent independent investigation.

Judgment must be reversed where, after the hearing, in the absence of the defendant, the justice of the peace went to the store of the plaintiff and looked over his books, which had not been offered in evidence, and, following this independent investigation, rendered a judgment different from the one which should have been rendered upon the evidence adduced at the trial.

Certiorari. C. P. Bradford Co., Dec. T., 1900, No. 367.

William E. Lane, for plaintiff; *William P. Wilson*, for defendant.

FANNING, P. J., Sept. 2, 1901.—It appears from the depositions that some time after the hearing the justice went to the store of the plaintiff and looked over his books, which had not been offered in evidence. The defendant was not present and was not informed of the proposed investigation by the justice. Following this independent investigation, the justice rendered a judgment very different, it is contended, from the one that should have been rendered upon the evidence adduced at the trial.

It is unnecessary to cite authorities to show that such a proceeding is very irregular and fatal to the judgment. Doubtless, the magistrate was actuated by an honest desire to know all the facts of the case, so that a proper judgment might be given, but his act deprived the defendant of his right to be heard on the evidence thus secured. The judgment must therefore be reversed.

Some other irregularities appear in the record and from the testimony, but the conclusion already reached renders it unnecessary to discuss the same.

Now, to wit, Aug. 24, 1901, judgment reversed.

From R. H. Williams, Towanda, Pa.

Erdmann et al. v. Mitchell et al.

Courts of Common Pleas—Equity jurisdiction—Act of June 16, 1836, sec. 13.

Under the Act of June 16, 1836, § 13, P. L. 784, extended throughout the Commonwealth by art. v, § 20, of the Constitution of 1874, the Courts of Common Pleas have the jurisdiction of courts of chancery, so far as relates to the prevention, or restraint, of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals.

Constitutional law—Right of a workman to obtain employment.

The rights of enjoying liberty, of acquiring property and of pursuing his own happiness, inherent and indefeasible in every man, guaranteed under the Bill of Rights, which constitutes the 1st article of the Constitution of 1874, necessarily include the right of a workman to work when, where and as he pleases, without let or hindrance by others, and such right is one of the rights of individuals within the protection of the Chancellor.

Labor unions—Coercion of non-union workmen.

A combination to coerce workmen to become members of a trades union, or to interfere with them in working or in obtaining work to induce them to become members, is unlawful, and all acts done by members of the combination in furtherance of such intention, by interfering with the freedom of employers in their lawful employment of such workmen, if accompanied by damage, are acts contrary to law and prejudicial both to the interests of the community and to the rights of individuals.

Labor unions—Unlawful conspiracies—Acts of June 14, 1872, April 20, 1876, and June 16, 1891.

The Acts of June 14, 1872, P. L. 1175, April 20, 1876, P. L. 45, and June 16, 1891, P. L. 300, merely relieve workmen from criminal prosecution in the cases therein specified, and do not legalize a combination or conspiracy of union workmen to coerce employers or non-union workmen, which would have been illegal before their passage, so as to deprive persons injured by such combination or conspiracy of their civil remedies at law or in equity.

It seems that if the true construction of these statutes is to deprive persons injured by such combinations or conspiracies of union workmen of their civil remedies at law or in equity, the statutes must be regarded as in violation of the 11th section of the Bill of Rights and unconstitutional.

The plaintiffs were journeymen plumbers, who were members of an incorporated trades union, known as the "Plumbers' League of the City of Philadelphia." The defendants were officers and members of an unincorporated association, known as the "Council of Allied Building Trades of Philadelphia and Vicinity," whose object was to gain control of the building trades throughout the neighborhood by organization of their various branches. The plaintiffs' organization was not in affiliation with the defendants, and had refused to enter into affiliation with them; defendants thereupon ordered a strike of all workmen in affiliation with their organization employed upon the same building as plaintiffs, to coerce their employers into discharging them. The strike was afterwards settled, and, pursuant to the agreement of settlement, plaintiffs were discharged, and thereafter the president of the Plumbers' League was informed by the secretary of the Council of the Allied Building Trades, himself one of the defendants, that the latter association intended to drive all the plumbers in the city into an association in affiliation with them by using the same means as in this instance, wherever they had the opportunity of doing so. Plaintiffs found it almost impossible to get work in Philadelphia. *Held*, that the conduct of the defendants was prejudicial to the interests of the community and to the rights of the plaintiffs, and its continuance would be enjoined by a court of equity.

Findings of fact and of law. C. P. No. 3, Phila. Co., March T., 1901, No. 2869, in equity.

David Lavis, for plaintiffs; *Simpson & Brown*, for defendants.

MCCARTHY, J., Nov. 28, 1901.—This cause was tried upon June 18 and June 19, 1901, before me sitting as chancellor. Both plaintiffs and defendants were represented by their respective counsel. Evidence was given in open court on behalf of the plaintiffs. The defendants offered no testimony, and, after the hearing of plaintiffs' evidence, moved the court to dismiss the bill. The case was fully argued by counsel.

DISTRICT REPORTS.

Erdmann et al. v. Mitchell et al.

Abstract of the pleadings.

The bill sets forth that the plaintiffs, on April 23, 1901, and for a long time prior thereto, were employed as journeymen plumbers upon a building in course of erection in Philadelphia; that the defendants are officers and members of an association known as the Council of the Allied Building Trades of Philadelphia and Vicinity; that plaintiffs have been hampered and annoyed in their business by the control sought to be exercised over the general contractors in charge of the construction of the said building; that while engaged in their said employment, to the entire satisfaction of their employers and themselves, the defendants and William Spencer, a duly authorized agent of defendants, on the day aforesaid, unlawfully interfered with and molested plaintiffs by threatening, soliciting and demanding the said contractors to discharge or cause the discharge of plaintiffs from their employment because plaintiffs were not members of the said association; that defendants claim the right to declare strikes and otherwise interfere with the employment of labor, when, in the judgment of the association, such strikes shall be necessary, proper or desirable, and to require, under penalties, obedience of each and every member of the association to its official orders; that defendants unlawfully conspired and threatened to declare a strike, and to order away from their respective employments all mechanics, members of said association, who were working upon said building on the aforesaid day, if the contractors did not comply with their demand and remove or discharge plaintiffs; that by reason of defendants' conduct, plaintiffs were discharged from said work on the day aforesaid, and two of them have since been without any employment; that the motives of defendants were to oppress, the means they used unlawful, and their conduct injurious to the rights of plaintiffs and the public; that defendants still threaten to order a strike if plaintiffs are reinstated in their employment upon said building, and to demand their removal and discharge whenever and wherever they may obtain employment; that plaintiffs have no adequate remedy at law.

The prayer of the bill is that the defendants, and each and every member of the Council of the Allied Building Trades of Philadelphia and Vicinity, its officers, agents, servants and employees, be perpetually enjoined from interfering with plaintiffs or endeavoring to persuade their employers or any one else to discharge them, and for further relief.

The answer is filed by the six defendants named in the bill, but the Christian name and medial initial of the defendant Woods are stated as Daniel S. in place of James T. Among other things, the answer admits that plaintiffs were employed on April 23, 1901, upon the building in Philadelphia, and does not deny that they had been employed there prior thereto, and that their employment was that of journeymen plumbers; it admits that defendants are members and officers of the said association, but corrects the name of the president of the said association from James T. Woods, as stated in the bill, to Daniel S. Woods; it denies that plaintiffs have been hampered and annoyed in their business by the control sought to be exercised over the general contractors, or that defendants, or any of them, or any one for them, unlawfully interfered with or molested plaintiffs by threatening, soliciting and demanding the said contractors to discharge or cause the discharge of plaintiffs from their employment, and avers that defendants never at any time demanded the discharge of plaintiffs; it denies that defendants claim to exercise the right to interfere with the employment of labor when the said association deems it necessary, proper or desirable, but does not deny that they claim the right of declaring strikes and requiring, under penalties, the obedience of each and every member of the said association to its official orders; it avers that defendants and each of them claim the right, by fair argument and persuasion, to induce those affiliated with

defendants to decline to work with people whose sympathies are in antagonism to their own and defendants' material interests, and further avers that defendants have never used unlawful means for such purposes, and did not use them in the case of plaintiffs; it denies that defendants unlawfully conspired and threatened to declare a strike and order all the other mechanics working on said building from their respective employments if the contractors did not comply with the demands made to remove or discharge the plaintiffs; it avers that defendants tried to induce plaintiffs to join with defendants for the purpose of bettering the condition of plaintiffs and of defendants and of others in like situation; that plaintiffs refused, and that a number of persons employed on said building, by reason of that refusal, declined to work with plaintiffs; it denies that plaintiffs were discharged through any act of defendants, or that defendants' motives were to oppress plaintiffs or any one else, or that the means defendants used were unlawful, or that any conduct of defendants was injurious to plaintiffs or the public, but does not deny that plaintiffs were discharged from their work at said building on April 23, 1901, and that two of them, namely, Erdmann and Campbell, have been since without any employment; it denies that defendants, or any of them, still threaten to order a strike if plaintiffs are reinstated in their employment on said building, or that defendants intend to demand the removal and discharge of plaintiffs whenever and wherever they may obtain employment. It prays that defendants may be dismissed, with costs.

Findings of fact.

The following facts are clearly established from the pleadings and proofs:

1. The defendants are members of an unincorporated association of workmen, known as the Council of the Allied Building Trades of Philadelphia and Vicinity. This association will hereinafter be referred to as the Allied Trades. Its members are delegates chosen by trades unions of workmen "engaged in the building trades."

The objects and purposes of the Allied Trades sufficiently appear in the "constitution and by-laws" of the association, which was placed in evidence at the trial. The portions of this instrument which have a special bearing upon the case at bar are set out in the following extracts: The preamble recites that "the ownership and management of all industry is being placed on an organized basis, to the end that competition shall be replaced by unity of action," and declares, among other things, that "it behooves us as intelligent men to more thoroughly organize the 'workman' who makes the profits of all industry possible. Each union in a city should be allied with the other in the central council, and, following this to its logical end, each central council of every city should be allied with the other in such a manner as would grant to each city or locality the right of local autonomy with the allied support of the entire world." "We earnestly invite all organizations of workmen engaged in the building trades to join us in our efforts to build a permanent edifice until there shall be no man working in the building trades that does not own allegiance to The Council of the Allied Building Trades of Philadelphia and Vicinity." By article VII of the constitution the president is required, with the consent of the council, to appoint certain standing committees, among them an "organization committee of ten members." Article VIII prescribes the duties of committees, and section 3 is as follows: "The organization committee shall endeavor to organize any building trade that is not organized; they shall endeavor to get all building trades unions not affiliated with this council to affiliate with same," etc. Article XVI on "trade rules" contains the following sections: "Section 1. It shall be the special duty of this council to use the united strength of all trades represented herein to induce all non-union men to conform to and obey the laws

of the organization to which they should properly belong." "Section 3. Any organization that is not represented in this council shall not be protected on any building or job until affiliated with this body, except by unanimous consent of the council." Article IX establishes "an executive board, composed of the properly-elected business agents of the various organizations affiliated with this council." By section 5 of the same article, "the executive board shall be empowered to act on all occasions on behalf of the council, and to deal with all emergencies that may arise in the *interim* between meetings." Article XIII, section 2, provides: "When any trouble occurs on any building or job affecting any organization represented in this council, it shall be the duty of the business agent of said organization to immediately endeavor to settle same with the contractor or owner in accordance with the trade rules and to the satisfaction of the organization involved. Failing in this, the business agent shall have power to call said strike. If the aforesaid strike is liable to become general, he shall then lay the matter before the executive board at its next meeting and be governed by their action or decision, which shall be equally binding on all organizations in this council engaged on the job or building." Section 2 of article XI, as amended, provides: "The funds for the maintenance and expenses of this council shall be raised from the revenue obtained by issuing quarterly working-cards at ten cents per card."

Four of the defendants are officers of the Allied Trades: Daniel S. Woods is president; M. Collins is vice-president; Robert T. Mitchell is secretary; Thomas Maguire is treasurer. The remaining defendants, John Love and Harry Keeler, are members of the association, being delegates from two of its affiliated trades unions.

2. The plaintiffs are also workmen. Their trade is that of journeymen plumbers. They are members of an incorporated trades union chartered by Act of Assembly of this Commonwealth under the corporate name of "The Plumbers' League of the City of Philadelphia." The Plumbers' League is not now, and has never been, in affiliation with the Allied Trades.

3. In the early part of the month of April, 1901, a large building, known as the "Mariner and Merchant Building," was in course of erection at the southwest corner of Third and Chestnut streets in the city of Philadelphia. The firm of W. A. & A. E. Wells had the general contract for the erection of the building; Hoban & Doyle, master plumbers and gas-fitters, were sub-contractors for plumbing and gas-fitting. The plaintiffs were employed by Hoban & Doyle as journeymen, and were at that time actually at work upon the plumbing and gas-fitting at the building. Their work was entirely satisfactory to their employers, and also to the general contractors. None of the defendants were employed about the building.

4. In the early part of April, 1901, there were also at work upon the Mariner and Merchant Building certain other mechanics, of the respective trades of electricians, painters and steam-fitters' helpers, who were non-union workmen and did not carry the quarterly card of the Allied Trades. The plaintiffs, who were the only plumbers at that time working at the building, were also without the quarterly card. At a meeting of the executive board of the Allied Trades, the date of which does not appear in evidence, a strike was ordered of the workmen engaged at the building in affiliation with the association, the reason assigned for which was the employment there of the non-union electricians, painters, steam-fitters' helpers, and the plumbers, the present plaintiffs; that is, of mechanics who did not carry the Allied Trades' working-cards. The strike, according to the testimony, went into effect about two weeks prior to April 23, 1901, "on a Friday," and two-thirds of the mechanics employed about the building ceased working there upon and after that day. The defendants, prior

10 DIST. R.

to this strike, had tried to induce plaintiffs to join with them, and plaintiffs had refused.

5. After the strike was in effect, the defendants, Mitchell, Love, Maguire and Keeler, representing the Allied Trades as a committee, called upon Mr. Gilbert, manager for the firm of general contractors engaged in erecting the building, and informed him that if the plaintiffs were removed from work at the building the strike would cease. There seems to have been several such interviews, as a result of which an agreement was finally reached, which was reduced to writing. This writing was placed in evidence at the trial, and is in the following words:

"Agreement entered into between the W. A. & A. E. Wells Co. and the Council of the Allied Building Trades.

"It is hereby agreed, in the event of members of the United Association of Journeymen Plumbers finishing the plumbing in the Mariner and Merchant Building, on the corner of Third and Chestnut streets, and all workmen of other trades that are now or may hereafter be employed thereon, have in their possession the working-card of their respective unions for the current quarter, that no other strike will be declared until the completion of the said building; provided, however, that a general strike of any of the trades shall not be considered a violation of this agreement.

"Executed this 16th day of April, 1901.

By general contractor,

[SEAL.]

"W. A. & A. E. WELLS.

"THOMAS MAGUIRE, Chairman. R. T. MITCHELL, Secretary."

The United Association of Journeymen Plumbers mentioned in the agreement is a trades union affiliated with the Allied Trades.

In consequence of this agreement, Messrs. Wells & Wells requested Hoban & Doyle to cause the plaintiffs to desist from working at the said building, and Messrs. Hoban & Doyle complied with that request, and on April 23, 1901, directed the plaintiffs to cease working on the building. The plaintiffs accordingly took away their tools on that day, and have not been employed at that building since. When they had left the building the strike was formally declared off, and the striking workmen returned to their several employments. The steam-fitters' helpers, painters and electricians, against whom the strike had also been directed, were not required to leave the building, although they were still without working-cards of the Allied Trades, and, in point of fact, these mechanics continued at work there after the strike was settled.

6. At the time or shortly after the removal of the plaintiffs from the work upon the building at Third and Chestnut streets, Mr. Weild, president of the Plumbers' League, and Mr. Clune, a member of the league, had an interview with the defendant, Mitchell, secretary of the Allied Trades. The president of the Plumbers' League asked of him whether "the Allied Trades intended to stop meddling with the members of the Plumbers' League and not interfere with them at their work." He was informed by Mr. Mitchell that the Allied Trades intended to pursue the same course as at Third and Chestnut to drive every plumber in Philadelphia into the United Association of Journeymen Plumbers; that they would use the same means that they had used at Third and Chestnut on every building where they had the opportunity of doing it; that they intended to do the same as had been done with Erdmann, Best and Campbell, "and the intentions were to drive all the plumbers of the city of Philadelphia into the U. A. Association."

7. Since April 23, 1901, the plaintiff, Best, has not been employed at his trade in the city of Philadelphia. He has, however, been working for Hoban & Doyle, his former employers, at out-of-town work. The plaintiff, Campbell, some weeks after April 23, 1901, went into the employ of another firm of master

plumbers, and was set to work at a job in Philadelphia, where he remained for a few days. He has not had any other employment at his trade in Philadelphia. The plaintiff, Erdmann, after April 23, 1901, lost nine days' work, then obtained a job for five days in Oak Lane, which is in the city limits; since then, he has not obtained any work at his trade in the city. He applied to several master plumbers for employment, but was everywhere refused work.

Findings of law.

This case possesses features which do not appear to have been heretofore presented for adjudication in the courts of this Commonwealth. It is not an action wherein workmen are arrayed against the employers of labor, nor is it a contest between members of a trade organization, upon the one hand, and so-called non-union workmen—that is, those who are not members of a trade organization—upon the other. In this case both plaintiffs and defendants are union workmen. The controversy has arisen out of the fact that there are two organizations in the city of Philadelphia for the trade of journeymen plumbers, of which one is affiliated with a larger association, embracing delegates from the various local unions of workmen engaged in the building trades, and the other is not so affiliated. The defendants, with others, have combined together for the purpose of compelling the members of the non-affiliated association to leave it and to enter into membership with the affiliated union. The questions to be determined are whether this court, in its equity jurisdiction, possesses the power, and, if possessing it, whether it ought to enjoin those who are so combined to effect this result from accomplishing their purpose, and the answers depend upon the determination of the further questions, whether the acts complained of are or are not unlawful and prejudicial to the rights of the plaintiffs; whether the plaintiffs have or have not suffered injury therefrom, and, if so, whether the injury is irreparable and without adequate remedy at law. In solving these questions, I find the law to be as follows:

1. The equity jurisdiction of this court depends upon statutory enactment: Dohnert's Appeal, 64 Pa. 311. The legislature, by statute approved in 1836, gave to the Court of Common Pleas for the city and county of Philadelphia the power and jurisdiction of courts of chancery, so far as relates, among other things, "to the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals:" Act of June 16, 1836, § 13, P. L. 784. This jurisdiction in equity was extended to all the Courts of Common Pleas in the Commonwealth, and therefore to this court, by section 20 of art. v of the Constitution of 1874.

2. The people of the Commonwealth of Pennsylvania, by the Declaration of Rights, which constitutes the 1st article of the existing Constitution of the State, proclaim as follows: "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare that all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness:" Constitution, 1874, art. I, § 1. By the concluding section of that article, they further declare: "That everything in this article is excepted out of the general powers of government, and shall forever remain inviolate:" Constitution, 1874, art. I, § 26.

3. The rights of enjoying liberty, of acquiring property and of pursuing his own happiness, inherent and inalienable in every man, necessarily include the right of a workman to work when, where and as he pleases, without let or hindrance by others, and such right is one of "the rights of individuals" within the protection of the chancellor.

10 DIST. R.

"It is difficult to see why the rights of life and liberty, which include the right to provide a living for one's self and family by any lawful means, should not be protected as fully as the less important right of property. It cannot be that the strong arm of chancery can be successfully invoked to preserve the accumulations of the rich and is powerless to protect the capital of the poor, his brain and muscle and power and will to work when and as he pleases. This is, in a legal sense, property; it belongs to each man exclusively, and, with the mass of the community, it is their all. It is entitled to the protection of the law, and none is more interested in the assertion of this power than the defendants, as representatives of organized labor:" *Brace Bros. v. Evans*, 5 Pa. C. C. Reps. 163.

4. A combination to coerce workmen to become members of a trades union, or to interfere with them in working or in obtaining work to induce them to become members, is unlawful, and all acts done by members of the combination in furtherance of such intention, by interfering with the freedom of employers in their lawful employment of such workmen, if accompanied by damage, are acts contrary to law and prejudicial both to the interests of the community and to the rights of individuals.

In the *Old Dominion Steamship Company's Case*, decided in the United States Circuit Court for the Southern District of New York, certain defendants, constituting the "Executive Board of the Ocean Association of the Longshoremen's Union," not being in plaintiff's employ, procured plaintiff's workmen in New York and in southern ports to quit work in a body, for the purpose of compelling the plaintiff to accede to their demands and pay southern negroes the same wages as were paid longshoremen in New York. It was held that such procurement of workmen to quit work, being designed to inflict injury on plaintiff and not being justified, constituted in law a malicious and illegal interference with plaintiff's business which was actionable. The defendants also sent threatening notices to the plaintiff's customers and patrons to intimidate them from having dealings with it, and various persons were deterred in consequence, which acts were held illegal, rendering the defendants liable in damages, and also to be misdemeanors, both at common law and by the penal code of New York. In that case the defendants were arrested and held to bail, and their motion to vacate the order of arrest was denied. In the opinion refusing to vacate the order, the whole subject is thus tersely summed up: "Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working or in obtaining work, because they are not members, or in order to induce them to become members, or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are, *pro tanto*, illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable:" *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Repr. 48.

In the case of *Plant v. Woods*, decided in the Superior Court of Massachusetts in September, 1900, an unincorporated association of workmen, known as "The Painters and Decorators of America," which was in affiliation with a national

organization having headquarters at Lafayette, Indiana, filed a bill to restrain the defendants, another unincorporated organization of workmen, also called "The Painters and Decorators of America," but affiliated with a different national organization having its headquarters at Baltimore, Maryland, to restrain them from any acts or the use of any methods tending to prevent the members of plaintiffs' association from securing employment or continuing in their employment. It appeared in evidence that the general method of the defendants' operation was to have an agent visit the shop where members of the plaintiffs' union were employed, inform the employer of the intention of the defendants' union to treat members of the plaintiffs' union as non-union workmen, and ask him to induce such of his workmen as were members of the plaintiffs' union to apply for reinstatement in the defendants' union. The manner of the agent was uniformly courteous. No threats of personal violence were made. He did not ask for the discharge of the members of the plaintiffs' union, and he did not disparage them as workmen further than to characterize them as "non-union." The master in the case found, however, from the evidence, that the defendants intended that employers should fear trouble in case the workmen affiliated with plaintiffs should decline to apply for reinstatement, and that some of the employers did have such apprehensions and communicated the same to the defendants, who did not deny that such results might follow. Strikes did occur, which appeared to have been steps taken by the defendants to obtain the discharge of workmen affiliated with plaintiffs, who declined to apply for reinstatement in the defendants' union. From the opinion of the court, which granted the injunction prayed for, the following extracts are taken: "The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette union to join the Baltimore union, and as a means to this end, they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business. We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and to carry out their purpose have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property, by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. . . . The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs, and each of them, to join the defendant association, peaceably, if possible, but by threat and intimidation, if necessary . . . The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. . . . The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business and molested and disturbed them in their efforts to work at their trade. It is true, they committed no acts of personal violence or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in

cases like these. . . . It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter, against their will, to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will. . . . The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them. The necessity that plaintiffs should join this association is not so great nor is its relation to the right of the defendants, as compared with the right of the plaintiffs, to be free from molestation such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable and inconsistent with the spirit of our laws." *Plant v. Woods*, 178 Mass. 492.

In the case of *Curran v. Galen et al.*, decided in the New York Court of Appeals in 1897, it appeared that plaintiff brought suit for damages against the defendants, members of an unincorporated association in the city of Rochester, called the "Brewery Workingmen's Local Assembly," composed of workingmen employed in the brewery business in that city, who, he averred, had combined to injure him by taking away plaintiff's means of earning a livelihood and preventing him from obtaining employment. He alleged in his complaint that two of the defendants had threatened him that unless he would join the assembly they and that association would obtain his discharge from the employment in which he then was, and would make it impossible for him to obtain any employment in Rochester or elsewhere unless he became a member of the assembly. Plaintiff refused to become a member, whereupon the two defendants named and the assembly made complaint to his employers and forced them to discharge him, and by false and malicious reports in regard to him, sought to bring him into ill repute, and prevent him from prosecuting his trade and earning a livelihood. The answer, among other things, set up the existence in Rochester of the Ale Brewers' Association, and an agreement between the association and the assembly, that all employees of the brewery companies belonging to the association should be members of the assembly, and that no employee should work for a longer period than four weeks without becoming a member. It further alleged that plaintiff was retained in the employment of a company belonging to the association for more than four weeks after he was notified of the agreement; that they had requested him to become a member of the assembly, and upon his refusal to comply they had notified the brewing company, in pursuance of the said agreement and in accordance with its terms, without intent or purpose to injure plaintiff in any way. To this answer plaintiff demurred. The demurrer was sustained at special term and afterwards at general term, whereupon the defendants appealed, and the question to be determined upon the appeal, as stated by the court, was "whether this matter set up by way of special defence is sufficient to exonerate the defendants from the charge made in the complaint, of a conspiracy to injure the plaintiff and to deprive him of the means of earning his livelihood." In the decision of this question, the court say: "In the general consideration of the subject it must be premised that the organization or the co-operation of workingmen is not against any public policy. . . . It is proper and praiseworthy, and, perhaps, falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. Public policy and the interests of

society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. . . . Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful vocation under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion or a fettering of the individual glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies or the fellow-feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified?" *Curran v. Galen et al.*, 152 N. Y. 33.

5. The provisions of the Acts of Assembly of June 14, 1872, April 20, 1876, and June 16, 1891, are not applicable to the present case. The first of these Acts is entitled "An Act to relieve laborers, workingmen and journeymen from certain prosecutions and indictments for conspiracy under the criminal laws of this Commonwealth." It is enacted in the following words: "From and after the passage of this Act, it shall be lawful for any laborer or laborers, workingman or workingmen, journeyman or journeymen, acting either as individuals or as the member of any club, society or association, to refuse to work or labor for any person or persons whenever, in his, her or their opinion, the wages paid are insufficient, or the treatment of such laborer or laborers, workingman or workingmen, journeyman or journeymen, by his, her or their employer, is brutal or offensive, or the continued labor by such laborer or laborers, workingman or workingmen, journeyman or journeymen, would be contrary to the rules, regulations or by-laws of any club, society or organization to which he, she or they might belong, without subjecting any person or persons so refusing to work or labor to prosecution or indictment for conspiracy under the criminal laws of this Commonwealth." There are two provisos, the first being that the Act shall not apply to the members of any organization whose constitution, by-laws, rules and regulations do not strictly conform to the constitution of this State and of the United States; and the second, that the Act shall not prevent the prosecution of persons who hinder other persons from continuing to labor or from being employed: Act of June 14, 1872, § 1, P. L. 1175.

The second proviso of the foregoing Act is construed by the supplement approved in 1876, which enacts: "That the use of lawful or peaceable means, having for their object a lawful purpose, shall not be regarded as 'in any way hindering' persons who desire to labor; and that the use of force, threat or menace of harm to persons or property shall alone be regarded as in any

way hindering persons who desire to labor for their employers from so doing or other persons from being employed as laborers:" Act of April 20, 1876, § 1, P. L. 45.

The third and latest Act on the subject is entitled "An Act to relieve employees from certain prosecutions and punishments for conspiracy under common law or under the criminal laws of this Commonwealth," and it is enacted in the following words: "That it shall be lawful for employees, acting either as individuals or collectively, or as the members of any club, assembly, association or organization, to refuse to work or labor for any person, persons, corporation or corporations, whenever, in his, her or their opinion, the wages paid are insufficient, or his, her or their treatment is offensive or unjust, or whenever the continued labor or work by him, her or them would be contrary to the constitution, rules, regulations, by-laws, resolution or resolutions of any club, assembly, association, organization or meeting of which he, she or they may be a member or may have attended, and as such individuals or members, or as having attended any meeting, it shall be lawful for him, her or them to devise and adopt ways and means to make such rules, regulations, by-laws, resolution or resolutions effective, without subjecting them to indictment for conspiracy at common law or under the criminal laws of this Commonwealth. Provided, first, that this Act shall not be held to apply to the member or members of any club, assembly, association, organization or meeting, the constitution, rules, regulations, by-laws, resolution or resolutions of which are not in conformity with the Constitution of the United States and to the Constitution of this Commonwealth. Provided, second, that nothing herein contained shall prevent the prosecution and punishment, under any law other than that of conspiracy, of any person or persons who shall, by the use of force, threats or menace of harm to person or property, hinder or attempt to hinder any person or persons who may desire to labor or work for any employer from so doing for such wages and upon such terms and conditions as he, she or they may deem proper:" Act of June 16, 1891, § 1, P. L. 300. There is a third proviso, which need not be quoted.

Setting aside the doubt as to the constitutionality of these Acts, *vide* Cote v. Murphy, 159 Pa. 432, and O'Neil v. Behanna, 182 Pa. 245, it is plain that they do not apply to the case at bar. The title of an Act is a part of the Act, and from their titles, as well as from the express letter of their enactments, it is perfectly clear that the intention of these statutes is to relieve employees from prosecution as criminals in the cases specified and defined by the Acts, but it is not the scope and purpose of these statutes to legalize acts which are unlawful. The first two statutes, those of 1869 and 1872, have received judicial construction. In the well-considered opinion delivered in the case of Brace Bros. v. Evans, before cited, it is said: "But the intent of these statutes was merely to relieve the persons committing the acts specified from the penalties of crime. Because they are declared not to be criminal, and the perpetrators are relieved from criminal prosecution, does not make them lawful. There are many acts which are unlawful which are not criminal. Trespass upon real estate is unlawful; it is not criminal. Waste is unlawful; it is not criminal. And yet those may be the subject of equity jurisdiction. So the acts referred to in these statutes may be unlawful, because they injuriously affect the rights of individuals, notwithstanding they are divested of their criminal character. The legislature did not intend to deprive any citizen of legal redress for any injury sustained by the acts referred to. It has no power to do so if it had so intended. The 11th section of the Bill of Rights declares that 'Every man, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law.' If, therefore, the legislature should enact that violence done to

Erdmann et al. v. Mitchell et al.

personal property should not be indictable, it would not deprive the injured party of his redress by appropriate remedies, legal or equitable."

6. The acts of defendants are prejudicial to the rights of the plaintiffs, and they are irreparably injured thereby. As to this there can be no dispute. The testimony shows that the plaintiffs have been removed from their work at the Mariner and Merchant Building; that two of them have since had virtually no employment in Philadelphia, and that all of them have been more or less without work anywhere. That they have suffered, in consequence, pecuniary loss cannot be doubted. If the plaintiffs are wholly dependent for their living upon the labor of their hands, and there is nothing in the evidence to suggest that they have other means of livelihood, it is clear that a continuance of the defendants' acts must result either in driving the plaintiffs out of the community or out of their trade, or in reducing them to beggary. The defendant Mitchell has declared that it is the purpose and intention of himself and his associates to continue these acts. No attempt was made at the trial to contradict this declaration, and the defendants being all engaged in a common enterprise with Mitchell, his statement must be accepted as evidence against them all: *Vide Com. v. Eberle*, 3 S. & R. 9.

7. The plaintiffs are without an adequate remedy at law. It is true they might bring their respective actions against the defendants for damages for injury already occasioned them, but this affords them no security against the recurrence of such acts in the future, and the very multiplicity of the suits at law which would be necessitated by the state of facts is of itself a sufficient ground to warrant the interposition of the strong arm of the chancellor.

In conclusion upon the whole case, I find that the acts of the defendants as complained of by the bill and established by the evidence, are unlawful and prejudicial to the interests of the community and to the rights of the plaintiffs, and their commission and continuance should be prevented and restrained by injunction.

A decree for the decision of this cause in conformity with the foregoing findings has been prepared and will be filed by the prothonotary in accordance with the 63rd Rule of Equity Practice.

Root's Estate.

Wills—Legacies—Charge on land.

In order to charge legacies upon the land by implication, such implication must be clear. It does not clearly appear where testator, by separate clauses of his will, gave to his wife his personal and real estate for life, to other legatees pecuniary bequests in excess of his personal estate, and made no disposition of the residue.

Petition for citation. O. C. Phila. Co., July T., 1900, No. 281.

J. C. Lancaster and *C. E. Lex*, for petitioner.

W. Gorman and *J. F. Lamorelle*, for respondent.

ASHMAN, J., Nov. 2, 1901.—The testator, by separate clauses of his will, gave his personal and real estate to his wife for life. He gave to other legatees pecuniary bequests in excess of his personal estate, and he made no disposition of the residue. His wife survived him nearly thirty years, and after her death the personal estate was exhausted in a *pro rata* dividend of about 50 per cent. to the legatees. The single point at issue is whether the legacies were a charge upon the land. No express direction to subject the realty appeared, and the charge, if any, must arise by implication.

The authorities are uniform in holding that such implication must be clear: *Haworth's Appeal*, 105 Pa. 362; *Shenk v. Shenk*, 150 Pa. 521; and it is necessary 10 DIST. R.

Root's Estate.

early clear when by a gift of his residuary estate, in which realty and personalty are blended, the testator has provided a common fund for the payment of his gifts: Gallagher's Appeal, 48 Pa. 121; Bennett's Estate, 148 Pa. 139.

There was no such blended gift in this instance. The widow was given a life-estate in the personalty, and the legacies were payable at her death; and she was given a separate life-estate in the realty, with no disposition over. It is not safe to assume that the testator knew that his personal estate would be insufficient to meet his testamentary purpose. Even if he knew its exact amount at the time, he may have counted, not unreasonably, upon a rise, during the life of his wife, in the value of its investments.

The distinction between this case and Clery's Appeal, 35 Pa. 54, to which we were referred at the argument, is a broad one. The gift there to the widow was of the whole personal estate after the payment of debts, and there were other legacies amounting to \$8000, and it was held that the last-named gifts would be meaningless if they were not intended to be paid out of the realty.

In Linnard's Estate, 24 W. N. C. 492, which was also relied on, it was decided that the language of the will imported a residuary gift of blended real and personal estate. See Duvall's Estate, 31 Crumr. 176, where the rule laid down in Aldrich v. Cooper, 2 White & Tudor's Leading Cases, 346, is adopted by the Supreme Court: "The personal estate is not only the primary, but, *prima facie*, the exclusive fund for the payment of legacies, and this conclusion cannot be repelled by showing that the testator had no personal estate when the will was executed, and must therefore have intended that the legacies should come out of the real estate. Where one dies without leaving sufficient personal estate for the payment of his bequests, they are adeemed wholly or *pro tanto*, unless there is something more than the mere gift of the bequest to denote an intention that it should be paid out of the land."

The petition is dismissed.

Lisle's Estate.

Wills—Construction—Devises of realty construed by rule in force at date of execution—Trusts—Precatory words.

The transmission of real estate is governed by established principles which, whether originating in the common law or created by statute, determine, until changed by statute or decision of the court of last resort, the effect of every species of conveyance, including wills devising real estate, made prior to such change or repeal. Hence, when a testatrix, who died in July, 1848, executed her will in April, 1848, and devised her estate to her four children, "their heirs and assigns," and provided further, "I also request my children, in making their wills, to give the property they receive by this will, unless the strongest reasons should urge them to the contrary, to the direct heirs of my husband and myself," and the question to be decided is whether the fee simple is reduced to a life-estate, the case is governed by Coates's Appeal, 2 Barr, 129, decided in January, 1845, and not by Pennock's Estate, 8 Harris, 268, decided in 1853.

Collateral inheritance tax—On what payable—Testamentary powers—Whether will is to be regarded as in execution thereof.

Where three of the children died and, under their wills, three-fourths of their mother's estate became vested in their surviving sister in fee, and she died, devising her real estate to her nephews and niece, the latter took three-fourths of the estate devised to them by virtue of testatrix's absolute ownership, subject to the payment of the collateral inheritance tax, and the remaining one-fourth, under her power of appointment, to them as lineal descendants of the original testatrix, and not liable to the payment of such tax.

Collateral inheritance tax—Devises—Citation.

Where the collateral inheritance tax is due on realty, the devisees and not the executors are the proper parties to whom to direct the citation.

Petition and answer. O. C. Phila. Co., April T., 1901, No. 497.

Lisle's Estate.

Clayton H. Kochersperger and Emanuel Furth, for petitioner.

R. Mason Lisle, for respondent.

PENROSE, J., Nov. 2, 1901.—The transmission of real estate is governed by established principles, which, as they apply to all conveyances or assurances, are called rules of property—a rule, as we are told by Blackstone, being “permanent, uniform, and universal,” and not confined in its operation to individual cases. Such, for example, are the rules that a fee cannot be created by deed without the use of the word heirs, that a contingent remainder must be supported by a prior estate of freehold, that the exercise of a power of appointment by a tenant for life does not make the lands assets for the payment of his debts (in Pennsylvania, though it is otherwise in England), that a will, in the absence of evidence of contrary intent, passes lands acquired after its execution, &c., &c., &c. These rules may have their origin in the common law, or, as in the case of after-acquired lands by a testator, be created by statute; but in either case, until changed by statute or by decision of the court of last resort, they determine the effect of every species of conveyance, including wills devising real estate, made prior to such change or repeal. Illustrations of this are furnished by the cases of wills of persons dying before the passage of the Act of 1833 as to after-acquired real estate (*Mullock v. Souder*, 5 W. & S. 198), or of execution of wills by mark, under the Act of 1848, instead of by signature (*Greenough v. Greenough*, 1 Jones, 489; *McCarty v. Hoffman*, 11 Harris, 507); and whether the rule is fixed by Act of legislature or ascertained by the court, whose decisions are equally binding upon the citizen, is immaterial. As was said by Lord Kenyon, in *Doe v. Allen*, 8 Term Rep. 504, “The maxim *misera est servitus ubi jus est vagum et incertum* applies with peculiar force to questions respecting real property . . . and if by means of new light occurring to new judges, all that which was supposed to be law by the wisdom of our ancestors is to be swept away at a time when the particular limitations are to take effect, mischievous indeed will be the consequences to the public.” So in *Goodtitle v. Otway*, 7 Term Rep. 420, it was said, “*Stare decisis* is a safe and prudent maxim: then it is every man’s fault if he does not take such advice as will be sure to lead him right, and the persons advising will have the means of doing it: but if everything is set afloat again, the ablest conveyancers may not be able to direct him.”

In *Coates's Appeal*, 2 Barr, 129, decided in January, 1845, it was solemnly declared, following the English cases, and especially *Wright v. Atkins*, 17 Vesey, 255, that an absolute estate given by will was reduced to a life-estate with remainder in trust by succeeding words of desire, expectation, or confidence,—whether the subject be real estate, as in *Wright v. Atkins*, or personal. This was reiterated in *Jackson v. Jackson*, 2 Barr, 214–15, decided in March of the same year.

The rule of property having been thus enunciated, Mrs. Lisle executed her will in April, 1848, devising her realty, in equal shares, to her four children, Nancy, Ellen, Sarah, and James, “their heirs and assigns,” providing, however, as in *Coates's Appeal* and *Wright v. Atkins*, as follows:—“I also request my children in making their wills to give the property they receive by this will, unless the strongest reasons should urge them to the contrary, to the direct heirs of my husband and myself.” She died in July, of the same year, and her real estate, therefore, under the law then governing, vested in her four children for life, with remainder to the “direct heirs” of her husband and herself, subject to the power of appointment and the provision with regard to the “strongest reasons,” &c., &c.; this being the effect whether the words of qualification in the will were to be regarded as mandatory, as in *Burt v. Herron*, 16 P. F. Smith,

10 Dist. R.

Lisle's Estate.

400 ; Kennedy's Appeal, 32 P. F. Smith, 163, or merely precatory, as in Coates's Appeal.

That the rights thus vested could not be divested by the subsequent ruling of the Supreme Court in Pennock's Estate, 8 Harris, 268, decided in 1853—five years after the death of the testatrix—seems clear from the principles which have been referred to. See, also, Peppard v. Deal, 9 Barr, 142 ; Shinkle v. Crock, 5 Harris, 163 ; Buffington v. Summit Branch R. R. Co., 24 P. F. Smith, 162 ; Butler v. Van Wyck, 1 Hill, 438, cited by counsel for the respondents. Pennock's Estate declared that words in a will, following an absolute gift, expressing desire, recommendation, and confidence, do not, *per se*, reduce the original gift, or create a trust in favor of the persons commended ; and this is now the rule of property on the subject. But it does not change rights which vested before the rule as declared in Coates's Appeal was rescinded, or affect the interpretation of words based upon it and becoming operative as conveyances in the meantime.

The estate, however, having thus passed to the four children of Mrs. Lisle, when James, in 1852, in the exercise of his power, devised his fourth to his sisters, Ellen and Sarah, in fee, they held, to that extent, absolutely. So in 1889, when Nancy (Mrs. Ashmead) devised her share to them in fee, they acquired in like manner another fourth ; and when Sarah devised her estate, including what she had thus become the absolute owner of, to Ellen, in June, 1890, the latter held three-fourths under devises or appointments of the other donees, absolutely, and only one-fourth under the limitations of the original will.

It follows, therefore, that in 1890, when her will devised the real estate to her niece and nephews, they took, to the extent of three-fourths, by virtue of her absolute ownership, subject to the payment of collateral inheritance tax : the other fourth passing under her power of appointment to them as lineal descendants of the original testatrix not being liable to such payment.

Of course, the property acquired by the exchange referred to in the petition and answer took the place of that previously held, and became subject to all its incidents so far as concerns questions of title or trust.

We cannot agree to the suggestion that the determination of the question as to who were to take as "direct heirs" was intended by the testatrix to remain open until the death of the last survivor of her four children. As they died, successively, the others were such direct heirs, and the successive appointments to them—the validity of which seems never to have been doubted—show that this was the contemporaneous and general understanding of the family.

It may be suggested, in conclusion, that the executors of Ellen's will, *qua* executors, are not the proper parties. It is true the Act of 1887 provides for citation to executors, but it can scarcely have been intended that this should apply to cases of devises of real estate with which they have nothing to do ; but the tax is made a lien on the real estate, and the devisees can be brought in under the principle of Detweiler's Appeal, 8 Wright, 243. We therefore grant leave to amend the petition accordingly ; after which, if no sufficient cause be shown to the contrary, our decree will be in favor of the Commonwealth to the extent of the allowance of tax on three-fourths of the amount of the clear value of the property.

Coray's Nomination.

Political parties—Rules—Investigating committee—Notice to parties proceeded against—Democratic State Central Committee illegally constituted—Nominations

A failure on the part of an investigating committee, appointed by the State committee of the Democratic party to investigate the party regularity of those composing the party organization, to notify the members against whom the proceedings were taken of the time when and place where the committee would meet, and to cite them to appear and be heard in their defence, renders a resolution removing such members from their positions a nullity.

The resolution, being a nullity, did not become of any force by being approved by the Democratic State Executive Committee and by the Democratic State Central Committee.

Although, under the rules of the Democratic party, the Democratic State Central Committee had, when legally constituted and acting, the exclusive power and authority to nominate whomsoever it might select to fill any vacancy on the ticket which might occur less than thirty days before the election held Nov. 5, 1901, such nomination could not be made by the committee after the exclusion of regular members without a hearing and the admission of others having no right of membership therein, as it was illegally constituted.

Objections to the nomination of Elisha A. Coray, Jr., for the office of State Treasurer on the Democratic ticket. C. P. Dauphin Co., Jan. T., 1902, No. 105.

M. E. Olmsted, Charles H. Bergner, Grant Weidman and Charles J. Sharkey, for objectors.

Snodgrass & Snodgrass and James A. Stranahan, for respondents.

SIMONTON, P. J., Oct. 21, 1901.—A judgment in this case was entered on Oct. 19, 1901, unaccompanied, for lack of time, by a statement of the reasons on which it was based. We now state these reasons.

Waiving the question of the power of the State committee to appoint the so-called Hasson committee with the powers purporting to be given to it in the resolution appointing it, which were, in part, "to hear, determine and dispose of all objections to the composition of the present organization in the said city, and in this regard to remove any present representative or official in the said organization and to substitute others in their place, when the said committee shall find the said representatives faithless to the party;" we find that the committee did not give notice to Patrick Donohue, Thomas E. Fitzpatrick, Thomas J. Ryan, John A. Thornton and Edward F. Bennis, of the time and place when and where it would sit to consider the question whether they were "faithless to the party," and did not cite them to appear and be heard in their defence, and did not hear them or give them an opportunity to be present and be heard, and therefore the finding of the committee embodied in the resolution passed by it on Oct. 10, 1901, declaring that "Patrick Donohue, Thomas E. Fitzpatrick, Thomas J. Ryan, John A. Thornton and Edward F. Bennis, have been faithless to the Democratic party, and are hereby removed from their positions as representatives in the said Democratic State Central Committee from the county of Philadelphia," was a nullity, and did not have any effect upon the status of said parties, and did not remove them "from their positions as representatives in the said Democratic State Central Committee from the county of Philadelphia," and did not legally substitute others in their stead.

We further find that this resolution, being a nullity, could not and did not become of any force or effect by being approved by the Democratic State Executive Committee, nor by the advice of this committee to the State Central Committee to "approve and ratify the same," nor by its approval and ratification by the State Central Committee at its meeting in Harrisburg, on Oct. 11, 1901. We further find that, by the rules of the Democratic party, the State Central Committee had, when legally constituted and acting, the exclusive power and authority to nominate whomsoever it might select to fill the vacancy

Coray's Nomination.

on the ticket that had occurred less than thirty days before Nov. 5, 1901. But we also find that Patrick Donohue, Thomas E. Fitzpatrick, Thomas J. Ryan, John A. Thornton and Edward F. Bennis were not notified to attend the meeting of the State Central Committee on Oct. 11, 1901, and were not given an opportunity to be heard and were not heard in their defence on the charge of being "faithless to the party," and for this reason, as well as because of the nullity of the Hasson committee resolution, they were, on Oct. 11, 1901, and still are, legal members of the State Central Committee, and as they were illegally excluded therefrom, and others having no right of membership were substituted in their stead and took part in deliberating and balloting, the committee was illegally constituted, and had no power to nominate any one or to certify a nomination.

The above are the findings and reasons on which the judgment entered on Oct. 19, 1901, is based.

From William M. Hargest, Harrisburg, Pa.

Commonwealth v. Pflueger.

Criminal procedure—New trial—Acquittal improperly obtained—Costs—Same placed on prosecutor by jury.

The fact that a verdict of acquittal in a criminal prosecution was procured by fraud or misconduct on the part of the defendant affords no ground for granting the Commonwealth a new trial. Where, however, in such a case, the costs have been imposed upon the prosecutor by the jury, a rule to set aside the verdict as to costs will be made absolute. The wrong done in obtaining a verdict of acquittal by fraud or misconduct is itself a substantive offence, and can be punished as such.

Rule for new trial. Q. S. Berks Co., March Sess., 1901, No. 28.

A. H. Rothermel, district-attorney, and Edward Kremp, for Commonwealth;
Jacobs & Keiser, for defendant.

ENDLICH, J., June 29, 1901.—The defendant was indicted for a misdemeanor under Act of June 11, 1879, P. L. 142. The jury acquitted him and put the costs upon the prosecutor. Thereupon this rule was granted, counsel representing the prosecution earnestly contending that a new trial might be allowed, notwithstanding the acquittal, on the ground that the verdict was obtained through improper influences. There seems, indeed, to be some authority for holding that a verdict of acquittal, procured by fraud or misconduct on the part of the defendant, may be set aside and a new trial ordered: 1 Bish. New Crim. L., § 1008, *et seq.* But no such doctrine appears ever to have been recognized in this State. In *Guffy v. Com.*, 2 Gr. 66, it is declared that the principle protecting a defendant acquitted in a criminal case against being put in jeopardy again "has been so applied as to deprive the court of the power to grant a new trial in a criminal case where the verdict is in favor of the defendant." And in *Hollister v. Com.*, 60 Pa. 103, it was laid down that where there has been a conviction on one count and an acquittal on another, and the defendant asks for a new trial, the latter cannot be granted on the whole indictment, but only on the count on which there was a conviction. Again, in *Com. v. Hayward*, 4 Del. Co. Reps. 569, an application on the part of the Commonwealth for a new trial of a case in which the defendant had been acquitted was refused on the broad ground that "he cannot be required to answer again." In none of these decisions, nor any others in the courts of this State that have been pointed out, is there so much as a hint of a possible exception in the case of an acquittal improperly procured. Nor does there appear to be any reason for such an

Commonwealth v. Pflueger.

exception, since the wrong thus done is itself a substantive offence liable to be reached and punished as such. Of course, there is, in what has been said, no reference to a verdict of acquittal obtained in a sham prosecution instigated by the defendant himself and managed by him with a view to forestalling, on the ground of such acquittal, a *bona fide* prosecution by the State. The doctrine applicable to such cases is discussed in *Shideler v. State* (Ind.), 14 Crim. L. Mag. 204.

But whilst it is impossible to make absolute the rule which the prosecution in this case asked for and obtained, the fact remains that the conduct of one of the jurors is shown to have been such as to cast a cloud upon the verdict, which ought to prevent the imposition of sentence in accordance with it: *Com. v. Martin*, 16 Pa. C. C. Reps. 140. In order to meet this aspect of the case, it will be altogether proper (see *Gring v. Burkholder*, 2 Woodw. 82) to convert the rule for a new trial into a rule to set aside the verdict as to costs and decide that.

And now, June 29, 1901, it is ordered that a rule to show cause why the verdict rendered in this case shall not be set aside, in so far as it imposes the costs of prosecution upon the defendant, be entered as of March 28, 1901, *nunc pro tunc*; that the rule for a new trial be discharged, and that the rule to set aside the verdict as to costs be made absolute.

From D. N. Schaeffer, Reading, Pa.

Commonwealth v. McFadden.

Sunday observance—Sufficiency of complaint—Act of April 22, 1794.

It is essential to the validity of a conviction, under section 1 of the Act of April 22, 1794, 3 Sm. Laws, 177, that the written complaint should affirmatively show on its face that the act complained of was performed on Sunday, and that the offence was committed in the county. These are jurisdictional facts, and their omission is a fatal defect.

Certiorari. C. P. Luzerne Co., May T., 1901, Nos. 91 and 92.

S. S. Herring, for plaintiff; *R. Nelson Bennett*, for defendants.

LYNCH, P. J., June 10, 1901.—On March 11, 1901, Hugh McFadden and Daniel E. Lewis were convicted (in two separate cases) "of having performed worldly employment on Feb. 17, 1901, the same being the Lord's day, commonly called Sunday, and the work not of necessity or charity," and because of another conviction for the same offence, "defendant is adjudged to be dismissed, upon payment of costs only. *Certiorari* was sued out in each case.

These cases are both defective in this: It is not charged in the complaint upon which the proceedings are based that defendant violated any law of this Commonwealth, or, if he did do so, that the offence was committed within the jurisdiction of this court. It is essential to the validity of a conviction, under section 1 of the Act of April 22, 1794, 3 Sm. Laws, 177, that the written complaint should affirmatively show on its face that the act complained of was performed on Sunday. The complaint must also show on its face that the offence was committed in this county. These are jurisdictional facts, and their omission is a fatal defect: *Com. v. Gelbert*, 170 Pa. 426; *Com. v. Phelps*, 170 Pa. 430.

The complaints here sworn to by Fred Smith on Feb. 18, 1901, omit these two jurisdictional essentials, and therefore the proceedings in each case are set aside and the judgments for costs are reversed.

From Sidney R. Miner, Wilkes-Barre, Pa.

Abington Township v. Philadelphia & Reading Ry. Co. et al.*Public roads—Railroads—Grade crossings—Permitting same.*

A proposed grade crossing near an established grade crossing of the same road will not be restrained by preliminary injunction, although its construction will make the danger to one traveling the public road greater than before, when the danger is not so great as to deter the public from using the road altogether, when the connecting railroad will be used but a few months during the year, and will reduce the number of times trains will be required to cross other roads at grade in the vicinity, when no testimony is offered to show how the proposed crossing can be avoided, when either an overhead crossing or a depression of the public road is out of the question, and when no evidence is submitted as to the distance, expense or other data in reference to another place of crossing sufficiently distant to avoid the particular danger complained of and which would answer the purpose as well; it will be presumed that the traveler will be warned in some manner of approaching trains, and that the location of the proposed crossing has been selected with reference to its practicability and safety.

Motion for preliminary injunction. C. P. Montgomery Co., March T., 1901, No. 9.

Evans, Holland & Dettra, for plaintiff.

James Boyd and Charles Heebner, for defendants.

WEAND, J., June 8, 1901.—This case comes before us on a motion for a preliminary injunction to restrain defendants from constructing a grade crossing over Mount Carmel avenue, a public road in Abington township. At Glenside station the Northeast Pennsylvania Railroad branches off from the North Pennsylvania Railroad, and crosses Mount Carmel avenue at grade.

Willow Grove Park is a summer resort located on the line of the Northeast Pennsylvania Railroad, and during the time of its opening is visited daily by thousands of persons. During the season additional trains are run over defendants' roads. Trains coming from the north, *i. e.*, from Norristown, Doylestown, Manayunk and other points on the line of or connecting with the North Pennsylvania road, and having for their destination Willow Grove Park or other points on the Northeast Pennsylvania road, are now obliged to run to Glenside or below, and then be switched on to the Northeast Pennsylvania. By this method they first cross a road near the station, claimed by the plaintiff to be a private road, but used generally by the public; then, as claimed by defendants, crossing and recrossing the Willow Grove and Germantown turnpike road, which is extensively traveled; then recrossing the first mentioned road, and then crossing Mount Carmel avenue. In coming down the Northeast Pennsylvania road, trains desiring to go north on the North Pennsylvania road make the same number of crossings of these country roads. All these crossings are at grade, and have been used for several years. This makes five grade crossings, according to the defendants' testimony. The plaintiff contends that it is not necessary to run as far as the turnpike, or at least not usual so to do, and that only three grade crossings occur. Defendants claim that the increasing travel to and from the park demands increased facilities for the safe handling of their trains, and to that end propose to connect the two steam roads north of Glenside station, thereby making but one grade crossing necessary instead of three or five as at present, and thereby lessening the danger, inconvenience and loss of time caused by backing and switching. The point at which the proposed connecting branch crosses Mount Carmel avenue is about 190 feet from the crossing over the same avenue by the Northeast Pennsylvania road, and it is claimed by plaintiff that in this fact consists the great danger, because of the position persons traveling by vehicles would be placed if caught in this space with trains at the same time on the siding and on the Northeast Pennsylvania road. It is not denied that the defendants have the right to construct a con-

Ablington Township v. Philadelphia & Reading Ry. Co. et al.

necting road, nor is it contended that all grade crossings of country roads should be prohibited; but it is urged that the peculiar features of this case should induce the court, in the interests of public safety, to enjoin this particular crossing in the manner proposed. That the proximity of the two crossings makes the danger greater than one ordinary crossing to a traveler caught between them, with trains on both roads, is evident; but this fact alone will not warrant us in granting a preliminary injunction. Should the danger be so great as to deter the public from using the avenue altogether, a different question might arise. From the evidence before us, it is apparent that this connection will only be used to any extent during a few months of the year; and we must assume that the defendants, for their own interests and that of the public, will in some manner warn travelers of approaching trains. A signalman or other safeguard at either or both crossings could easily make the fact known. Here we have presented to us the question as to whether the public safety is not increased by reducing the number of times trains will be required to cross Mount Carmel avenue and other roads, and whether this does not counteract or offset the apprehended danger of being caught between the crossings. By the use of this connection, trains using it will be required to slow up in order to cross the tracks of the Northeast and North Pennsylvania roads, and their approach from either direction can easily be seen by a traveler having due regard for his own safety, and who will obey the injunction to "stop, look and listen."

The plaintiff has offered no testimony of civil engineers or of persons accustomed to work of this kind to show how the proposed crossing can be avoided. On the part of the defendants it is shown by their engineers that an overhead crossing is impracticable, and that to depress the public road would increase the danger of crossing the Northeast Pennsylvania road, because the ascent would be so steep as to obstruct the view of the railroad.

No evidence has been submitted as to the distance, expense or other data in reference to another place of crossing sufficiently distant to avoid the particular danger complained of, and which would also answer the purpose of defendants.

We must assume that the defendants have selected their location with reference to its practicability and safety. They claim that the matter of drainage alone compels this method of crossing if done at this point; that their increasing business and the demands of the public require greater facilities for the transfer of their trains than are now enjoyed; that the safety of their passengers and of those who use the public roads in that vicinity will be greatly promoted; that they have selected the most suitable and available point for that purpose, and that no other kind of crossing is reasonably practicable.

The higher courts have not yet been called upon to define what the law requires in reference to grade crossings of country roads by railroad or electric railway. It would seem impossible now to prohibit established steam roads from crossing public country roads by necessary sidings or connections at grade in consequence of the necessary change of grade of the parent road. It may depend on the danger to be occasioned; and, if so, each case must be judged by its peculiar facts. We are unwilling, with the meagre facts before us, presenting such diverse views as to the effect of the proposed crossing, to prevent by a preliminary injunction what seems to be a necessary work, so far as the defendants and those traveling on their road are concerned.

The contention of defendants that we have no jurisdiction to sustain this bill need not now be discussed. We think we have, and the demurrer is overruled.

And now, June 3, 1901, a preliminary injunction is refused.

From Montgomery Evans, Norristown, Pa.

Williams v. Brice.

Wills—Construction—After-acquired realty—Residuary devise followed by specific description—Acts of April 8, 1833, sect. 10, and June 4, 1879, sect. 1.

Where it is the clearly expressed intention of the testator, at the date of making the will, to exclude the heir-at-law, and no change is made in the will during the remainder of testator's life, the rule which protects the heir-at-law against being disinherited by conjecture does not apply.

Testator, by will dated May 31, 1889, gave to his sister, Mary, the whole of his personal estate, and further provided: "I hereby give and bequeath to my four sisters and my brother (naming them), who are tenants in common with me of the four brick houses and lot on the corner of Market and Liberty streets, Pittsburgh, Pa., the fractional ground rent of \$97.24 per annum to them, and that the same may be merged in the fee and *pro tanto* extinguished. I also give and devise to my sister, Mary, all the residue of my real estate, consisting of the ($\frac{1}{6}$) one-sixth part of the following properties inherited from my father, to wit" (describing properties), "to have and to hold to herself, her heirs and assigns forever," subject to the payment of certain annuities. Mary was named as executrix in the will, which directed that she should not be required to file any account. Testator died on Nov. 11, 1894. At the date of the execution of the will he was seized of an undivided one-sixth interest in the properties, but subsequently acquired, by purchase and inheritance, interests which increased his holding to a one undivided fifth interest. No change was made in the will. Held, that, under the Acts of April 8, 1833, § 10, P. L. 249, and June 4, 1879, § 1, P. L. 88, the one-thirtieth interest acquired after the date of the will passed to Mary under the residuary clause.

Case stated. C. P. No. 5, Phila. Co., March T., 1901, No. 354.

John G. Johnson, for plaintiff; George C. Bowker, for defendant.

MARTIN, P. J., Nov. 27, 1901.—The will of Thomas Williams, Jr., dated May 31, 1889, gave to his sister, Mary C. Williams, the whole of his personal estate, and further provided: "I hereby give and bequeath to my four sisters, Margaret D. Williams, Agnes W. Pemberton, Sarah D. Williams and Mary C. Williams, and my brother, Richard A. Williams, who are tenants in common with me of the four brick houses and lot on the corner of Market and Liberty streets, Pittsburgh, Pa., the fractional ground rent of \$97.24 per annum to them and that the same may be merged in the fee and *pro tanto* extinguished. I also give and devise to my sister, Mary C. Williams, all the residue of my real estate, consisting of the ($\frac{1}{6}$) one-sixth part of the following properties inherited from my father, Thomas Williams, to wit" (describing the properties), "to have and to hold to herself, her heirs and assigns forever," subject to the payment of certain annuities. She was named as executrix in the will, which directed that she should not be required to file any account.

Testator died on Nov. 11, 1894. At the date of the execution of the will he was seized of an undivided one-sixth interest in the properties, but subsequently acquired, by purchase and inheritance, interests which increased his holding to a one undivided fifth interest. No change was made in his will.

The question to be determined is whether the one-thirtieth interest acquired after the date of the will passed under its terms, or did Thomas Williams, Jr., die intestate of that portion of his estate?

"In the construction of wills, it is the duty of the court, in the first place, to ascertain from the words used by the testator what his meaning was, and to give effect to that meaning if words are to be found sufficient for the purpose:" Malins, V. C., in *Smyth v. Smyth*, L. R., 8 Ch. Div. 563.

There are two rules of construction applicable to this case furnished by the Act of April 8, 1833, § 10, P. L. 249, which enacts that "the real estate acquired by a testator after making his will shall pass by a general devise, unless a contrary intention be manifest on the face of the will;" and the Act of June 4, 1879, § 1, P. L. 88, which provides that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take

effect as if it had been executed immediately before the death of the testator, unless the contrary intention shall appear by the will."

The field of inquiry in which the intention of testator is to be sought may be further restricted in this case by the maxim that no presumption of an intention to die intestate as to any part of his property is allowable when the words used by the testator may fairly carry the whole: Schouler on Wills, § 490.

The rule which protects the heir-at-law against being disinherited by conjecture cannot weigh, where, as in this instance, it was the clearly expressed intention of the testator at the date of making the will to exclude him, and no change occurs in the will during the balance of testator's life.

It was said by Judge Penrose, one of the most eminent jurists in this branch of learning, "the object of the statute (June 4, 1879) was not to affect the construction of the language of the testator so much as to prevent an intestacy as to any part of his estate:" Fidelity Insur., Trust, &c., Co.'s Appeal, 108 Pa. 492.

In the absence of direct authority, the English decisions upon closely analogous cases are of value in determining the question at issue, in view of the fact that the Act of 1833, relating to after-acquired real estate, is in its provisions similar to section 23 of the Wills Act of 1 Vict., ch. 26; and the Act of 1879, providing that wills shall take effect as if executed immediately before the death of testators, is in the words of section 24 of the Wills Act.

Many of these cases have been cited with approval by the Supreme Court of Pennsylvania.

In *Bridges v. Bridges*, 8 Vin. Abr. 295, pl. 13, testator gave "the remainder of my estate, viz., my bank stock, India stock, South Sea stock and South Sea annuities, to my son."

The court was of opinion that the latter words, which came under the *vide-lit*, did not restrain the general words precedent (the remainder of my estate), but were added by way of enumeration or description of the main particulars of which his estate did consist and not to restrain the word (estate) to those particulars.

In *Chalmers v. Storil*, 2 Vesey & Beames' Reps. 221, Sir William Grant, Master of Rolls, used the following language: "The testator gave all of his estate whatsoever, real or personal, to be divided between his wife and children. The subsequent enumeration of the articles of which he supposed his property to consist does not limit the gift to the particulars specified. Intending to give everything he could, he has incorrectly stated what he had. . . . Here the testator disposes of the whole of his personal estate, and, therefore, does not mean to die intestate as to any part of it."

In *King v. George*, L. R., 4 Ch. Div. 435, subsequently affirmed on appeal (see L. R., 5 Ch. Div. 627), the vice-chancellor said: "To my mind, it is clear that the testator did not intend to die intestate as to any part of her property, but that she intended by the use of the words 'all that I have power over' to give all her property of every description, and then foolishly and unnecessarily proceeded to enumerate part of them. Then, applying the rule in this case that the first duty of the court is to ascertain what was the intention, and then, having done that, to say whether there are words to carry that intention into effect, I am satisfied the intention was to dispose of all her property, and I am of opinion, both upon principle and authority, that the words are sufficient for the purpose."

"This subject, where wills are made in comprehensive form, followed by an enumeration, has been a subject of difficulty to judges for the last century and a-half, and amongst the most learned of them there has been a remarkable difference of opinion. But I cannot help thinking that the doctrine has been settled that where a testator gives his property generally by the words 'all

10 DIST. R.

my property' or 'all my estate' or 'all that I have power over,' as in this case, where he uses words sufficient to pass everything, and then proceeds to enumerate particulars—it is now, I think, pretty well settled that the enumeration of particulars does not abridge or cut down the effect of the general words."

In *Smyth v. Smyth*, L. R., 8 Ch. Div. 564, the court used the following language: "My opinion is that the testator could not have intended to die intestate, but he intended to dispose of everything he had in the world. I believe, in using the words 'all the rest and residue,' he meant the rest and residue of everything; that is, all the property of every description which he had not already given away. Then, he adds, 'money chattels, and all other my effects.' It has been argued that the word 'effects' will not pass real estate. Why it should not I cannot tell, but I certainly do not agree with the argument."

"Now, as regards the earlier cases, I have expressed my opinion that these cases, although decided by great judges, were decided at a time when there was that extraordinary leaning in favor of the heir-at law. I believe, however, that they are not now considered as authorities, and I unhesitatingly express my opinion that they are no longer law. The decisions in more recent times have been very different and are much more liberal in the construction of wills."

The principle is well illustrated in the case of *Russell v. Chell*, L. R., 19 Ch. Div. 432, where testator, owning a one-third interest in a partnership business at the date of executing his will, bequeathed it in trust for his wife. He subsequently acquired the interests of his brothers in the business, and at the time of his death was the sole owner. It was held that the wife was entitled to the whole income. Vice-Chancellor Bacon said: "The court leans against intestacy in all cases, not from compassion, but as a fixed principle of law. The law is opposed to intestacy; and the Wills Act proceeds exactly upon this principle, though not recognizing it in terms. . . . In this case the testator, having a one-third share at the time when he made his will, in 1857, by a series of accidents, which I need not describe, became entitled to the entirety. One of the results is that, by the purchase of the other shares, the testator's share has become increased. . . . Then, inasmuch as he has said, 'I, being a manufacturer in partnership, give all my interest in the partnership to my wife, including one-third of the capital, one-third of the profits, one-third of the buildings and stock in trade, and so on,' enumerating them particularly, because he afterwards becomes possessed of a larger interest than one-third, it is said that the interest which passed by his will is confined to that one-third which he had in the year 1857, and is not to comprehend the interest which he had in 1881, when he died. In my opinion, that would be a very violent construction. It is clear that it would disappoint the intention of the testator. . . . In my opinion, the 23rd section of the Wills Act has direct application, and I hold that the acquisition of a larger interest does not affect in the slightest degree the disposition which the testator made of all the interest which he had in the houses, chattels and other property in the co-partnership business, although the partnership had ceased to exist, and he had become the sole owner of the property."

In *Dickinson v. Dickinson*, L. R., 12 Ch. Div. 22, testator used the words, "all my leasehold houses, land and premises, situate at Chesterwood (charged, nevertheless, with the payment of all mortgage debts charged thereon, and also with the payment of an annuity of nine pounds now charged thereon)."

At the date of his will, testator was possessed of two leasehold properties, situate at Chesterwood; one of them subject to a mortgage, and the other charged with the annuity of nine pounds. Between the date of his will and the time of his death, the testator purchased another leasehold property, situate at Chesterwood. Lord Justice James held that the after-acquired leasehold property passed under the bequest.

In re The Midland Railway Co., 34 Beav. 525, a will dated in 1849 devised "*all that messuage or dwelling-house, situate in Bordgate, wherein my son now resides.*" Testator subsequently to the date of his will purchased a copyhold piece of adjoining land, which he converted into a garden for the house. He died in 1851, at which time the son remained in occupation of the whole of the premises. Sir John Romilly, Master of Rolls, said: "The question is, whether this copyhold garden passed under the devise, and I am of opinion that it did." After quoting the words of the section of the Wills Act, he added: "The burden of proof lies, therefore, to show that it did not pass, and this from the will itself. I think the word 'now' is solely descriptive of the messuage. . . . It is merely descriptive of the subject-matter of the devise, and not used as confining the extent of the devise."

In Saxton v Saxton, L. R., 13 Ch. Div. 359, by a will made in 1876, a term in a leasehold was given to the widow, subject to the payment of rent and performance of covenant. The following year testator purchased the fee. He died without altering his will. It was held that the 24th section of the Wills Act made the will speak from the death, and that it passed the house for whatever interest he had in it. This case followed the earlier decision of Miles v. Miles, L. R., 1 Eq. 462, in which a will made in 1862 devised "all that my messuage, partly freehold and partly leasehold, No. 3 Cannon St." Testator subsequently purchased the reversion, but died without changing his will, and Lord Romilly said: "It was his clear intention that the whole messuage should go to the specific devisee. The description was an accurate one at the time his will was made, and after the purchase of the reversion he did not think it necessary to describe it again." To the same effect is the decision of Struthers v. Struthers, 5 W. R. 809, in which testator gave leaseholds for the residue of the terms, and it was held that the will operated to pass the fee subsequently acquired.

In the present case, considered under the light of these authorities, there are no words in the will of Thomas Williams, Jr., indicating an intention that after-acquired property should not pass by the general devise to his sister of "all the residue of my real estate;" nor are there any words showing that he had in contemplation at the date of the will the further acquisition of other shares in the property devised.

It therefore seems clear that Mary C. Williams takes the entire interest in the property owned by Thomas Williams, Jr., at the date of his death, and that the added words of description which were applicable at the period when the will was made, but did not embrace the subsequent acquisitions, do not, on principle or authority, indicate an intention that she should not have it.

An examination of the authorities cited in support of the theory that Thomas Williams, Jr., died intestate of the one-thirtieth interest in the property in question shows that they do not affect the principles established by the authorities heretofore referred to.

In Fidelity's Insur., Trust, &c., Co.'s Appeal, 108 Pa. 492, there was a specific bequest of 81 shares of stock "now standing in my name on the books of the company." The stock specified was subsequently surrendered and other shares taken in lieu thereof. It was held to be a clear case in which testator did not intend that her will should speak as of the time immediately preceding her death. (See opinion of Penrose, J., 108 Pa. 494.)

In Baker's Appeal, 115 Pa. 590, it was held that the terms of the will clearly indicated the intention of the testator to dispose of certain property, and that, in the absence of an ambiguity, extraneous evidence could not be received to show that he had other property to which the will might apply.

Enobin v. Wylie, 10 House of Lords Cases, 1, is explained in the opinion of Vice-Chancellor Mahlins in the later case of King v. George, L. R., 4 Ch. 10 Dist. R.

Div. 435, affirmed on appeal L. R., 5 Ch. Div. 627, in which he states that case to have been decided upon the clearly-expressed intention of the testator to dispose of his Russian property only; that he was directing a disposition of only that property and restricted the will to it, and not upon the question of defective enumeration.

In *Leach v. Jay*, L. R., 6 Ch. Div. 496, *Jessel, M. R.*, said in construing a will without other context, where there was a devise of real estate of which testator might die seized, "in this particular will, the testatrix, for what reason I know not, used a technical word, a word not only technical but a word that has no significance in ordinary language at all. It is a purely technical word, and it appears to me that the whole of my duty consists in ascertaining whether she was, at the time of her death, 'seized' according to the technical meaning of that technical term of this real estate."

Howe's Appeal, 126 Pa. 241, was a decision that upon the plain words of a will, in the absence of ambiguity, there was no occasion to refer to interpretation. Judgment for plaintiff in the sum of \$175,000.

McGerrin v. Wanamaker.

Practice, C. P.—Bills of costs—Rule of court—Verification—Filing.

Under Rule 14, § 2, of Courts of Common Pleas of Philadelphia county, bills of costs must be verified by parties to the record or their attorneys.

Exception to taxation of costs. C. P. No. 1, Phila. Co., Sept. T., 1900, No. 721.

Eugene Raymond, for plaintiff; *Maurice W. Sloan*, for defendant.

BRÉGY, J., Nov. 25, 1901.—The facts necessary to determine the question before us are these: The plaintiff filed a bill of costs, sworn to by some one whose relation to the case does not appear, certainly not the plaintiff or his counsel. The prothonotary disallowed the bill.

The rule of court on the subject is as follows:

"Rule 14. Section 2. . . . Bills of costs shall contain the names of the witnesses, the dates of their attendance, and the places from which mileage is claimed. *They shall be verified by the affidavit of the party filing them that the witnesses were actually present in court on the days stated, and that, in his opinion, they were material witnesses.*"

It will be noticed that the words of the rule require bills of costs to "be verified by the affidavit of the party filing them."

Who, then, can file a bill of costs? The plaintiff or defendant can do so in person, and so can their attorneys. No one else has a right to file any paper in a case. It would seem, therefore, that the only ones who can make the affidavit to a bill of costs in conformity with the words of the rule, to wit, "shall be verified by the affidavit of the party filing them," are the parties to the case or their attorneys.

This interpretation is required by the words of the rule itself, but the fact of the materiality must also be sworn to, and this, in addition to the fact that the opposite party is entitled to have the oath of some one known to the case as a criterion of its accuracy, furnishes another reason for holding that bills of costs filed for material witnesses (and all must be such) should not be verified by the affidavit of subpoena servers, office clerks, or persons who are entire strangers to the record.

The exceptions are dismissed and taxation confirmed.

Sanson v. Philadelphia Steel Company.

Equity—Specific performance—Construction of written agreements—Inconsistent clauses.

The Philadelphia Steel Company entered into an agreement with one Parker and others to purchase a tract of land with a mill thereon erected and pay for the same 20,000 shares of its capital stock.

By the articles of agreement, it was expressly provided that, "In consideration of said sale and upon the delivery of said property to it, (the steel company was) to issue to vendor and nominees, as hereinafter provided, or to such nominees as the vendor shall, in writing, hereafter direct, at such times and in such amounts as they shall respectively direct, certificates of stock of the company to the aggregate amount of \$200,000, or 20,000 shares." By a subsequent article in the agreement, it was also provided that "said stock shall be issued in parts as follows: Aaron I. Sanson, Jr., 1500 shares; James O. David, in trust for Hallahan, Sanson & Parker, 1000 shares." Of the shares to be issued to Sanson, the company had only issued 95, when Parker notified it to make no further issue, and, in obedience to the notice, it refused to make any further issues of shares to him. It was admitted that of the 1000 shares to be issued to James O. David in trust, Sanson was entitled to 500, if entitled to anything. Sanson thereupon filed this bill, praying, *inter alia*, for a decree directing the defendant company to issue to him 1905 shares of its corporate stock, and enjoining the holders of the stock issued under the agreement from disposing, transferring or voting on same, and declaring said stock illegally issued, and setting aside all business transacted at stockholders' or directors' meetings of the defendant company.

Held, (1) that the "other nominees" in the first clause of the agreement of purchase were those persons, not named in the instrument, to whom the balance of the stock not appropriated to those who were named, might thereafter be issued, "as directed in writing by the vendor," in accordance with the wording of the subsequent clause; that the agreement gave Parker no right to forbid the issue of stock to the persons named therein, and his written notification afforded the defendant company no justification for refusing the plaintiff's demand: that a decree should therefore be made, directing the defendant company to issue 1905 shares to the plaintiff; (2) as the stockholders had not been made parties to the bill, no decree could be made enjoining them from disposing of their stock or affecting their interests.

It seems that, irrespective of the non-joinder of the stockholders as parties defendant, the above facts would not justify a chancellor in such wholesale interference with the affairs of the defendant company and the stockholders as would have been involved in granting the other prayers of the bill.

Findings of fact and of law. C. P. No. 3, Phila. Co., June T., 1901, No. 1592, in Equity.

Albert W. Sanson and Isaac D. Yocum, for plaintiff.

J. W. Hallahan and J. V. McGeoghegan, for defendant.

MCCARTHY, J., Dec. 9, 1901.—This case was tried before me, sitting as chancellor, on July 9, 1901. Both plaintiff and defendant were represented at the trial by their respective counsel of record. Evidence offered on behalf of both parties was heard in open court. After hearing all the evidence, the case was argued by counsel.

Abstract of pleadings.

The bill, among other things, recites a series of transactions, as the outcome of which, in September, 1900, the plaintiff, with one Parker and others, became the equitable owners of a certain tract of land in Reading, Pennsylvania, with a steel mill thereon, and the plant and stock of the mill, to which property the said Parker held the legal title; that defendant company, by resolution, authorized the execution of an agreement with Parker to acquire the property and issue \$200,000 of its capital stock in payment therefor; that an agreement was executed in pursuance of that resolution in October, 1900, and on Oct. 26, 1900, a deed and bill of sale were executed by Parker to the defendant company; that by the said agreement—set forth at length in Exhibit A attached to the bill—plaintiff was to receive 2000 shares of stock, and 1000 shares were to be held in trust for plaintiff, Parker and another; that of these last-mentioned 1000 shares, 500 shares were contributed by plaintiff; that the purpose of the

10 DIST. R.

Sanson v. Philadelphia Steel Company.

trust has failed, and the shares which were to have been issued to the trustee should revert and be issued to the owners; that plaintiff has received 95 shares of stock, and there is a balance due him of 1905 shares; that he has demanded a certificate for the same, which is refused. The prayers are: (1) For an answer; (2) for issue to plaintiff of 1905 shares of defendant's stock; (3) to enjoin holders of stock issued under the agreement of October, 1900, from disposing, transferring or voting on same; (4) to declare said stock illegally issued; (5) to set aside all business transacted at stockholders' and directors' meetings of defendant company; (6) to enjoin defendant from disposing of property, and (7) further relief.

The answer avers lack of knowledge on the part of defendant as to the transactions of the plaintiff with Parker and others which resulted in the acquisition by them of the title to the aforesaid property, and also as to alleged conversations between plaintiff and the secretary of the company, and as to certain transfers of stock made by Parker, and admits all the remaining averments of the bill. It further avers that the refusal to issue the stock to plaintiff was in pursuance of the written instruction of Parker, under the terms of the agreement made part of the bill, and prays to be dismissed, with costs.

Findings of fact.

1. On Sept. 25, 1900, one Thomas U. Parker held the legal title to a tract of land situate in the city of Reading, Pennsylvania, on which was erected a mill for the manufacture of steel. He also held the legal title to the machinery, plant, fixtures and stock in and about the mill. There were several equitable owners of the said real and personal property, of whom the plaintiff was one.

2. On Sept. 25, 1900, the stockholders of the defendant company, by resolution duly adopted, purchased from Thomas U. Parker the aforesaid real and personal property for \$200,000, "payable in full-paid and non-assessable stock of this company," subject to the judgment of the board of directors as to the value of the property.

3. In October, 1900, an agreement in writing was executed and delivered between Thomas U. Parker and the defendant company, reciting, among other things, that the board of directors of defendant company had adjudged the said property to be of the fair value of \$200,000, and that it was necessary for the business of the company and to carry out its objects, and thereby selling to the defendant company the said real and personal property, the purchaser agreeing, "in consideration of said sale and upon the delivery of said property to it, to issue to the vendor and nominees, as hereinafter provided, or to such other nominees as the vendor shall in writing hereafter direct, at such times and in such amounts as they shall respectively direct, certificates of stock of the company to the aggregate amount of \$200,000, or 20,000 shares." By article III of the agreement it is provided: "Said stock shall be issued in part as follows," after which 14,375 shares of stock are parceled out among seven different nominees, two of the parcels being set out as follows: "Aaron I. Sanson, Jr., 1500 shares;" "James O. David, in trust for Hallahan, Sanson & Parker, 1000 shares." Article IV provides: "The balance of said stock shall, unless otherwise directed in writing by the vendor, be issued as follows: To Aaron I. Sanson, Jr., trustee, 5625 shares."

4. By agreement with his co-owners, the plaintiff's share of the consideration for the purchase of their joint property was 2500 shares. Of these he agreed to contribute 500 shares to a fund of 1000 shares intended to be held in trust until the superintendent at the mill should sign a certain agreement and comply with certain conditions, and then to be given to him. The superintendent died of

an injury before complying with the stipulations, and these shares have never been issued.

5. Subsequently to the execution of the before-mentioned agreement, the said real and personal property was conveyed and delivered to the defendant company by deed and bill of sale duly executed.

6. Under date of Dec. 24, 1900, Parker notified the defendant company, in writing, not to issue any more stock until further notice from him.

7. In January or February, 1901, the plaintiff found, from an examination of the stock certificate book of defendant company, that upwards of 7000 shares of stock had been issued, but, excepting a single certificate for 95 shares, none had been issued to himself. Thereafter plaintiff made demand upon the defendant company for the issue to him of the balance of the stock to which he claimed title, which demand was refused.

8. In the early part of December, 1900, it was found that the mill could not be worked profitably, and the defendant company stopped its operations at once, and has since been doing no business whatever. It is not insolvent, however, but has just about sufficient assets to pay its indebtedness.

Findings of law.

1. It was conceded at bar on the argument that, so far as the plaintiff's right of recovery is concerned, this case turns upon the interpretation to be given to the agreement of October, 1900. The words to be construed are as follows: "To issue to the vendor and nominees, as hereinafter provided, or to such other nominees as the vendor shall, in writing, hereafter direct," and "the balance of said stock shall, unless otherwise directed in writing by the vendor, be issued as follows."

The defendant's contention is that this language gave to the vendor the right at any time of his own volition to substitute one or more nominees in place of the seven nominees of the agreement, and the answer is, that if such were the purpose of the contracting parties, no nominations at all would have been made in the instrument; it would be idle to agree to do that which the mere whim of another might the next moment render nugatory. The "other nominees" of the first phrase are evidently those persons not named in the instrument, to whom the balance of the stock not appropriated to those who are named may hereafter be issued as "directed in writing by the vendor," in accordance with the wording of the second phrase. It follows that the agreement gives Parker no right to forbid the issue of stock to any of the first seven nominees therein, and that his written notification of Dec. 24, 1900, afforded the company no justification for refusing the plaintiff's demand.

2. The purpose for which the trust fund for the benefit of the superintendent of the mill was created having failed, there is undoubtedly a resulting trust in favor of those who agreed to contribute to the fund to receive back the amounts of their respective contributions. Further consideration of this matter, however, is unnecessary, as defendant's counsel, on the argument, admitted that plaintiff, if entitled to recover at all, is entitled to receive 1905 shares of stock, which includes the 500 shares agreed to be contributed by plaintiff to the trust fund.

3. The Philadelphia Steel Company is the sole party defendant to this action. The holders of the stock which has been issued are not parties and have not had their day in court, which is a sufficient reason for refusing the prayers of the bill, asking that the stock they hold may be decreed to be illegally issued and the stockholders enjoined from disposing of it or voting upon it. Independently of this, however, the evidence discloses no facts which would justify a chancellor in that wholesale interference with the affairs of the defendant company and its stockholders for which the plaintiff petitions.

10 DIST. R.

My conclusion upon the whole case is that the second prayer of the bill, which asks for a decree that 1905 shares of the capital stock of the defendant company be issued to the plaintiff should be granted, and the remaining prayers should be refused.

A decree proper for the decision of the cause in accordance with these findings has been prepared, and will be filed by the prothonotary in conformity with Rule 63 of Equity Practice.

Horner's Estate.

Evidence—Books of original entry—Stock broker's books—Admission of debt—Sufficiency of.

The books of a stock broker, containing a running account with a customer of the purchases and sales of stock, are not admissible as books of original entry.

A *prima facie* right to recover is not shown where, although the testator admitted to the trustee that he was indebted to the claimants, he did not state the amount nor in what manner the indebtedness was incurred, and the trustee himself had no personal knowledge of the transactions between the claimants and testator.

Wills—Construction—Issue—Rule against perpetuities.

A gift by testator to his brother in trust for his own use for life, etc., and at his death in trust for testator's two nieces for life (they being in life at testator's death) and the life of the survivor, and upon the death of the survivor in further trust for the children and issue of his two nieces, to be paid to them when they attained full age, etc., with a gift over in case either niece should die without leaving children or issue surviving, does not violate the rule against perpetuities.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 397.

Julius C. Levi, W. C. Wilson and Horace M. Rumsey, for exceptants.

P. W. Miller, contra.

HANNA, P. J., Nov. 23, 1901.—As we are of opinion the books of a stock broker containing a running account with a customer of the purchases and sales of stocks are not admissible as books of original entry, they cannot be received in evidence as proof of the claim made in this case. Being discarded, therefore, there is no sufficient proof to warrant an allowance of the claim.

The trustee admitted he had no personal knowledge of the transactions between claimants and testator. And while the latter admitted to him an indebtedness to the claimants, yet he did not state the amount, nor in what manner it was incurred. In view of these facts, there is not even a *prima facie* right to recover shown, and the claim was properly rejected.

We have also considered the exceptions to the finding by the auditing judge that the gift by testator to his brother in trust for his own use for life, etc., and at his death in trust for testator's two nieces for life and the life of the survivor, and upon the death of the survivor in further trust for the children and issue of his two nieces, to be paid to them when they attained full age, etc., is not a violation of the rule against perpetuities.

It must be conceded a gift to testator's brother for life, and at his death of the income to his nieces for life, is a valid gift. They were all in being, survived the testator, and are still living. And we think the ultimate gift of the principal of the trust fund to the children and issue of the nieces is equally valid; for the reason that the payment is to be made to the children and issue who survive the nieces and reach twenty-one years of age.

This is shown by the context, where testator says: "In case either niece should die without leaving children or issue surviving," etc.; thus clearly referring to the children or issue living at the death of the parent. There is, therefore, a vested interest in the children and issue of the nieces, and accordingly within the limits prescribed by the rule. The vesting is not postponed, but merely the payment of their shares, until they reach lawful age.

Horner's Estate.

Nor is the gift to those only who live to attain full age. In *Coggins's Appeal*, 124 Pa. 10, the gift was to the children who should attain twenty-five years of age. In that case it was held it was clear that "the age of the grandchildren refers not merely to the time of payment or distribution, but is descriptive of the persons who take." In that case it was the postponement of payment to the age of twenty-five years that rendered the gift invalid. See, also, *Gray on Perpetuities*, § 205.

As we agree with the conclusion of the auditing judge, the exceptions are dismissed and adjudication confirmed. A schedule of distribution will be prepared as therein directed.

Homeyard's Estate.

Decedent's estate—Marriage—Presumptions—Legitimacy—Cohabitation and reputation—Sufficiency of evidence to rebut presumption—Declarations by claimant's mother that decedent had refused to marry her.

When a child's birth occurs after its parents rent rooms and while they are living together, and for twenty-five years thereafter the parents live, cohabit and are reputed as man and wife, the presumption of the child's legitimacy is not overcome by testimony to the effect that the wife left another man to whom she was supposed to be married, in order to live with the decedent; that she afterwards said, on one occasion, that she had begged the decedent to marry her, and he had refused; that the decedent said of the child, in her presence and in the presence of others, that she was not his child, and finally, that no record of her birth appeared on the register of the health office.

It is the actual intent with which the parties came together that will govern, notwithstanding their previous record or subsequent denial; the fair interpretation of the fact that the claimant's mother begged the decedent to marry her is that she was doubtful, not as to the fact of the marriage, but as to the proof.

Exceptions to adjudication. O. C. Phila. Co., April T., 1900, No. 278.

J. R. K. Scott and B. F. Owens, for exceptant; *John H. Fow*, contra.

ASHMAN, J., Nov. 30, 1901.—The friends and foes of the claimant united in establishing the fact that the decedent and Eleanor Homeyard lived and cohabited and were reputed as husband and wife for twenty-five years. They were also practically in accord in declaring that after their union the claimant was born, and lived alternately with them and with a near relative until she was sixteen years of age. The recognition in speech and act by both parties, of their marital relations and their parentage of the child, was distinctly proved; and it was also shown that when the claimant was married, the decedent attended and gave her away. These proofs, which of themselves made out a *prima facie* case for the claimant, were sought to be neutralized by testimony to the effect that the wife had left another man to whom she was supposed to be married in order to live with the decedent; that she had afterwards begged the decedent to marry her, and he had refused; and that the decedent had said of the claimant, in her presence and in the presence of others, that she was not his child; and finally, that no record of her birth appeared on the register of the health office. We do not think that, in reason or by the light of adjudged cases in law, this countervailing evidence can overcome the legal presumption in favor of marriage and of the legitimacy of offspring. Against his acts and declarations to the contrary, the decedent could not, by words spoken as the witness asserted they were, in anger, bastardize his child. So jealous is the law in this regard, that, in *Dennison v. Page*, 29 Pa. 420, in which the authorities were accumulated, it was held that issue born at any time during marriage is legitimate, and that hence the mother of a child born in wedlock, though begotten before, was incompetent to prove that the child was not the actual child of her husband. The alleged declaration of the mother that she had, after the commencement of their intercourse, begged, without

Homeyard's Estate.

success, the decedent to marry her, is more serious, for it might be taken to imply that no marriage had taken place. Fairly interpreted, however, her language indicates that she was doubtful, not as to the fact, but as to the proof of her marriage. She said to the witness: "If I could only get Jack to marry me, and so had a certificate to show, I would be all right, but he will die and will leave me without a penny some day."

Her dilemma and her doubt were the same in character as those of the wife in Comly's Estate, 185 Pa. 208, and were founded upon the belief that where her title to share in her husband's estate was concerned, the court would require special and formal proof of her marriage. The true rule to be deduced from that case and from Luce's Estate, 3 Pa. Superior Ct. 289, Strauss's Estate, 168 Pa. 561, Hines's Estate, 10 Pa. Superior Ct. 124, and the recent case of Com. v. Haylow, 17 Pa. Superior Ct. 541, is that the actual intent with which the parties come together will govern, notwithstanding their previous record or their subsequent denials. It is in consonance with this principle that words *in futuro*, which would ordinarily amount only to an executory contract, will, if immediately followed by cohabitation, be deemed of present application: Comly's Estate, *supra*. In the proceeding before us, the date was distinctly fixed on which the decedent and the claimant's mother rented rooms and commenced to live together; the birth of the child was shown to have occurred afterwards, and for nearly twenty-five years the cohabitation continued, with mutual acknowledgments by the couple of their union as man and wife, and with the accompanying recognition of that relation by neighbors and friends.

We are of opinion that the claim of the exceptant to two-thirds of the estate was valid. The exceptions to the adjudication are accordingly sustained.

Scully's Estate.

Jurisdiction, O. C.—Guardian—Appointment—Use of word "guardian" in will unnecessary.

It is not essential, in appointing a testamentary guardian, that the word "guardian" be used; it is sufficient if the person or persons intended are indicated and the duties required of guardians imposed. Hence, when the duties of guardians are imposed on executors, they become testamentary guardians, and the court is without authority to make a further appointment.

Petitions for appointment of guardians. O. C. Phila. Co., Oct. T., 1901, No. 73.

Horn R. Kneass, for petitioners; D. A. Stewart, for respondents.

PENROSE, J., Nov. 30, 1901.—The petitions in this case are in proper form, but the question presented is whether the minors have not a guardian already appointed, under the Act of June 10, 1881, P. L. 96, conferring upon a mother leaving an estate to her children,—where, as here, the father has died without exercising his right in this respect, the power to appoint a "testamentary guardian." It is not at all essential that in making such appointment the word "guardian" shall be used: it is sufficient if the person or persons intended are indicated, and duties such as are required of a guardian imposed; just as an executor, who in such case is called an executor "by the tenor" (Williams on Executors, 285), may be thus appointed: Carpenter v. Cameron, 7 Watts, 51. See, also, Vanartsdalen v. Vanartsdalen, 2 Harris, 384; Lukens's Appeal, 11 Wright, 356, 358; Sheets's Estate, 2 P. F. Smith, 257, &c., &c., &c.

The functions of a guardian are to take care of the estate of his ward during minority, to maintain him, and to see to his proper education; and these are precisely the duties which the mother in this case has directed her executors to perform. She gives the residue of her estate to them in trust to use the

Scully's Estate.

income "for the support, maintenance, and education of my children . . . until they shall attain the age of twenty-one years,"—with further provision as to placing them "by the executors" in the schools at which she desired them to be educated.

Testamentary guardians having been thus appointed, the court is without authority to make a further appointment (*Robinson v. Zollinger*, 9 Watts, 169; 2 Kent, 227; *Van Syckel's Estate*, 9 District Reps. 367, 369. See, also, *Wilson's Estate*, 2 Barr, 325, 329), and we are therefore compelled to dismiss the petitions.

Swenk, Benson & Co. v. Irwin.

Apportioned mechanic's claim—Rule for judgment for portion of claim under Acts of May 31, 1893, P. L. 185, and July 15, 1897, P. L. 276.

Where, on an apportioned mechanic's claim, the affidavit of defence to each *scire facias* set up the payment of a sum on the general account, for which no credit has been given, a rule for judgment for amount of claim admitted to be due under Act of May 31, 1893, P. L. 185, was dismissed because no amount was admitted to be due on each claim, and the court could not say in what manner it should be apportioned. So, also, a rule for judgment for that portion of claim as to which the court should adjudge the affidavit of defence insufficient in law was likewise dismissed.

Rule for judgment for that portion of the plaintiff's claim as to which the court shall adjudge the affidavit of defence to be not sufficient. C. P. Delaware Co., June T., 1899, No. 1301.

George E. Darlington, for rule; *W. Roger Fronefield*, contra.

JOHNSON, P. J., Sept. 6, 1900.—This is one of six *sci. fac.* issued on an apportioned lien against six adjoining and contiguous houses. The amount claimed to be due by the writ is \$402.87. An affidavit of defence has been filed as follows: "That he paid the above-named plaintiffs, on account of materials furnished for which this and other liens were filed, the sum of \$4400, and has received no credit therefor; that the materials claimed in the bill of particulars to have gone into the building described in the above writ were not furnished on the credit of the said building; that he avers, believes and expects to be able to prove that the building described in the above-mentioned writ was one of the six houses against which the said plaintiff filed a joint and apportioned lien, built on a lot of ground on the southeast corner of Summit avenue and Rigby avenue, in the borough of Lansdowne, county of Delaware, and State of Pennsylvania: that they were separated by Rigby avenue, a public street opened and used for public travel; from eight houses, against which said plaintiff also filed a joint and apportioned lien, on the southeast corner of Wycombe and Summit avenues, and by Summit avenue, a public street opened and used for public travel; from fourteen houses, against which said plaintiff also filed joint and apportioned liens, on the northeast corner of Summit avenue and Wycombe avenue, and that the said fourteen houses and said eight houses are separated from each other by Summit avenue, a public street opened and used for public travel; that the said twenty-eight houses were being erected and constructed at one and the same time, and that the plaintiff furnished the materials indiscriminately for the said twenty-eight houses, and will be unable to prove, upon the trial of said cause, exactly what separate items of material went into each house or block of houses. All of which he avers, believes and expects to be able to prove on the trial of said cause."

This affidavit alleges that the defendant has paid to the plaintiff \$4400 on account of material in this house and twenty-seven other houses (against which liens have been filed and on which suits on *sci. fac.* are pending), for which he has received no credit.

10 DIST. R.

Swenz, Benson & Co. v. Irwin.

While this is a rule for judgment on one of these *sci. fas.*, we cannot overlook the fact of the other pending suits, and the fact that \$4400 is alleged to have been paid on account of the material furnished all of them, and for which no credit has been allowed.

Some time ago a rule was taken in this and the twenty-seven other suits for judgment for amount *admitted* to be due. An affidavit of defence was filed setting up the payment of \$4400 on account, and for which no credit had been given. The rule was discharged, the court saying: "There is no amount admitted to be due on each lien, and we cannot say, in a rule for judgment, in which manner it shall be apportioned."

That rule was taken under the Act of May 31, 1893, P. L. 185. The present rule is taken under the Act of July 15, 1897, P. L. 276. It says: "The court shall adjudge any portion or portions of said affidavit of defence to be insufficient in law; the plaintiff or plaintiffs may take judgment for the portion or portions of said claim as to which the court shall adjudge the affidavit of defence to be insufficient."

Whether this Act applies to a case like the one before the court I am not prepared to say; but how can the court say, on this motion, what is the proper credit of the \$4400 to be allowed on this lien? The rule for judgment asks us to say the proper allowance is \$245.83. There is nothing before the court showing that this is the proper amount due on this lien. The affidavit is sufficient.

Rule discharged.

Gallagher's Estate.

Orphans' Court—Jurisdiction—Wills—Testamentary libel—Abatement.

The Orphans' Court has jurisdiction of claims for damages in testamentary libel.

The rules of abatement of personal actions have no application to such case.

Though the language used be not, *per se*, libellous; there being special averment of malice and injury, claimant has a right to be heard on proof.

Practice, O. C.—Putting non-resident claimant upon terms.

The Orphans' Court may, in its discretion, refuse to entertain a claim by a non-resident against a decedent, unless the claimant agrees to pay such sum as the court may find due by him to the executors.

Demurrer to claimant's petition. O. C. Allegheny Co., Dec. T., 1900, No. 80.

Watterson & Reid, for claimant; Charles D. Gillespie, for accountant.

¶ *Statement.*

HAWKINS, P. J., Nov. 18, 1901.—The questions in this matter arise on a claim for damages for alleged testamentary libel. The facts are these:

The will of decedent contains this paragraph: "*Fourth.* Patrick J. Brady, at present a resident of and an attorney-at-law in the city of Cleveland, Ohio, owes me more than three thousand dollars (\$3000.00) for educating, clothing and otherwise maintaining for him for ten (10) years in the college of Loretto, Pa., and Emmitsburg, Md. He often promised to pay that debt, yet never paid a dollar of it. I now solemnly declare that I refuse to relieve him from the obligation of payment in full, and I hereby will and bequeath the whole amount mentioned above to James Corcoran and Michael Gallagher, in equal shares, and to their heirs. Both are full cousins of mine and the first is Brady's uncle. However, I direct that said devisees shall collect the above debt themselves, and that the same shall not be included in the inventory of the estate assets, nor shall my executor be in any wise accountable for the non-collection thereof."

Pending the audit of the final account in the settlement of the estate, a petition was presented on behalf of said Patrick J. Brady, in which, after reciting said will and paragraph, it was averred, amongst other things:

"That, by reason of the execution of his said last will and testament, the said decedent so brought it about that on Nov. 25, 1899, the said will was probated at Pittsburgh, in the county of Allegheny, and that the said will which said decedent in his lifetime wrongfully, maliciously and injuriously composed and executed, was probated and published, which composition, in so far as it relates to your petitioner, charges, as herein set forth, a false, malicious and defamatory libel of and concerning your petitioner, and of and concerning him in the way of and in respect of his said profession and business as well as his position in society, containing, amongst other things, the false, scandalous, defamatory and libellous matter hereinbefore set out, of and concerning the said petitioner, and concerning him in his said profession (of law) and business, and concerning his social relationship.

"That, by reason of said premises, your petitioner has been and is greatly prejudiced in his credit and reputation aforesaid, and has been and is brought into public scandal, infamy and disgrace, and is and has been suspected to have been guilty of the misconduct so as aforesaid mentioned to have been charged upon and reputed to him by the said decedent, and to have acted as an ingrate, untruthfully, dishonestly, untrustworthy, and as one unworthy of belief, and of the confidence of the public.

"That the said decedent well knew that his said will could not be published until after his death, and that thereby he, your petitioner, would be placed at a disadvantage in meeting the false, fraudulent and malicious charges in his last will so made by the said decedent;" and

"That, by reason of the premises, petitioner had suffered "great damage, to wit, in the sum of \$50,000."

Thereupon petitioner asked leave to make proof of his claim; and, on demurrer, these questions were raised:

1. That the statement contained in the petition did not constitute libel; but, if it did,
2. This court had no jurisdiction; and
3. The right of action abated by the death of testator.

By agreement of counsel, the fund for distribution is held subject to the decision of these questions.

Opinion.

1. When the Constitution gave this court power to make distribution of the estates of decedents amongst "the persons entitled" thereto, jurisdiction to determine all incidental questions was necessarily implied. Distribution amongst next of kin or legatees, which is admittedly within its exclusive jurisdiction, cannot be decreed without first ascertaining the amount of debts. "The exclusive jurisdiction of the Orphans' Court to ascertain the amount of the estates of decedents and order their distribution among those entitled, creditors as well as legatees and distributees," said Agnew, C. J., in Hammett's Appeal, 83 Pa. 392, "is so fully settled that nothing but future legislation can alter it. . . . The creditors being thus bound to appear and claim their respective debts before the auditors appointed to settle and adjust their claims, a legislative protection of their rights will be found in the provisions contained in the 20th section of the Act of 1832. . . . Outside of the cited cases, when we examine the subject in the light of reason and necessity, the distribution of a decedent's estate among all entitled to it must belong to the Orphans' Court. It has possession of the fund, for it controls and directs all who have its custody, and it is only through its decrees the fund can be reached. It is true, the remedy of the creditors to establish his debt in a common law court is not taken away, for this may be necessary to stop the running of the statute of limitations, to decide disputed and complicated questions and make the settlement afterward before the auditors more easy and

10 DIST. R.

Gallagher's Estate.

convenient. But this does not, *ipso facto*, bring the pursuing creditor on the fund in the Orphans' Court. . . . The creditor who desires to share in the fund in the hands of an executor or administrator must present his claim before the auditor, and when there, it is subject to attack and he must establish it. If he have already established it in a court of law, it is so much the better; but, if not, then, under the decisions heretofore cited, he must support his right to share in the fund before the auditors by proving it. . . . Our conclusion does not affect the prerogatives of other courts, but only the rights of the creditors." The result of the authorities therefore seems to be that common law courts have jurisdiction to liquidate the amount due creditors of a decedent, but these creditors may waive the right of trial by jury and submit their claims to the adjudication of the Orphans' Court: *Phillips v. Allegheny Valley R. R. Co.*, 107 Pa. 465; *Bloom's Appeal*, 106 Pa. 498. The rights of an executor, on the other hand, are not co-extensive with those of creditors. His relation to disputed claims is defensive. He might, it is true, ask an issue to try disputed facts, but its grant lies solely in the discretion of this court. Even when granted, the verdict of the jury may be disregarded. The court is bound to revise it and is responsible for its rectitude: *Thompson's Appeal*, 103 Pa. 603. The reason of this lies in the fact that the jurisdiction is outside the course of the common law. Immediately on the debtor's death his estate passes into its grasp for the purpose of administration and distribution, and an executor is but its agent in that behalf. It needs not the aid of courts of law. The Act of 1832, which codified preceding legislation, not only gives jurisdiction, but prescribes the manner in which that jurisdiction shall be exercised; and the Act of 1806 not only requires that the statutory remedy shall be strictly pursued, but prohibits a resort to the provisions of the common law further than is necessary for carrying the remedy provided by statute into effect: *Ashford v. Ewing*, 25 Pa. 213. Within its appointed orbit, its jurisdiction is exclusive, and, therefore, necessarily as extensive as the demand of justice: *Shollenberger's Appeal*, 21 Pa. 337.

It is objected that the basis of the claim presented here being an alleged tort, trial must be by jury "as heretofore," in accordance with the constitutional provision. But the answer, so far as the creditor is concerned, is that this right may and has been waived, and the estate is without its provision. The exclusive jurisdiction of the Orphans' Court in the administration and distribution of decedents' estates existed long prior to the adoption of the Constitution (*Horner v. Hasbrouck*, 41 Pa. 169), and was neither within the reason nor purpose of the provision that "trial by jury shall be as theretofore." Even as between courts of co-ordinate jurisdiction, that in which it first attaches becomes exclusive (*King v. Nimick*, 34 Pa. 297); but this court has exclusive jurisdiction from the beginning over decedents' estates, and this is made effectual for complete relief. In the long line of cases relating to this subject not one has been found in which a claim for damages has been rejected on the ground of want of jurisdiction. On the contrary, it has been said again and again that "each creditor" has a right to be heard in support of his claim and in opposition to every claimant who interferes with it (*Kitteras's Estate*, 17 Pa. 416); no discrimination is even hinted as respects different classes; and, of course, creditors claiming damages have an equal right with others. As already seen, all creditors must appeal to the jurisdiction of this court who wish to share in distribution. In *Edmund's Appeal*, 19 W. N. C. 59, a decree of the Orphans' Court awarding damages for breach of covenant was affirmed by the Supreme Court; and in *McDaniel's Appeal*, 22 W. N. C. 19, damages for breach of contract to sell. "It is well established," said Mr. Justice Sharswood, in *Masson's Appeal*, 70 Pa. 26, "that wherever a court of equity has jurisdiction, if the relief prayed for cannot for some reason be granted, a compensation in damages may be awarded in lieu

thereof. Thus, if a plaintiff was originally entitled to specific performance of a contract of sale, but it so happens that before the final decree it becomes impracticable for the defendant to make conveyance, so that the specific relief prayed for in the bill cannot be decreed, the court will not turn the plaintiff over to seek his damages in an action at law, but will proceed directly to decree him compensation." These, it is true, are not cases of pure tort; but if this court has jurisdiction of claims for damages sounding in tort, it is impossible to see why it has not in those arising from simple torts. The functions of the jury in these two classes of cases are not essentially different. In each it consists in finding the fact and amount of damages upon evidence of the same general character, and it is obvious that if this court is competent to entertain jurisdiction in one case it is competent in the other. No one doubts the privilege of a claimant to waive his constitutional right of trial by jury.

2. The suggestion of abatement of action presents a more serious question. If the common law rule that personal actions die with the person applies, there is an end of this claim for damages. But the terms of the rule include only rights of action which existed at the date of death—*actio personalis moritur cum persona*—for a right cannot be extinguished which does not exist. This reading is implied in the provisions of our own Act of 1834 for the survival of certain actions "which might have been maintained against such decedent had he lived." No right of action existed for the wrong alleged to have been done this claimant when Father Gallagher died; for the will had not and could not have been published, and was, therefore, obviously not within the letter of the rule. Is it within the spirit? Even within these restricted limits the terms of the rule are broader than its application, for it has been made to yield to the demand of justice until its subjects are few. "That a personal action dies with the person," said Tilghman, C. J., in *Lattimore v. Simmons*, 13 S. & R. 183, "is an ancient and uncontroverted maxim; but the term ('personal action') requires some explanation. In a large sense, all actions, except those for the recovery of real property may be called personal. This definition would include contracts for the payment of money, and which never were supposed to die with the person; the maxim must therefore be taken in a more restricted meaning. It extends to all wrongs attended with actual force, whether they effect the person or property, and to all injuries to the person only, though without force." Legislative enactment gradually cut down these limits until practically slander and libel alone remained, and judicial construction restricted the limits still more by recognizing actions in the nature of libel (*Odgers on Libel*, 137) for injuries which went to increase the estate of the wrongdoer or impair that of the wronged. These encroachments on the application of the rule were made in aid of justice. Equity disclaims the maxim that a remedy dies with a person wherever the demand is proper for that jurisdiction: *Garth v. Cotton*, 1 Dick. 215. Even in the leading case in abatement of *Hambly v. Trott*, 1 Cowp. 373, a moving consideration with the court in dismissing the action was that there was another remedy open to the plaintiff to obtain what appeared to be a manifest justice, Lord Mansfield saying: "I shall be very sorry to decide that trover will not lie if there is no other remedy for the right." A wise policy of the law discourages actions which grow out of temporary excitement and leave no scars—these are soon buried in forgotten files and an end is made of litigious controversy—but gives compensation through actions in the nature of libel for substantial injuries.

The alleged libel here differs in essential respects from libels of the common stamp. It was written in cold blood in contemplation of publication at a time when no action could be brought against the person of the wrongdoer, and in a public record which would be a perpetual reminder of the charge. If the charge

Gallagher's Estate.

had been of perjury, or theft, or trickery, it will readily be seen what fatal effects the charge would have had on petitioner's professional standing and business. A will was probated in the early part of the last century, in which the testator recites that he had "directed two busts to be executed and placed in the court-house in Pittsburgh as legacies to two of the most unprincipled scoundrels who ever appeared before a court of justice." The testator had a large estate, which was afterwards sub-divided into lots, was built up and now forms part of this city. In examining the title, this clause has probably been read hundreds of times, and all these years the objects of testator's hatred and their representatives have borne this gross imputation for which there may have been no justification. So a will is mentioned in the text-books in which a notorious libertine maliciously gave legacies in alleged compensation to certain ladies who had repulsed his advances. It may possibly be that a single publication of outrageous charges such as these may fall within the law of abatement, although this would strike the average mind as gross injustice, but the constant repetition which is implied in the public record must inevitably lead to not only a blot on the escutcheon but to substantial injury, and makes some relief imperative. These records are in the path of search of a profession upon whose respect the standing of every lawyer mainly depends, and charges of disreputable conduct, on the part of any of them found there, must result in material injury, unless an early opportunity be afforded of vindication. When a lawyer's good name is taken away, the means whereby he lives is taken; his name is his capital. Refusal to grant relief in such case would amount to denial of justice and to a premium on irresponsible libel. No one would be safe from the "slings and arrows of outrageous" malice. It ought not be permitted that a solemn testamentary disposition should be made the vehicle of libellous matter.

It has been suggested that probate of libel may be prevented; that is conceded if an opportunity be presented in time to act (*Townshend on Slander*, 822; *Steadman v. Steadman*, 14 Atl. Repr. 406); but who can be expected to anticipate such malice in his neighbors? Even a citizen could not do this, much less a non-resident like petitioner. So the clause may be stricken out on the ground of anticipated injury; but what of the injury done in the meantime? If the clause be of such a character as would justify striking out, compensation for injury resulting from illegal publication ought to follow as a matter of course.

It will thus be seen that testamentary attack is not, in a strict sense, libel, but, to use the inaccurate expression of the books, only in the nature of it, for the obvious reasons:

- (a) That action cannot be brought in the wrongdoer's lifetime; and
- (b) It does not grow out of temporary excitement, but is deliberate, is made a public record and is far-reaching in its effect; and the justice of relief is at least as appropriate as that which has been given in other cases. If the purpose of this testator was to increase his estate by an illegal act, he ought to compensate the petitioner for any injury which has resulted.

3. It has been suggested that the language used in the will is substantially that in actions at common law for the recovery of money, and therefore privileged; but the answer to this is that plaintiff there is in pursuit of a legal remedy, and defendant is afforded an opportunity to answer and is on equal terms with plaintiff; while, here, that opportunity was denied and petitioner makes that special averment of damages, which, under the authorities, gives him a right to be heard. Whether he will be able to make out his claim remains to be seen.

It follows from what has been said—

- (a) That this court has jurisdiction of claims for damages in libel.
- (b) That the rule of abatement has no application to this case; and
- (c) That petitioner has a right to be heard.

Gallagher's Estate.

The demurrer must therefore be overruled; and the claimant may proceed to hearing, upon this condition, however, that, in case he should fail in making out his claim and it should appear he is indebted to this estate, he will thereupon forthwith pay the amount which may be found due by this court.

When once a court of equity takes cognizance of a litigation, it will dispose of every question which comes within the circle of contest (Shollenberger's Appeal, 21 Pa. 340), although, in doing so, it may adjudicate questions which, standing alone, would not be jurisdictional: Socher's Appeal, 104 Pa. 609. Thus, though, in general, no person but the plaintiff may be entitled to a decree, yet where both parties are actors, as in the settlement of accounts, a balance found in favor of the defendant will be decreed against plaintiff. This puts an end to litigation and thus subverts a wise public policy. The reason of the practice is applicable with as much force to the present case. The primary question involved is the existence or non-existence of a debt. The claimant denies its existence and seeks the aid of this court to recover damages for alleged injury resulting from malicious attack; but suppose this court should find that the charge was made in good faith and the debt exists, what then? The pleadings having raised this issue, the decision ought to be final. If claimant owes this debt he ought to pay it. The moral "do unto others as you would have them do unto you" has its legal aspect in the maxim that he who comes into court asking, must do, equity. Coming from another State, seeking justice, the petitioner certainly would not be doing equity to force the executor to expense, delay and risk of re-trial in a foreign jurisdiction when he had failed in a tribunal of his own choosing. It seems only just, therefore, that he should be put upon the condition of abiding by the decision of this court.

From Edwin L. Mattern, Pittsburgh, Pa.

Logan v. Logan.

Practice, C. P.—Divorce—Libel—Jurisdictional averments.

A libel in divorce should set forth the residence of the libellant, so that the jurisdiction may be apparent.

Libel in divorce. C. P. Montgomery Co., March T., 1901, No. 93.

A. R. Place, for plaintiff.

SWARTZ, P. J., May 16, 1901.—The libel or petition fails to disclose the residence of the libellant. The evidence taken in support of her allegations of cruel and barbarous treatment shows that she left the domicile of her husband and removed to her parents' home, in the city of Philadelphia. This was her residence at the time the libel was filed and at the time her testimony was taken. The husband was served at No. 909 Walnut street, Philadelphia. Whether this was his residence at the time does not appear. At the time of the separation of husband and wife they were domiciled in Warrington township, Bucks county.

The Act of March 13, 1815, § 2, 6 Sm. Laws, 286, provides that the libel shall be exhibited "in the Court of Common Pleas of the proper county where the injured party resides." That this provision is binding upon the libellant was decided by the Supreme Court in Sherwood's Appeal, 17 W. N. C. 338. The petition should set forth the residence of the libellant, so that the jurisdiction may be apparent: Richardson v. Richardson, 8 District Reps. 242. Even if the domicile of the husband continues the legal domicile of the wife, it cannot help her case, for it does not appear anywhere that the husband was a resident of this county when the subpoena was awarded. As the case stands before us, we cannot decree a divorce.

From Montgomery Evans, Norristown, Pa.

10 DIST. R.

Commonwealth v. Brangan, Coates and Westenberger.

Election law—Production of ballot-box—Act of May 6, 1899.

Where the registry of voters as furnished by the county commissioners, the list of persons voting at the election, and other papers required to be placed by election officers in an envelope lodged in the prothonotary's office, have been offered in evidence by the Commonwealth and admitted without objection, an order, on the petition of the Commonwealth, for the production of the ballot-box of the division under investigation containing the registry-list, and the election papers, ballot check-list, voting check-list, etc., for the purpose of offering them in evidence, will be refused, in the absence of any allegation on the part of the Commonwealth of fraud, or an attempt to prove fraud, or matters not susceptible of inquiry by the ordinary course of evidence, as the papers mentioned in the petition to be obtained from the ballot-box would merely duplicate those already in evidence.

Charge: Violation of election law of Pennsylvania. Q. S. Phila. Co., March Sess., 1901, Nos. 618, 619 and 620.

Petition of Samuel M. Clement, Jr., Assistant District-Attorney, to the Court of Quarter Sessions for the County of Philadelphia, for the production of the ballot-box of the 20th division of the 36th ward, used at the election held in November, 1900.

The petition read as follows:

"The petition of Samuel M. Clement, Jr., Assistant District-Attorney for the Commonwealth of Pennsylvania, respectfully represents to your honorable court that it is necessary for the Commonwealth to have in court the ballot-box of the 20th division of the 36th ward, used in the November election of 1900, together with the election papers, including the ballot check-list, voting check-list, etc., for the purpose of offering the same in evidence in the above-entitled matter now on trial before your honorable court.

"The case of the Commonwealth cannot be properly proved without this evidence, for the reason that the Act of May 6, 1899, P. L. 254, provides for proof that the names of electors voting in the said division, as stated in the indictment, should have appeared upon the registry of voters as furnished by the county commissioners, and the said registry of voters is contained in the said ballot-box.

"Therefore, your petitioner respectfully represents to your honorable court that whether the names as contained in the bill of indictment appeared upon the registry-list as furnished by the county commissioners cannot be shown except by the registry-list itself, which is contained, as aforesaid, in the ballot-box.

"Your petitioner, therefore, prays that your honorable court will issue a subpoena, returnable forthwith, requiring the prothonotary of the county of Philadelphia to produce the ballot-box and all election papers in the 20th division of the 36th ward for the election of November, 1900.

"And he will ever pray, etc. SAMUEL M. CLEMENT, JR."

Samuel M. Clement, Jr., for petitioner.

John R. K. Scott and R. O. Moon, for defendants.

Order (per MARTIN, J.).—And now, Dec. 11, 1901, the registry of voters as furnished by the county commissioners having been already produced from the county commissioners' office and proved in this case by the testimony of the proper clerks, and the list of persons voting at the election, and other papers required to be placed by the election officers in the envelope lodged in the prothonotary's office having been offered in evidence by the district-attorney and admitted without objection, the papers mentioned in the within petition to be obtained from the ballot-box would merely duplicate those already in evidence; and there being no allegation of fraud or of an effort to be made to

Commonwealth v. Brangan, Coates and Westenberger.

prove fraud or matters not susceptible of inquiry by the ordinary course of evidence, the ruling in the cases of Tenth Ward Contested Election, 2 W. N. C. 490; Kneass's Case, 2 Pars. 553; Daly v. Petroff, 32 Legal Intell. 21; In re Contested Elections John McCullough and H. B. Lippincott, 34 Legal Intell. 28; Brislin's Case, 2 District Reps. 549; Election of Councilmen in the 20th Ward, 2 District Reps. 635, is followed, and the prayer of the petition for the present is refused.

Corr's Estate.

Wills—Construction—Legacies—Conditions—Bequest of residuary estate.

Testator, after bequeathing many legacies to relatives and religious and charitable institutions connected with the Roman Catholic Church, provided by the last clause of his will: "If any of the legacies I have given should lapse for any reason and become a part of my residuary estate, then I order and direct that my said residuary estate shall be divided into three equal shares and paid to the Archbishop of Philadelphia, Father B. and Father C." *Held*, (1) that there was a valid disposition of testator's residuary estate, and it was not conditional upon the lapsing of one of the said legacies; (2) that this construction was not affected by the fact that testator in his first codicil, executed a very short time after the will, provided that if his legacies to charities should become void because of his death within the statutory period making such legacies void, the sums so bequeathed should become the property of his executors, nor by the further fact that, by a previous clause of his will, he provided that, if his personal estate was insufficient to pay the legacies, they should be reduced proportionately, when testator had upwards of \$300,000 invested in stocks and must have known of the fluctuations that frequently occur in their value.

PENROSE, J., dissents.

Exceptions to adjudication. O. C. Phila. Co., April T., 1901, No. 467.

D. Webster Dougherty and John G. Johnson, for exceptants.

Thomas R. Elcock, James Fitzpatrick and A. A. Hirst, contra.

FERGUSON, J., Nov. 30, 1901.—The testator died possessed of a considerable estate. He had no family of his own, but a number of collateral relatives. By his will he specifically devised his real estate, and, out of his personal estate, bequeathed a great many legacies of large and small amounts to his relatives and to religious and charitable institutions connected with the church of which he was a member. The last clause of his will is as follows:

"If any of the legacies I have given should lapse for any reason and become a part of my residuary estate, then I order and direct that my said residuary estate shall be divided into three equal shares and paid to the Archbishop of Philadelphia, Rev. Father Dougherty, and Rev. Father Fitzmaurice aforesaid."

This clause of the testator's will is the subject of this controversy. The first part of it was unnecessary, as any lapsed legacies would have fallen into and become a part of his residuary estate without it. It so happened, however, that none of the numerous legacies given by him did lapse, so that the contingency which it is alleged this clause was intended to meet never occurred. The question presented is, whether the gift of the testator's residuary estate was conditional upon the lapsing of one of said legacies, and it was contended that, unless there was such a lapsing, there was no disposition of the testator's residuary estate, as to which, therefore, he died intestate.

There are some of these legacies for only \$1000, while the residuary estate is upwards of \$100,000. Did the testator mean that if there was a lapse of any one of these small legacies, his residuary estate should go to the Archbishop and the others named, but that if it should so happen that none of them did lapse, then as to his residuary estate he intended to die intestate? This proposition is so absurd that the mere statement of it is a sufficient answer.

10 DIST. R.

It is a well settled presumption of law that when a man makes a will he does not intend to die intestate as to any portion of his estate, and wills must be construed so as to avoid intestacy, unless the contrary is unavoidable: Board of Missions' Appeal, 91 Pa. 513. Courts always incline to construe a residuary bequest so as to prevent an intestacy: Patterson v. Swallow, 44 Pa. 487. And in Thouron's Estate, 11 W. N. C. 287, Penrose, J., said, courts are not disposed to put upon a will a construction that will create an intestacy: Wadley v. North, 3 Vesey, 366; Mayberly v. Strode, 3 Vesey, 451, and Bayard v. Atkins, 10 Pa. 15.

But we are asked, notwithstanding all the presumptions of law are to the contrary, to conclude that this testator did not intend by this the last clause of his will to dispose of his residuary estate, but only that portion of it that should be created by the lapsing of legacies, and this in face of the fact that this clause was written with reference to his residuary estate and nothing else. The lapsed legacies were to become a part of it, and his said residuary estate was to be divided, etc. It is true that the word "if" would seem to imply a contingency; but, giving to it its full meaning, this will can be construed so as to avoid an intestacy without any violence to the language used. The lapsed legacies were to become a part of his residuary estate; thus showing that he not only contemplated having a residue, but that he intended to dispose of it, as he ordered and directed the *said* residuary estate, not *said part* of it, should be divided between the Archbishop and the two priests named.

It was contended that the will was to be taken as a whole, and that other portions of it indicated that the testator had no thought that there would be any residue, as in a previous paragraph he provided that, if his personal estate was insufficient to pay the legacies, they should be reduced proportionately. When it is considered that the testator had upwards of \$300,000 invested in stocks of various corporations, and knew the fluctuations that frequently occur in their value, it may well be presumed that this provision was inserted to meet the contingency of a decline in the stock market, and not because he had disposed of more than he possessed. He must have known that after giving all the legacies he bequeathed there was a considerable sum left, because, by the second codicil to his will, written a month afterwards, he gave \$15,000 more to charitable institutions.

It was also argued that by the execution of the first codicil, a very short time after the will, whereby the testator provided that if his legacies to charities should become void because of his death within the statutory period making such legacies void, the sums so bequeathed should become the property of his executors, was unnecessary if the whole residue went to the Archbishop and the two priests named, as they undoubtedly would see the testator's wishes in this regard carried out. This may be so, but the testator had indicated the charities that he desired to be the objects of his bounty. He had given to the Archbishop and the priests his whole residuary estate without limitation or condition as to what they should do with it. He might well have thought that the charities selected by himself should be preferred, and communicated this desire to his executors, while the residuary legatees may have thought there were others more deserving or necessitous. But whether this is so or not, there is nothing in this codicil to show that the testator by the last clause of his will did not intend to dispose of his residuary estate.

The exceptions are dismissed.

PENROSE, J., dissenting.—That when a will is executed the testator is presumed to intend to dispose of his entire estate, is a proposition which no one can gainsay; but implications of intention are overcome by what is expressed;

Corr's Estate.

and presumptions do not stand in the face of proof. The will of this testator bears evidence of having been drafted by a lawyer, learned in the law and skilled in the proper use of language. The residuary clause, so-called, is of a most unusual character. It does not say, what, indeed, would be wholly unnecessary to say, that all legacies which lapse shall fall into and become part of the residuary estate, but, as preliminary to what follows, "if" any should become part of the residuary estate, "then," that is, in that event, the residue thus created shall go to the eminent officials of the Catholic church who are there named. That in expression, at least, the gift is contingent, only taking effect if the event spoken of should happen, cannot be questioned; and that the testator intended precisely what his words indicate, is demonstrated by the first codicil.

This codicil, executed a few days after the execution of the will, provides that if by reason of the death of the testator within the statutory period his numerous gifts to charities (all charities of the Catholic church) should fail, the amount so given should go to his executors—obviously in order that his purpose might be carried out notwithstanding the statute (Schultz's Appeal, 30 P. F. Smith, 396; Hodnett's Estate, 154 Pa. 485); but if the will already contained a general residuary gift, charities failing under the statute would fall into it; and in whom would it be possible to confide with more absolute certainty that the designated beneficiaries would receive what was intended for them than the Archbishop and the two reverend fathers already named in the will? It is inconceivable, therefore, that the provision in which they were thus named was intended as a general residuary gift, or that it was to operate except as expressed, viz., in the event there mentioned; "if" pecuniary legacies should lapse by the deaths of the legatees, and to the extent of the residue so arising.

We have no right to alter or pervert the express words of a testator in order to effect an assumed intention. Interpretation is not to usurp the place of reformation; and the rights of heirs or those entitled under the intestate laws are only taken away by a will whose meaning is clear. It is a maxim that such persons can only be disinherited by express words or necessary implication, and that doubts are to be resolved in their favor: *Brendlinger v. Brendlinger*, 2 Casey, 131; *Hancock's Appeal*, 2 Amerm. 532; *Bender v. Dietrick*, 7 W. & S. 284; *Rupp v. Eberly*, 29 P. F. Smith, 144; *Bruckman's Estate*, 195 Pa. 363; *Nebinger's Estate*, 185 Pa. 399; *Reilly's Estate*, 200 Pa. 288; &c., &c., &c.

In my opinion the exceptions should be sustained.

Kuhn's Estate.

Wills—Construction—Legacy—Conditions—Performance—Contract of devise—ment.

A legacy "to A, son of B, if he shall be living with me at the time of my death, and in consideration therefor," is conditional upon the legatee's living with testator at the time of his death.

The services stipulated for in the contract, in pursuance of which the legacy was given, being those of a companion, and no place being fixed for rendering them, they were performed and the condition fulfilled when, from the time of the making of the contract down to the testator's death, the legatee lived in the same house with the testator and took his meals at his table, notwithstanding the fact that the place of residence was a hotel at which the legatee, before the making of the contract, was staying as testator's guest.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 403.

Victor Guillou, for exceptant; *Rowland Evans*, contra.

FERGUSON, J., Nov. 30, 1901.—The testator by his will made the following bequest, which is the subject of the present controversy: "To Jean Charles 10 DIST. R.

Kuhn's Estate.

Henri Thouvenin, son of Doctor Julien Thouvenin, of Nice, if he shall be living with me at the time of my death, and in consideration therefor, I give and bequeath the sum of twenty thousand (\$20,000) dollars." This bequest was made in pursuance of a contract between the testator, the father of the legatee, and the legatee, as follows: "I place my son Henri at the disposition of Mr. Kuhn; he will be ordered to live with him and keep him company. Mr. Kuhn agrees to make to my son a legacy in the sum of 100,000 francs, to be specified in his will, it being understood that if my son leaves Mr. Kuhn of his own free will, or if Mr. Kuhn has cause of complaint against him, this contract will be broken." This document was enclosed in an envelope and endorsed by the testator in the words following: "Agreement between J. Thouvenin, H. Thouvenin and Charles Kuhn, 15 Oct., '99, about H. Thouvenin, who will live with Mr. Kuhn as a companion." The facts are that the testator, who was a native and citizen of Pennsylvania, had, for many years prior to his death, been living at Nice, in the republic of France. His nephew, Hartman Kuhn Evans, had been living with him as a companion for several years prior to the summer of 1899, when Mr. Evans married and left. The testator had a villa at Vichy, where he spent the summers, afterwards passing a month or two in Paris. The Thouvenin family, consisting of Dr. Thouvenin, his wife and two sons, one of them being Henri, were in the habit of visiting him at his villa in Vichy. This they did in the summer of 1899, and afterwards, about the end of September, accompanied the testator to Paris as his guests. They occupied apartments at the same hotel, and all took their meals with the testator in his dining-room. This state of things continued until the death of the testator on Oct. 28, 1899.

There is no doubt but that the legacy is conditional upon the legatee living with the testator at the time of his death. The only question is, was the condition fulfilled? The services to be rendered were those of a companion. It is admitted that, from the time of the making of the original contract down to the time of the testator's death, the legatee did live in the same house with him, and took his meals at the testator's table. It was claimed, however, that, while this was so, the legatee was then living with the testator as his guest and not as a companion, and that it was not contemplated to commence the other relation until the testator returned to his villa at Vichy. There is not a particle of evidence in the case to support this contention, and all the facts would seem to indicate the contrary. No place was fixed for the rendering of the services, and no place could well be fixed. The services were to be that of a companion, and this employment necessarily implies that they were not to be rendered at any particular place, but anywhere that the testator might choose to go. The contract, which is the foundation of the bequest, is in the present tense. "I place my son Henri at the disposition of Mr. Kuhn," etc., as if it were a thing that was then done, and not something to be done in the future. The fact that the testator, in pursuance of the contract, made his will giving the legacy agreed upon to the claimant "if he shall be living with me at the time of my death," indicates that he was then living with him, and the legacy was given conditional upon his continuing to do so; besides, on the day before his death, the testator wrote to his servant at his house, giving some instructions with reference thereto, and, among other things, informed him that "M. Henri would dine and sleep at the house." Upon the whole case, we think it is evident that the condition upon which the legacy was given has been fulfilled and that the legacy is good and valid.

The exceptions are sustained.

VanSyckel's Estate.

Will—Powers—Exercise of same by will disposing of donee's own estate—Exceeding authority—Presumption.

An intention on the part of the donee of a power to exceed the same is not to be presumed, and where the donee exercises the power by a will which also disposes of the donee's own estate, what could not be done by virtue of the power is to be attributed to the estate as to which the authority was unrestricted.

Practice, O. C.—Petition for review—Necessary precision.

A petition for review, even when presented promptly, must point out with exact precision the errors requiring correction.

Petition, answer and proof. O. C. Phila. Co., Oct. T., 1882, No. 284.

Daniel W. Simkins and Alfred M. Mohr, for petitioner.

F. F. Eastlack, Jr., and John G. Johnson, for respondents.

PENROSE, J., Nov. 30, 1901.—Notwithstanding the exceptionally able argument of counsel for the petitioner, which omitted nothing that could possibly be said on behalf of their client, we are compelled to adhere to the views expressed in the adjudications of May 8 and June 5, 1891, and in the opinion on the former application for review (*VanSyckel's Estate*, 9 District Reps. 387); and whether, as contended by the respondents, the petitioner is not estopped from questioning the correctness of the distribution which he now seeks to set aside, or whether there has not been such laches on his part as will, after the lapse of ten years, preclude relief under the general powers of the court with regard to review—it being conceded that it cannot be granted under the Act of Oct. 13, 1840, after the expiration of five years,—are questions which, we think, need not now be considered.

It is to be remembered, as was pointed out in the opinion referred to, that the power given by the testatrix to her daughter was exercised by the latter by a will which disposed also of her own estate, and is to be construed accordingly. An intention to exceed the power is not to be presumed; and what she could not do by virtue of it is to be attributed to the estate as to which her authority was unrestricted.

Without further discussion, however, it is proper to say that a petition for review, even where presented promptly, should point out with exact precision the errors requiring correction. Here it is merely averred that the auditing judge, not "having in mind" "the principle which makes void an appointment which includes objects not within the terms of the power," did not discover "that the issue of living children were not objects of the power and acted upon the assumption that they were;" it being further averred that the attention of the court "was not called to the fact that some of the children . . . were born after the death of Sarah B. VanSyckel and that, therefore, the appointment was wholly void." The fact that "some of the children were not born" in the lifetime of the donor of the power, while it may be of importance in considering the validity of future limitations, is wholly immaterial so far as concerns gifts to them taking effect at the death of the donee of the power. The donee certainly was in being during the lifetime of the donor, and the rule against perpetuities does not forbid such gifts, whether for life, for years, or of an absolute interest: while what "was in the mind of the auditing judge" (though this can only be inferred from what he has done) with regard to issue of living children not being proper objects of the power, is not enough to invalidate the decree of distribution unless it be made to appear that as a result present interests were given to such issue either by the adjudication or the schedule of distribution prepared in pursuance of it. There is no copy of the

10 DIST. R.

Van Syckel's Estate.

schedule, and the adjudication does not, in point of fact, so award—if, indeed, to do so would be error.

Whether the future limitations are, or are not, separable (Gray on Perpetuities, sec. 541, *et seq.*) is a question not now to be determined.

The petition is dismissed.

Commonwealth ex rel. v. Rooney et al.

Townships of the first class—Act of April 28, 1899—Wilkes-Barre township—Essentials of quasi-corporate identity—Act of April 14, 1859.

The rights to sue and be sued by the corporate name, to take and hold real estate and personal property, and to make contracts, are essential to the quasi-corporate identity of a township or county. Hence, the Act of April 14, 1859, P. L. 661, which divided Wilkes-Barre township into two distinct wards, and constituted each ward a separate election district, and authorized it to elect certain ward officers, but did not give power to each ward to exercise any of these functions, did not divide the township into two corporations, but made two wards or election districts in the one township, which, under the Act of April 28, 1899, P. L. 104, by reason of its population, is a township of the first class.

Townships—Statutes—Construction—Implied repeal.

A special statute providing a method of electing township officers is superseded by a later general statute creating a new class of townships, and providing for their government, to which class belongs, by reason of population, the township for which the special law obtained.

Quo warranto. C. P. Luzerne Co., May T., 1901, No. 142.

E. F. McGovern, for plaintiff; A. C. Campbell, for defendants.

LYNCH, P. J., June 10, 1901.—Defendants hold office under provisions of the Act of April 28, 1899, P. L. 104, and election held Feb. 20, 1900. It is not denied that Wilkes-Barre township, as a whole, is a township of the first class, but it is contended by plaintiff that, for the purpose of this case, each ward of said township is a township, and therefore neither is in the first class. This claim is based upon the provisions of the Act of 1859, P. L. 661. By this Act the territory included in said township was divided into two wards, one to be known as the North ward and the other as the South ward, each of said portions of territory to be a distinct ward. By section 2, each ward constitutes and forms a separate election district, and the electors, where necessary, are authorized to vote for and elect for each ward certain officers. Both wards together elect auditors. Nothing is mentioned in this Act as to the election of clerk and treasurer.

The Act of 1834, P. L. 538, as to corporate powers, classes counties and townships as corporate bodies; to sue and be sued as such by the corporate name; to take and hold real estate and personal property; to make certain contracts; and these powers shall be exercised by the supervisors. All suits shall be brought and conducted by supervisors, and defence shall be made by them in suits against the township. If judgment against a township is obtained, execution is the same as it is against counties. The same Act gives authority to erect new townships, and provides in what way it shall be exercised. I find in the Act of 1859, dividing the territory of the township and authorizing the election of certain officers in each ward, no power in each ward to exercise any of the functions above set out, and which, in my judgment, are the essentials of these quasi-corporations: Judge Rice, in *Com. ex rel. v. Kelley et al.*, 5 Kulp, 535. The Act of 1859, in every section thereof, clearly indicates that it was not the intention of the legislature to divide the township into two corporations, but

Commonwealth ex rel. v. Rooney et al.

to make wards or election districts in the township. By the 4th section, persons, by name, are appointed officers "to hold the township or ward and general elections." Indeed, it is difficult to understand how the Act can be otherwise construed.

The 2nd section, Act of 1859, empowers the electors of each ward to elect one supervisor. Has this part of said Act been repealed by the Act of 1899? This Act, section 2, provides that in all townships of the first class the officers provided for by this Act shall be chosen at the municipal election then next ensuing, and the township government constituted by this Act shall go into force on the first Monday of March then next ensuing.

Section 4, paragraph 1, provides the number and term of commissioners, and paragraph 4, section 4, declares, "whenever the form of government provided for by this Act for townships of the first class becomes operative in any township, the office of supervisor of highways shall cease to exist in such township," and all corporate power, authority and franchise of the township is vested in and exercised by the board of township commissioners by section 7, and particularly, among others, the following powers: To grade, pave, light and repair highways; and section 8 requires the board of commissioners shall cause all public highways within the township to be effectually opened and constantly kept in repair at all seasons and clear of all impediments to easy passing and traveling, following the language in the Act of 1836. These few abstracts of the Act of 1899 show clearly that this Act is in force, and applies to the township of Wilkes-Barre.

From Sidney R. Miner, Wilkes-Barre, Pa.

Ferree & Co. v. Pierce.

Practice, C. P.—Witness—Privilege—Premature service of process—Setting aside.

When a citizen of another State is a witness in, and is attending the trial of, a case in which a corporation of which he is vice-president and general manager is a party, he is privileged from the service of process during his attendance throughout the whole trial and for a reasonable time thereafter.

Service of summons an hour after the conclusion of the trial is premature and will be set aside.

Rule to set aside service. C. P. No. 2, Allegheny Co., April T., 1900, No. 36.

W. T. Tredway, for plaintiff; R. B. Ivory, for defendant.

SHAFFER, J., March 12, 1901.—The defendant, a resident of St. Louis, Mo., was in the city of Pittsburgh for the purpose of attending the trial of an action in one of the Courts of Common Pleas in the county, in which a corporation of which he is vice-president and general manager was a party, and also as a witness in the trial of the case. The evidence was closed on Jan. 10, 1901, at the adjournment of court. The addresses of counsel and the charge of the court were finished at 11 o'clock, Jan. 11, and at 12 o'clock on the same day the defendant was served with the summons herein.

He now moves to set aside the service of the writ on the ground of privilege.

We think his case is clearly within the well-established rule, and that he was privileged from the service of process during his attendance throughout the whole trial and for a reasonable time thereafter, and that one hour after the conclusion of the case was not such reasonable time.

The rule is therefore made absolute.
10 Dist. R.

From Edwin L. Matern, Pittsburgh, Pa.

Commonwealth ex rel. Depinet et al. v. Gingrich.

Municipal corporations—Powers—Cities of third class—Appropriations—Entertainment of guests.

Municipal corporations can exercise no powers except such as are conferred upon them by the Act by which they are created, or by the general laws of the Commonwealth, or such as are a necessary incident to the exercise of their corporate rights and duties.

Expenses incurred in giving a dinner to the guests of a city of the third class, delegates to a convention of the League of Cities of that class of Pennsylvania, are not authorized, under the Act of May 23, 1889, art. v, § 3, pl. 46, P. L. 277, on the ground that such entertainment conferred a municipal benefit, and the legislative authority of such a city has no power to appropriate the city's money to defray the same.

Petition for mandamus. C. P. Erie Co., Nov. T., 1901, No. 90.

C. P. Hewes, for relators; Baker & Sproul, for respondents.

THOMAS, P. J., 30th judicial district, specially presiding, Oct. 26, 1901.—The original petition, return and demurrer in this case were filed Aug. 26, 1901, and thereupon it was amicably submitted for our determination of the legal questions involved.

Upon argument, an attempt was made to raise questions not raised by the pleadings, which are, in our opinion, insufficient for the purpose of determining any question other than the one of the power of the legislative authority of the city of Erie to appropriate the money of the city for the purpose of receiving and entertaining, as the guests of the city, the delegates to the convention of the League of Cities of the Third Class of Pennsylvania, while said convention was being held in the said city of Erie in June last. The return sets this up as a legal reason why the mandamus should not be obeyed, and is therefore sufficient: *Kell v. Rudy*, 1 Pa. Superior Ct. 507.

It seems to be conceded that the items objected to on the part of the defendant are for expenses incurred in the giving of a "fish dinner" to the said guests and invited residents of the city, but was not so given in the regular course of the proceedings or deliberations of the said convention.

But however this may be, the entire question reverts to the proposition as to whether or not the city's money may be appropriated for the entertainment of guests of the city.

The relators rely for their authority upon the Act of May 23, 1889, art. v, § 3, pl. 46, P. L. 277, of which, in declaring the purposes for which cities of the third class are authorized and empowered to enact ordinances, confers the power "To make all such ordinances, by-laws, rules and regulations, not inconsistent with the constitution and laws of this Commonwealth, as may be expedient or necessary, in addition to the special powers in this section granted, for the proper management, care and control of the city and its finances, and the maintenance of the peace, good government and welfare of the city, and its trade, commerce and manufactures, and the same to alter, modify and repeal at pleasure." As an interpretation of like or similar powers, we are referred to *Com. v. Pittsburg*, 183 Pa. 202; *Tagg v. Philadelphia*, 18 W. N. C. 79, and *Tatham v. Philadelphia*, 2 W. N. C. 564.

In *Com. v. Pittsburg*, *supra*, the dispute arose over the power of the city to appropriate money to a committee of private citizens to make a preliminary investigation as to the feasibility of a ship canal connecting Pittsburgh and Lake Erie. The court held that the city had such power, as "the purpose for which it was made was certainly not foreign to the material interests and general prosperity of the municipality, but quite the contrary."

It would seem very clear that such a purpose looked directly to the welfare of the municipality, and especially so of its commerce, trade and manufactures.

Commonwealth ex rel. Deplinet et al. v. Gingrich.

It looked to *municipal* benefits, and, consequently, was a proper subject for municipal expenditure.

Tagg v. Philadelphia, supra, was an action of *assumpsit* for the price of a dinner furnished under a contract by authority of an ordinance, entitled "An ordinance providing for the reception and entertainment of the mayor of New Orleans, and other representatives of the municipal government of that city, on the return of the Old Liberty Bell," in which it was held, under the authority of *Tatham v. Philadelphia*, that the public money might lawfully be expended for such a purpose, and that the plaintiff was entitled to recover.

Tatham v. Philadelphia, supra, was a bill filed to prevent the officials from giving effect to an ordinance appropriating to the mayor of said city the sum of \$50,000 to meet "the official contingent expenses incidental to the Centennial Exhibition," but which, it was averred, was "to enable the mayor to extend the hospitalities of the city to such persons as he might deem worthy thereof, to entertain them," &c. The court held that "the ordinance does not authorize the mayor to extend the hospitalities of the city to visitors, if that was not already a part of the official duty," but, after reviewing the authority conferred upon the mayor and councils by several Acts of Assembly, in view of the usages thereunder, held "that councils may, in the exercise of a sound discretion, appropriate such sums as they may deem expedient for the commemoration of events of public interest or the entertainment of the guests who are drawn to the city on such occasions." In so holding, the court, after referring to the rule that, "without express power, a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests," says, "But neither the general rule nor any of the precedents cited are decisive of the present case. Regard must be had to the terms of the municipal charter and the usage under it, if the usage has acquired the force of an established construction," and, after citing numerous incidents of like appropriations and the usages under the various Acts of Assembly, arrives at the foregoing conclusion.

But what may, by the force of usage, have become the settled law in Philadelphia, a city of the first class, cannot, for that reason, determine the law as to similar matters in the city of Erie or in cities of the third class generally, where no such usage is shown or averred to exist, and of which we have no knowledge.

In the case of *Bergner v. Harrisburg*, 1 Pearson, 291, it was held that the city authorities of Harrisburg had no authority to appropriate the city's money to meet the expenses incurred in the reception of the President of the United States and other Federal officials who were invited to the city, pursuant to a resolution of the municipal authorities extending to them the hospitalities of the city, inasmuch as no general authority therefor existed (although the Act incorporating the city of Harrisburg is quite similar, as to powers conferred, to the Act of 1889, under which the city of Erie is operating), nor was there any well-established *custom* in Harrisburg which would warrant such action.

Municipal corporations can exercise no powers excepting such as are conferred upon them by the Act by which they are created, by the general laws of the Commonwealth, or such as are a necessary incident to the exercise of their corporate rights and duties; and we are of opinion that the charges not being incurred for anything that could confer a municipal benefit, no authority, either conferred by law or shown to have been derived from usage, would authorize the expenditure here sought to be enforced: *Hodges v. Buffalo*, 2 Denio, 110; *Hood v. Mayor and Aldermen of Lynn*, 1 Allen, 103.

Nor are we persuaded that the expenditures in this case can be authorized on the ground that they conferred a municipal benefit, because they were incurred
10 Dist. R.

Commonwealth ex rel. Depinet et al. v. Gingrich.

in the reception and entertainment of delegates to the convention referred to. It is true such convention was held to further the interests and promote the welfare of Erie, as well as all other third class cities; but the reception and entertainment of the delegates was not a necessary incident to such action, nor one from which the municipalities in general, or particularly that of Erie, would or could derive a municipal benefit.

The defendants admit, upon argument as well as by their answer, the validity of the bills of

Lewis Avery, for.....	\$5.00
John B. Laver, for.....	10.00
John J. O'Brien (badges), for.....	50.00

Total.....\$65.00

And, without discussing this feature of the case, we shall enter a decree accordingly.

From Joseph M. Force, Erie, Pa.

Carter, Executor, v. Blair, Administrator.

Evidence—Granting rule to take depositions out of State—Act of June 25, 1895.

A rule to take the testimony of witnesses residing out of the State, under the Act of June 25, 1895, P. L. 279, will only be allowed where there is a special or substantial reason for departing from the previously established practice.

To give effect to this Act, the court should be fully informed as to the cause of action, the names and residences of the witnesses and the subject-matter of the expected testimony.

Motion by plaintiff for permission to enter a rule to take testimony out of the State, under the provisions of the Act of June 25, 1895, P. L. 279. C. P. Cumberland Co., May T., 1901, No. 97.

Wetzel & Hambleton, for motion.

A. G. Miller, F. E. Beltzhoover and W. F. Sadler, contra.

EDW. W. BIDDLE, P. J., July 13, 1901.—The present controversy is founded on a motion by plaintiff for permission to enter a rule to take the testimony of various witnesses residing in the city of Washington, D. C., under the provisions of the Act of June 25, 1895, P. L. 279. Such a rule will be allowed only where there is a special or substantial reason for departing from the previously established practice: *Sprague v. Greenwald*, 5 District Reps. 631; *Carter v. The Producers' Oil Co., Limited*, 5 District Reps. 640. In order to give effect to said Act, the judge should be fully informed as to the cause of action, the names and residences of the witnesses and the subject-matter of the expected testimony: *Hodell Furniture Co. v. Leonard*, 17 Pa. C. C. Reps. 513. The motion recites that "the testimony will consist in an examination of various clerks and professional gentlemen at Washington, D. C., at which city all the facts are to be found; that the services extended over a long period of years; the defendant has local counsel at Washington, D. C.; that it will be impossible to compel the attendance of said witnesses by subpoena, and the testimony of these witnesses is important and essential to the plaintiff."

The defendant has filed an answer denying that he has an attorney at Washington, and averring that an unnecessary and oppressive burden would be imposed on the estate which he represents by permitting the rule to be entered.

The motion fails to give either the names or the number of witnesses, or the subject-matter upon which it is proposed to interrogate any particular person; hence an allowance of it would give to plaintiff an unrestricted license to

DISTRICT REPORTS.

Carter, Executor, v. Blair, Administrator.

examine as many witnesses as he should see fit upon each and every element of the case. It is true that the deposition of plaintiff makes the matter somewhat more definite, yet it shows his purpose to be to adduce in Washington all of the evidence (including his own) in support of the claim, a considerable portion of which will be of an expert character. In order to accomplish this end, he seeks to get a broad authority from the court, which will practically substitute Washington for Carlisle as the place for the oral examination of his numerous witnesses. Whilst it would evidently be advantageous to plaintiff in several respects to have the whole matter heard in the city where he and his witnesses reside, a corresponding disadvantage would probably thereby be imposed on defendant. We are unwilling to inaugurate the practice which is contemplated by the present motion, being of opinion that such a radical departure from established methods would not be warranted by the Act of 1895.

And now, July 13, 1901, after due consideration of the motion, answer and depositions in this case, the motion is dismissed and the rule to show cause, founded thereon, is discharged.

From A. G. Miller, Carlisle, Pa.

In re Road in Winslow and Washington Townships.

Road law—Notice to land-owner—Defects cured by confirmation—Setting aside.

Personal notice to the land-owner of the view is necessary. In case of private roads, the fact that such notice was given must appear in the report; in the case of public roads, it need not appear.

Mere formal defects and irregularities in a report of viewers are cured by confirmation, but where there is a radical error manifest on the face of the record, it may be taken advantage of after confirmation. Hence, where it affirmatively appeared by the report of the viewers that personal notice of the view had not been given to the land-owners, the omission was held a fatal defect, and the decree confirming the report was set aside.

Road law—Practice after setting aside decree of confirmation—Recommitment to viewers.

The practice of recommitting the report of viewers for correction in matters of both form and substance is well settled. Hence, where it appeared that the viewers considered and passed on the question of damages, and that the only complaint in a rule to open confirmation was that notice had not been given to the land-owners, held, that the report should be referred back to the viewers to proceed according to law and the rules of the court, and re-report their findings.

Rule to take off confirmation and set aside report of viewers. Q. S. Jefferson Co., April Sess., 1900, No. 1, R. D.

M. M. Davis, for rule; G. M. McDonald, contra.

REED, P. J., May 29, 1900.—This is an application to open the confirmation and to set aside the report of viewers laying out a public road in Winslow and Washington townships. The viewers made their report Nov. 13, 1899, and, no exceptions being filed or review asked for, it was confirmed Jan. 11, 1900, and ordered to be opened thirty-three feet wide. An order to open was placed in the hands of the supervisors Feb. 14, 1900.

The road has not been opened yet, and this application by the Central Land and Mining Company, through whose land the road passes, was made April 9, 1900, and is based on want of knowledge of the proceedings until after the opening order had been placed in the hands of the supervisors, and because the viewers omitted to give it personal notice of the time and place of their meeting to lay out said road and to consider the question of damages which might arise by reason of locating and opening the same over its land, no damages being assessed or awarded to the said Central Land and Mining Company.

10 DIST. R.

In re Road in Winslow and Washington Townships.

The decisions of our Supreme Court are in apparent conflict on the question of whether a land-owner is entitled to personal notice of the view. There is no statute requiring such notice, and in the following cases it was held that it was not necessary: In re Road in Sterrett Township, 114 Pa. 627; *Wagner v. Salzburg Township*, 132 Pa. 636. These cases, however, were probably decided under local statutes, which prescribed the notice and the manner of giving the same. In the Appeal of The Central Railroad Co. of New Jersey, 102 Pa. 38, personal notice to the land-owner was said to be an essential requisite to the validity of the proceedings, and also that it must appear of record that such notice was given. It was subsequently held, In re Road in South Abington Township, 109 Pa. 118, that personal notice to the land-owner was necessary, but might be shown by parol. This latter statement of the law is affirmed to be correct by Mr. Justice Gordon, In re Road in Plumcreek Township, 110 Pa. 544, as applicable to public roads, but not to private roads. Rule No. 276 of this court expressly requires that five days' notice of the time and place of the view, if practicable, shall be given to the owners or occupiers of the land over which the proposed road passes. The purpose of notice is to give the person to be affected his day in court, and before it can be said that a land-owner is estopped from claiming damages, it must either actually or presumptively appear that he has had notice of the view. Mere formal defects and irregularities are cured by confirmation. Moreover, inasmuch as the viewers are not required to state in their report that they gave notice to the land-owners, or that they endeavored to procure releases from damages, nor the manner of disposing of the question of damages, the absence in their report of any reference to these subjects will be construed to mean that the proper notice was given and that no damage has been suffered, and therefore, in giving effect to the legal presumption that the viewers did their duty, a decree of confirmation will not necessarily be disturbed after the time for filing exceptions has expired. But where there is a radical error manifest on the face of the record, it may be taken advantage of after the report of viewers has been confirmed: *Bean's Road*, 35 Pa. 280; *O'Hara Township Road*, 152 Pa. 319. If it appears that the viewers have neglected to consider and pass on the question of damages arising from the opening of the road, it is a fatal defect: *North Union Township Road*, 150 Pa. 512. In the case just referred to, more than three years had intervened between the confirmation of the report and the application to set it aside.

In the case in hand, it affirmatively appears by the report of the viewers that the required notice of the view was not given to this petitioner or to the owners of the land over which the proposed road passes. This, as we have already pointed out, is fatal to the decree. Where it appears on the face of the record that a step essential to the validity of the proceedings has not been taken, there is nothing upon which to found a decree: *Appeal of The Central Railroad Co. of New Jersey*, *supra*; *O'Hara Township Road*, *supra*.

It appears that the viewers did consider and pass on the question of damages to the land-owners, and report that none will be sustained. Inasmuch as the only complaint is that this action by the viewers was not preceded by notice to the parties to be affected, we see no objection to sending the report back to the viewers, with directions to proceed in discharge of this neglected duty according to law and the rule of this court. The practice of recommitting reports for correction in matters of both form and substance is well settled: *Potts's Appeal*, 15 Pa. 414; *New Hanover Road*, 18 Pa. 220; *Hilltown Road*, 18 Pa. 233; *In re Road in Springdale Township*, 91 Pa. 260; *Road in Hempfield Township*, 122 Pa. 439.

And now, May 29, 1900, the rule is made absolute and the decree confirming the report of viewers is taken off, and the said report is now referred back to

In re Road in Winslow and Washington Townships.

the viewers to consider and report on damages and releases according to law and the rules of this court. The said amended report to be made at the August Sessions next, and, when made, to lie over one term of court before final confirmation.

From George W. Means, Brookville, Pa.

Philadelphia, Trustee, v. Cleary.

Practice, C. P.—Ejectment—Non pros.—Laches.

In order to establish title to land by a judgment of non-suit by reason of the delay on the part of the plaintiff in prosecuting his action, such delay must last for twenty-one years. Hence, where the time elapsing between the date of the service of a summons in ejectment and the date when the parties, by agreement, submitted their case to arbitrators, after which it was prosecuted with reasonable diligence, is less than thirteen years, a rule for a *non pros.* will be discharged.

Ejectment. Rule for *non pros.* C. P. Schuylkill Co., July T., 1885, No. 43.

R. H. Koch, for defendant; D. W. & S. H. Kaercher, for plaintiff.

BECHTEL, P. J., May 20, 1901.—This is an action of ejectment instituted May 6, 1885. On May 11, of the same year, a guardian *ad litem* was appointed for certain of the defendants, and on the 18th of the same month notice of the appointment and service was filed. On Jan. 24, 1898, a determination to arbitrate was filed by the plaintiff. On Feb. 11, 1898, by agreement of counsel for the plaintiff and the defendant, arbitrators were chosen. May 4, 1898, an award was filed in favor of the defendant, and, on the 18th, this was appealed from by the plaintiff. On April 1, 1901, a rule to plead was entered, and the 22nd of the same month the rule now pending was taken, to which the plaintiff filed an answer on May 6. These facts, which appear of record, do not bring this case within the ruling in *Waring Bros. & Co. v. Penna. R. R. Co.*, 176 Pa. 172, an action of trespass to recover damages, nor the doctrine of *Neel et al. v. McElhenny*, Guardian, 189 Pa. 489, in which case, after a reversal in an action of ejectment, the plaintiff waited twenty-five years before returning the case to the Common Pleas by *remittitur*, during which time rights of other parties intervened by conveyances. This decision was filed in 1899, and the judgment of reversal in 1871, while the suit was instituted in 1866. These cases are followed by the ruling in *Hillside Coal & Iron Co. v. Heermans*, 191 Pa. 116, in which the prior cases are reviewed and considered. The difference between personal and real actions is pointed out in this case. A statement is necessary in the one, to inform the defendant of the cause of action, while in the other, the defendant is at once informed by the writ of summons as to the character of the demand made. In the one, the statute of limitations is but six years old, while in the other, it is twenty-one years. The court, in speaking of this, say: "It could scarcely be contended that a defendant should be entitled to establish title to land by means of a judgment of non-suit by delay of the plaintiff for fourteen years in prosecuting his action, when the law does not permit a title to be established by means of adverse possession for less than twenty-one years." This authority, under the facts of the case before us, would seem to require the discharge of the above rule. From the date of the service of the summons in this case to the time when the parties, by agreement, submitted it to arbitrators is less than thirteen years. The action is ejectment, and every word of the opinion in *Hillside Coal & Iron Co. v. Heermans*, *supra*, applies with equal if not greater force to the case in hand. See also the decision in *Ward v. Patterson*, 46 Pa. 375, as to responsibility for neglect in moving a cause to trial.

Rule discharged for reasons herein given.

From J. O. Ulrich, Tamaqua, Pa.

10 Dist. R.

In re Vacation of Delaware Ave., Ball St. and other Streets.

Vacation of streets—Assessment of benefits—Ordinance releasing—Effect of.

The City, by an ordinance directing the vacation of certain streets, provided that, in consideration of a certain property-owner making no claim for damages, the City released all claims for benefits against the property-owner. *Held*, (1) that the ordinance had the effect of a contract binding on both parties; (2) that no assessment of benefits could be recovered against the property-owner.

Practice—Road jury—Findings of fact.

In a case of this kind, it is proper for the jury of view to make their assessment of benefits against the property-owner, thus bringing the question of law before the court for decision.

Exceptions to report of viewers. Q. S. Phila. Co.

Frazier & Frazier, for claimants.

F. L. Wayland, assistant city solicitor, for City.

George S. Graham, for the William Cramp and Sons' Ship and Engine Building Company.

ARNOLD, P. J., Dec. 16, 1901.—As viewers in road cases have no authority to decide questions of law, the viewers in the present proceedings did right in finding "that the property of the William Cramp and Sons' Ship and Engine Building Company in the vicinity of the streets above vacated, has received special benefit from the vacation of said streets over and above any benefit which may have been received by it in common with other neighboring property in general; and the jury value and assess such special benefit against the William Cramp and Sons' Ship and Engine Building Company, in the sum of \$100,750," which is the full amount of the damages awarded to the owners of property injured by the vacation of the streets. This brings all the facts before us in such a manner as to enable us to decide the questions of law raised by the exceptions.

We find that the City Councils directed the vacation of the streets by an ordinance approved April 3, 1894, and in the 6th section thereof ordained that "The William Cramp and Sons' Ship and Engine Building Company shall agree that they will make no claim for damages for property taken or injuries sustained by widening, extending or opening any of the said streets or avenues, or the vacation of the streets, or because of any changes herein authorized, and the City of Philadelphia hereby release The William Cramp and Sons' Ship and Engine Building Company, in consideration thereof, of all claims for benefits by reason of the same."

The effect of this ordinance is to make a contract between the City of Philadelphia and the William Cramp and Sons' Ship and Engine Building Company which neither party can violate or disregard without the consent of the other, and therefore it is binding upon the City. Consequently no claim for benefits can be recovered from the Ship Building Company.

We think it better to dispose of the matter finally on the exceptions, instead of allowing the City to file a claim against the Ship Building Company for benefits, which, at a trial, would have to be decided against the City.

We therefore will approve the report of the viewers as to the award of damages, and sustain the exceptions of the Ship Building Company as to the assessment of benefits against it.

Rorke's Estate.

Decedent's estate—Practice, O. C.—Distribution—Postponement pending litigation in other jurisdictions.

The distribution of a decedent's estate is solely within the jurisdiction of the Orphans' Court, and while the court will, in the exercise of its discretion, suspend the distribution for a reasonable time and set apart a reasonable amount to meet the claims of creditors who elect to proceed in another jurisdiction, yet it is error to postpone the distribution indefinitely to await the action of another court.

Hence, when testator died in December, 1899, largely indebted and leaving both real and personal property, and the settlement of his estate was attended with much difficulty, trouble and embarrassment to his executors, whose account was filed in April, 1901, and called for audit in May, 1901, held, that twenty-four creditors, whose claims in the aggregate amounted to more than \$100,000, should not be longer delayed to await the determination of an equity suit brought in one of the Courts of Common Pleas against the testator in his lifetime, which might perhaps last for years, as such delay might eventually cause the loss of their liens against his real estate.

Exceptions to adjudication. O. C. Phila. Co., Jan. T., 1900, No. 270.

Samuel Peltz, for accountant.

S. W. Pettit, *H. C. Thompson* and *D. M. Lowrey*, for exceptant.

HANNA, P. J., Nov. 23, 1901.—In *Hammett's Appeal*, 83 Pa. 392, it is clearly shown that the distribution of a decedent's estate is solely within the jurisdiction of the Orphans' Court, and should not be delayed to meet the claims of creditors who have sought to enforce their claims in another jurisdiction. And while the Orphans' Court, in the exercise of its discretion, may suspend the distribution for a reasonable time and set apart a reasonable amount to meet the claims of creditors who have elected to proceed in another jurisdiction, yet it is error to postpone the distribution indefinitely to await the action of another court. See, also, *Hulse's Estate*, 12 Phila. 130, where distribution was postponed at the instance of a creditor who was using due diligence in having his claim litigated in another court having exclusive jurisdiction of the subject-matter, viz.: The settlement of partnership accounts between the creditor and decedent. And in that case the only person to be affected by the delay was the executor.

In the present case, the testator died Dec. 20, 1899, leaving both real and personal estate. He died largely indebted, and the settlement of his estate was attended with much difficulty, trouble and embarrassment to his executors. The exceptant, during the lifetime of testator, filed in the Court of Common Pleas No. 4 of this county a bill in equity against testator and other stockholders of the Chestnut Street Trust and Saving Fund Company, which had become insolvent and made an assignment for the benefit of creditors, seeking in that proceeding to make testator and the other directors of said company personally liable, not only for the amount of a deposit made therein by the plaintiff, but all other indebtedness of said company lost, as alleged, through the negligence and the carelessness of its directors. This proceeding was pending at the time of the death of testator, and from that time until the present date is still undetermined.

The account of the executors was filed April 3, 1901, and called for audit by the court on May 13, 1901, when the exceptant, by his counsel, requested the auditing judge to defer and postpone distribution of the balance in the hands of the executors to and among other creditors appearing and prepared to prove their claims until the final disposition of the bill in equity then pending.

This was objected to on behalf of creditors whose claims were undisputed and by those desirous of presenting and proving the indebtedness of testator to them; whereupon, in view of all the circumstances, the laches and delay of the
10 DIST. R.

Rorke's Estate.

exceptant, the hardship the postponement would impose upon creditors, the uncertainty and indefiniteness of the determination of the equity proceeding, and the fact that the estate of testator was composed, in addition to the personality mentioned in the account, of valuable real estate still applicable to the payment of debts, the application of the exceptant was overruled and distribution awarded.

The single question therefore is, should twenty-four creditors, whose claims amount to more than \$100,000, be still longer delayed to await the determination of a proceeding which may be postponed for years, and thus, perhaps, eventually lose their lien upon the real estate of testator which has already almost expired? Act of June 14, 1901, P. L. 562.

Upon consideration of all that has been said, we think the creditors are entitled to present distribution, and any further delay inequitable and unjust.

The exceptions are dismissed and adjudication confirmed.

Craig's Estate.

Legacy—Validity of, and consideration for, assignment of—Jurisdiction and practice, O. C.—Abandoning right to contest will.

Where the respondent has assigned a part of his legacy to the petitioner, and the executor has retained a sum sufficient to pay it out of the award to the legatee, the court is bound to pass upon the validity of the assignment, upon a petition for a citation, without regard to the reasons for its non-production at the audit.

The giving up, by the petitioner, of his intention of contesting the will, was sufficient consideration for the assignment, and, as it was not shown that the petitioner's belief in the testator's insanity was not genuine, nor that his belief that he could procure medical testimony in support of his theory was unfounded, it cannot be said that the assignment was procured by fraud.

Petition for citation. O. C. Phila. Co., Jan. T., 1900, No. 331.

W. H. Hepburn, for petitioner; F. S. Drake, for respondent.

ASHMAN, J., Nov. 30, 1901.—The matters embraced in the petition and answer are clearly cognizable by this court. The respondent had assigned to the petitioner \$3000 of his legacy, and the executor retained that sum out of the award to the legatee. If the assignment had been presented at the audit the court would have been bound to pass upon its validity, and without regard to the reasons for its non-production then, it is clear that the court is equally competent and equally bound, in order to avoid circuitry of action, to pass upon it now.

The respondent admits that he executed the assignment. He avers, indeed, that he did not at the time understand its effect. But it had been the subject of careful deliberation and of discussion between the two parties and the attorney who prepared it; the promise involved in it was within the comprehension of a child; and the after-conduct of the respondent shows that he knew precisely what he had done. Only the question of fraud, therefore, in the procurement of the assignment remains to be considered. The alleged fraud consisted in statements made by the petitioner, which he either knew to be false, or about which he knew nothing. The petition set up that the petitioner had announced to the respondent his belief in the insanity of the testator and his intention to contest the will on the ground of testamentary incapacity; and that, in order to avoid such contest, the respondent agreed to assign him \$3000 of his legacy. In support of these averments, the petitioner produced a letter from a lawyer of a date prior to his interview with the respondent, declaring the fact of insanity and the need for immediate action, and he also produced the assignment. This made out a *prima facie* case. The petition itself could be overcome only by the

Craig's Estate.

oaths of two witnesses, or by the oath of one witness with corroborating facts. The evidence introduced by the contestants tended to show testamentary capacity in the testator, but it did not show that the petitioner's belief in his insanity was not genuine, nor that his belief that he could procure medical testimony in support of his theory was unfounded. The main point with the respondent was the avoidance of a contest which the petitioner had threatened to institute; and in his anxiety to secure that end he agreed to compensate the petitioner for his possible loss, without pausing to inquire whether the facts upon which the latter relied would sustain his attempt to overthrow the will. His is not the first instance on record in which a bargainer has found, or believed that he has found, that he had made an improvident contract; but his mistake in this respect has never been regarded as a legal ground for repudiating his obligation. The foregoing propositions scarcely require the citation of authorities. The jurisdiction of the Orphans' Court is shown, among other cases, by Dundas's Estate, 73 Pa. 474; Otterson v. Gallagher, 88 Pa. 355; Bridham's Appeal, 1 Penny. 262; Dundas's Estate, 136 Pa. 318.

On the question of consideration for the promise to refrain from suit, the remarks of Nelson, J., *Seaman v. Seaman*, 12 Wend. 381, are apposite: "If the declaration distinctly shows that the plaintiff would have derived a benefit resulting from the avoidance of the will, I think there can be no doubt that he has suffered damage or detriment, though the defendants have not received a benefit sufficient to create a good consideration. He had filed a *caveat* with the surrogate and was entitled thereby to contest the validity of the will. This right secured to him by law he gave up in consideration of the agreement upon which this suit is brought. Whether he would have succeeded in the litigation is not the test; if this were so there would be no security nor anything gained by compromising a doubtful or litigated claim by stipulation to be afterwards fulfilled; for then to procure a fulfillment of it, the party would be obliged to show he gave up a right or claim which he could have enforced by law, and the old controversy must be litigated over again. It is enough that he yielded to his adversaries the right he possessed to contest the will."

The petition is granted.

Markle's Estate.

Wills—Construction—Advancements—Will to be construed in its entirety.

Where a testator gives the residue of his estate in trust for his five children, and directs the income to be paid to them in equal shares until each arrives at the age of forty years, providing, as to the payment of income, that, "in the division of the income, each of my children shall be charged with interest on the amount of advancements which I have heretofore made or may hereafter make to them," and then gives one-third of each child's share so held in trust to him absolutely upon attaining the age of forty years, and directs the other two-thirds to be held in trust for life, providing, as to the payment of principal as each child attains the designated age, that "in such payment or distribution such child to be charged with the principal of the amount of the advancements I may have heretofore made or may hereafter make to him or her, as part of such payment or distribution," the entire amount of the advances to each child is to be charged against his share, and, when they exceed the one-third of such share, the balance only is to be held in trust.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1888, No. 190.

D. Stuart Robinson and Samuel Dickson, for accountants.

John G. Johnson, for *Ida M. Hessenbruck*.

George Wharton Pepper, for *George B. Markle*, and *E. G. Tacy*, Guardian.

PENROSE, J., Nov. 30, 1901.—The only exceptions argued before the court—all others, as we understand, being withdrawn or abandoned—are those relating to 10 DIST. R.

Markle's Estate.

to the manner in which the testator's advancements to his children are to be treated in distribution. The will gave the residue of the estate in trust, after various provisions not now material, for the five children "in equal fifth shares,"—the income to be paid to them in equal shares until each arrives at the age of forty years, free from liability for debts or engagements: it being further provided that "in the division of the income each of my children shall be charged with interest on the amount of advancements, which I have heretofore made or may hereafter make to them, at the rate of four per cent. per annum as part of his or her share;" and that one-third of one-fifth (the share so given to each) shall be paid to each child upon attaining the age of forty years, absolutely, and the other two-thirds held in trust for such child, for life, with power of appointment by will among issue, &c., &c., and in default of appointment to such issue, *per stirpes*, absolutely, with limitation to the other children of the testator, &c., in default of such issue, &c., &c., &c.: it being provided with regard to the payment of principal so to be made as each child reaches the designated age, that "in such payment or distribution such child to be charged with the principal of the amount of the advancements I may have heretofore made or may hereafter make to him or her, as part of such payment or distribution,"—the "other two-thirds of the share of such child" being held for him or her for life, &c., &c., as already stated.

The only difficulty arises from the fact that in the case of at least one of the children the advancements exceeded one-third of the principal of one-fifth, and as the language of the will is that the "other two-thirds of such share" shall be held as above, it is argued that to the extent of the excess above such one-third, the advancement is to be no longer regarded. But the testator has said that each child is to be charged, not with so much of the advancements as shall equal one-third of one-fifth, but "with the principal of the amount of the advancements"—that is, the whole principal of the whole amount; and he has also declared, in express terms, that the share of each child shall be one-fifth of the residue of his estate, advancements being included,—this being, manifestly, his primary and paramount intent. In the face of these provisions and of the further fact that the share, so far as not consumed by the advancements, is to be held for the benefit of the child who has already had the advantage of such anticipated payment, with further provision for his family, at his death, it would be a very narrow interpretation which would give controlling effect to the words "one-third" and "two-thirds," and disregard everything else in the will. The principle is elementary that a will is to be construed in its entirety; that the precise, literal meaning of words is not to be too closely adhered to; that the interpretation, in case of doubt, is to be in favor of equality, and as nearly in conformity with the statute of distribution as possible; and that the presumption is in favor of first takers as against more remote beneficiaries, especially where the latter are unknown to the testator.

We think that the testator meant what he said, and that the entire amount advanced to each child is to be charged against the one-fifth held; and that where this exceeds one-third of such fifth, the balance, only, of the share will continue in trust.

It necessarily follows from this that the distribution of income and of increase of principal by enhancement of securities is to be governed by the same principle—that is to say, it is to be made in the proportions which the shares after deducting advancements bear to each other. Thus perfect equality will be accomplished, while any other method would lead to injustice.

It may be added that this was the theory adopted in the adjudication of the first account of the executors, in March, 1890, the correctness of which seems to have been conceded by all parties then interested.

Markle's Estate.

The case of Wagner's Appeal, 2 Wright, 122, was cited by counsel for the exceptant; but without stopping to discuss all the points of difference, it is enough to say that there one of the persons named as distributees had been advanced beyond the amount of his entire share, and that, in itself, is sufficient to distinguish the case from the one now before us.

The exceptions, so far as they are in conflict with this opinion, are dismissed. Counsel will prepare the necessary decree.

Hoffman's Estate.

Decedent's estate—Refunding bond—Surety—Releasing counter-indemnity.

Where the reason for the existence of a refunding bond, required for the protection of a devisee of real estate from a claim which had been preserved as a lien by suit in the Common Pleas, ceases, counter-indemnity of the surety is released, and may be returned to the depositor.

In releasing such fund, all payments and charges made and expenses incurred with the approval of the depositor in his lifetime are to be allowed against his administrators, and it should also be clearly shown that, during the time the money was retained, no income, gain or profit, including interest on deposits, was derived from its use.

Petition, answer and proofs. O. C. Phila. Co., July T., 1899, No. 259.

Joseph W. Hunsicker, for petitioner; *Reynolds D. Brown*, for respondent.

PENROSE, J., Nov. 30, 1901.—The refunding bond, with security, required by the adjudication of the executors of the decedent was purely for the protection of a devisee of real estate from a claim which had been preserved as a lien by suit in the Common Pleas. The claim was for wages by a person who, with full knowledge that the account was before the Orphans' Court for settlement and distribution, had deliberately refused to present her claim there and brought the suit referred to. So far as she was concerned, therefore, the case falls directly within the principle of Hammett's Appeal, 2 Norris, 392, and the distribution in the Orphans' Court discharged the property embraced in it from any liability to her. Subsequently the suit in the Common Pleas was ended by judgment of *non pros*, and the lien against the real estate having been thus lost, the reason for the existence of the refunding bond ceased, and the amount placed by Horace N. Hoffman, one of the distributees, under the control of the surety company to indemnify it against liability on the bond, need, therefore, no longer be withheld from his administrator—he having in the meantime died.

The surrender by the company or its agent or its depository in obedience to the decree of the court will be a complete protection, while authority of the court to make the order is settled by very many recent decisions (Brooke's Appeal, 6 Outerb. 150; Odd Fellows' Saving Bank's Appeal, 8 Crumr. 356; Meeker's Appeal, 154 Pa. 491; Watts's Appeal, 158 Pa. 1; Luckenbach v. Luchenbach, 175 Pa. 484; Gilpin's Appeal, 176 Pa. 373; Pittsburgh Bank's Appeal, 183 Pa. 260; Tyson v. Rittenhouse, 186 Pa. 137; Tyson's Appeal, 191 Pa. 218, 223, &c., &c.).

It only remains to consider how far it is proper to allow the retention of the amount claimed by the attorney for Horace N. Hoffman, by whom, under some arrangement with the surety company, the fund has been held since May, 1900. Of course all payments and charges made and expenses incurred with the consent or approval of Horace N. Hoffman while he lived are properly to be allowed as against his administrator; and this, under the testimony, which is practically without contradiction, applies to all that it is asked should be deducted, including the fee of \$250 for services in the Orphans' Court with reference to the moneys awarded.

10 DIST. R.

Hoffman's Estate.

It seems to us, however, that it should be clearly shown that during the eighteen months that the moneys have been thus held, no income, gain, or profit, including interest on deposits, if any, was derived from its use. There might, at least, have been a deposit in a reputable trust company, and the fund thus made productive, if only to the extent of two per cent. per annum. The petitioner has leave to file interrogatories and require an answer on this subject, with the further right, if desired, to take testimony.

Our order is that the amount mentioned in the petition, less the deductions claimed in the answer, be paid to the petitioner as administrator of Horace N. Hoffman, by the respondent, together with such income, gain, or profit, including interest on deposits, if any, as may have accrued or been earned while the moneys have been so held by him.

Counsel will prepare the necessary decree.

Bilderback's Estate.

Decedent's estate—Implied trusts—Evidence—Sufficiency of.

In the absence of fraud, accident or mistake, a legal title under a deed in fee simple cannot be turned into a parol trust by testimony originating many years before and resting in the memory of a single witness, and in loose declarations made long subsequently by the legal owner. Against it the argument would be conclusive, that whatever may have been the original purpose of the parties, the deed itself must be taken to have expressed their final determination.

The decedent's stepson claimed \$2400 from the estate, upon the ground that, shortly before her marriage with his father, she had accepted from her intended husband \$2400 to purchase a house and lot in her own name, for their joint occupancy, with the condition that, at her death, she should leave the property to him. She took a fee simple under the deed from the vendor and died intestate. At the audit, it was established by the testimony of one witness that such an agreement was entered into between claimant's father and decedent, and that she had made repeated declarations to disinterested third persons, acknowledging the arrangement and asserting her intention of carrying it out. This testimony was also corroborated somewhat by a letter from the decedent's husband to her, bearing date Jan. 5, 1885, which read as follows: "I propose to buy a house if the money I have is enough to do so, and have the deed in your name; in fact, your house, to will it to our Charlie at your death."

He *id.*, that the evidence was insufficient to establish a trust, in conflict with the terms of the deed.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1900, No. 495.

E. Hunn, Jr., for exceptant; *A. D. Harrington*, contra.

ASHMAN, J., Nov. 30, 1901.—The exceptant claims \$2400 from this estate under anomalous circumstances. In 1885 his father, who was then a widower, married the decedent. Shortly before that event he handed the decedent \$2400 with which to purchase a certain house and lot in her name, but for their joint occupancy, and he coupled with the gift the condition that she should, at her death, leave the property to his son. The house was accordingly purchased and the deed therefor delivered to the decedent in her maiden name as grantee, and it was thenceforth occupied by the couple until the death of the husband, and then by his widow until her death. The premises were subject to a mortgage which was paid off in the husband's lifetime through stock held by the decedent in a building association. The evidence received at the audit was oral, and comprised the testimony of witnesses, one of whom swore that she was present when the agreement was entered into between the husband and the decedent, and the others who repeated declarations of the wife, in which she acknowledged the compact, and asserted her intention to fulfill it by leaving the property in accordance with its terms. She died intestate. If this testimony concluded the case, we should have a legal title under a deed in fee simple, contradicted by

a parol trust originating many years before and resting in the memory of a single witness, and in loose declarations made long subsequently by the legal owner; a species of evidence upon which courts always look with more or less misgiving. Against it, the argument would be conclusive, that whatever may have been the original purpose of the parties, the deed itself must be taken to have expressed their final determination. In the whole transaction there was no sign of fraud, accident or mistake to remove it from the operation of the statute forbidding parol trusts of realty, or to give play to the functions of a court of equity. Several letters, however, were produced, which were found among the decedent's effects and were identified as in the handwriting of the husband. One of these, and the only one which bears upon the alleged agreement, was dated Jan. 5, 1885, and contained this language: "I propose to buy a house if the money I have is enough to do so, and have the deed in your name; in fact, your house, to will it to our Charlie at your death." This was written three weeks before the execution of the deed. In order to render it available in establishing the exceptant's claim, we must find that it embodied an intention to give a life-estate to the wife with the remainder to the son; that its conditions were accepted by the wife; and that it was finally carried into effect by a deed which was utterly repugnant to its terms. It goes without saying that we cannot string presumptions like these upon so slender a thread. The letters were regarded as inadmissible by the auditing judge, but they were produced at the argument, and their rejection at the audit was immaterial, because, for the reasons already given, they would not have changed the result.

The exceptions are dismissed.

Commonwealth v. Brangan, Coates and Westenberger.

Election law—Practice, Q. S.—Provinces of court and jury—Directing verdict for defendant—Presumptions.

Where the judge and inspectors of an election division at a general election are indicted for neglect of their statutory duty under section 10 of the Act of Jan. 30, 1874, P. L. 31, as amended by the Act of May 6, 1899, P. L. 255, to require vouchers to be signed and sworn to in the case of voters whose names do not appear on the registry list, and the only evidence sustaining the indictment is the fact that the vouchers were not found in the envelope filed in the prothonotary's office, a verdict will be directed for the defendants.

The failure to return such vouchers to the prothonotary's office, as required by law, is an entirely different offence from the neglect to take them in the first instance, as charged in the indictment. See S. C., 10 District Reps. 739.

Charge to jury. Q. S. Phila. Co., March Sess., 1901, Nos. 618, 619 and 620.

Defendants, being the judge and inspectors in the 20th division of the 36th ward at a general election held in November, 1900, in the city of Philadelphia, were indicted for neglect of their statutory duty under section 10 of the Act of Jan. 30, 1874, P. L. 31, as amended by the Act of May 6, 1899, P. L. 255, to require vouchers to be signed and sworn to in the case of five persons whose names did not appear on the registry of voters, but who claimed the right to vote at the election.

Upon the trial of the case, the court took judicial cognizance of the fact that the election was held on the date laid in the indictment. Defendants were identified as the election officers by one of the clerks. The Commonwealth proved the registry of voters in the division by the production of the list from the county commissioner's office and the evidence of the proper clerks to identify it.

The testimony of a witness who made a careful examination of the names on the registry was admitted, under objection, to prove that those mentioned in the indictment were not on the registry. The list of voters which the law
10 DIST. R.

Commonwealth v. Brangan, Coates and Westenberger.

requires to be filed by the election officers with the prothonotary was produced and placed in evidence, showing that the names in the indictment had been voted at the election.

Two witnesses testified that, about a year after the election, they visited the prothonotary's office and failed to find vouchers in the envelope for the names set out in the indictment. This evidence was objected to, but admitted by the court as a circumstance that might be connected by other testimony with the neglect of duty for which the defendants were indicted.

The majority and minority clerks were sworn, but were unable to state whether vouchers had been taken in the case of the persons mentioned in the indictment or not. A petition was presented to have the ballot-box opened, which was refused: 10 District Reps. 739. The Commonwealth closed its case; whereupon counsel for defendants requested that the jury be instructed to render a verdict of "Not guilty."

John R. K. Scott and R. O. Moon, for defendants.—The absence of the vouchers in the envelope at the prothonotary's office, when it appears the envelope had been open and accessible to the public during the year intervening between the election and date of examination, and that its contents had been removed and used in the official count in the election court, could, at most, give rise to a presumption that the vouchers had not been placed in the envelope and filed in the prothonotary's office; but this is a duty, arising at the close of the election, distinct from that for which defendants stand indicted; *McCann v. Shonk*, 7 Legal Gazette, 95; *School Director's Election*, 18 Phila. 458.

If defendants took vouchers at the time the votes were cast, and subsequently neglected to place them in the envelope and return them to the prothonotary's office, they could not be convicted on these indictments.

There is not a scintilla of evidence to go to the jury. If the jury finds that the absence of the vouchers from the envelope a year after the election justified the presumption that they had not been placed in the envelope, the further presumption that they were not taken in the first instance would be a presumption upon a presumption, which is not permitted even in civil cases: *Douglass v. Mitchell*, 35 Pa. 440; *Welsh v. Erie, &c.*, R. R. Co., 181 Pa. 461.

The prosecution must add the proof of other circumstances indicative of guilt in order to render the naked absence of the vouchers from the envelope available toward a conviction: *Rex v. Adams*, 3 C. & P. 600; *Reg. v. Hall*, 1 Cox C. C. 231; *Regina v. Cruttenden*, 6 Jur. 267; *Anon*, 7 Monthly L. Mag. 58.

The doctrine that, wherever there is a scintilla of evidence of a material fact, it must be submitted to the jury, has been exploded both in this country and in England.

Where there is no evidence of a fact sought to be established, or where the evidence could not reasonably satisfy the jury of the existence of such fact, or is so weak that it would be the duty of the court to set aside a verdict finding such fact, the question should not be submitted to the jury: *Sartwell v. Wilcox*, 20 Pa. 117; *Howard Express Co. v. Wile*, 64 Pa. 201; *Cunningham v. Smith*, 70 Pa. 450; *Hyatt v. Johnson*, 91 Pa. 196.

Samuel M. Clement, Jr., assistant district-attorney, contra.—The Commonwealth has made out a case by the evidence giving rise to the duty to take vouchers, the production of the contents of the envelope from the prothonotary's office, and the testimony of those who searched and failed to find the vouchers in the envelope: In the Matter of the Contested Election of Barber, 10 Phila. 579.

MARTIN, J., Dec. 11, 1901.—"Gentlemen of the jury: The presumption of law is that the defendants performed the duties cast upon them by the Act of Assembly, and, before they can be called upon to answer in a

Commonwealth v. Brangan, Coates and Westenberger.

criminal prosecution, this presumption must be overcome by the Commonwealth by evidence beyond a reasonable doubt. While the evidence in this case indicates that the vouchers were not found in the prothonotary's office, there is no testimony which shows that they were not taken at the time the votes were cast. The failure to return them is an entirely different offence from that of neglect to take them in the first instance, which is the charge contained in the indictments in this case. In view of the law, I direct you to return a verdict of not guilty."

Notes of Treasury Department Decisions.

From November 16 to December 9, 1901, inclusive.

The following decisions have been made by the Treasury Department of questions arising under the Act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes:" [The reference by Vol. to Treasury Decisions is to Vol. 4, of 1901.]

Bankers.

Special tax. Bankers must return for taxation capital, surplus, undivided profits and borrowed money used in the business of banking. No. 440, December 3, 1901. 4 Treasury Decisions, No. 49, page 29.

Bottled Wines.

Stamp tax. No. 443, December 7, 1901. 4 Treasury Decisions, No. 50, page 21

Cigarette Stamps.

Difference between cigarette stamps representing tax of 54 cents per 1000 and those representing tax of \$1.08 per 1000. No. 433, November 16, 1901. 4 Treasury Decisions, No. 47, page 15.

Grain Distilleries.

Records of operations of grain distilleries and duties of officers in charge of the same. No. 438, December 3, 1901. 4 Treasury Decisions, No. 49, page 28.

Examination of grain distilleries and duties of examining officers. No. 439, December 3, 1901. 4 Treasury Decisions, No. 49, page 28.

Legacy Tax.

Where collector is satisfied that a bequest is for \$10,000 even, and the residuary estate is bequeathed absolutely to the widow, no return is necessary. Executors should make return and pay the tax before turning legacy over to trustee. Corporate stock is held to be personal property, regardless of the nature of corporation. What is required in a legacy return. Fair market value at the date of decedent's death the measure of value of personal property. No. 435, November 25, 1901. 4 Treasury Decisions, No. 48, page 16.

Reversionary interest not vested in remainderman when the remainderman is older than the life-tenant, in the matter of legacy taxes, until, if ever, the property vests in possession of the remainderman. No. 436, November 25, 1901. 4 Treasury Decisions, No. 48, page 16,

Adopted child considered as a stranger in blood to the foster parent for the purpose of taxation under the war revenue law. When the will provides a life-interest in certain property to widow and remainder to her issue, the interest of a daughter is a vested interest. It is the daughter's expectancy of outliving her mother, as demonstrated by the tables, which fixes the status of her interest. No. 437, November 25, 1901. 4 Treasury Decisions, No. 49, page 27.

10 Dist. R.

Notes of Treasury Department Decisions.

Legacy return, Form 419, should be made and the tax paid to the collector or deputy collector of the district of which the deceased person was a resident. The non-resident mentioned in the statute is held to mean a person residing outside the jurisdiction of the United States. No. 442, December 7, 1901. 4 Treasury Decisions, No. 50, page 21.

Oleomargarine.

No. 441, December 4, 1901. 4 Treasury Decisions, No. 50, page 19.

Use of Telegraph in the Transaction of Official Business.

No. 444, December 9, 1901. 4 Treasury Decisions, No. 50, page 22.

Vested Interests Defined.

Vested remainders and contingent remainders contradistinguished. No. 434, November 21, 1901. 4 Treasury Decisions, No. 48, page 15.

Fritz v. Moyer and Hallman.

Affidavit of defence—Principal and surety—Rescission of contract by minor when of age—Effect on surety's liability.

An affidavit of defence to an action on a promissory note against two defendants, given by one as principal and the other as surety, in part payment of the purchase-money of a farm, is sufficient which alleges, among other defences, that the plaintiff afterwards sold the farm to another person, that the price obtained at the second sale was about the same as the defendant who gave the note agreed to pay, and that said defendant was a minor at the time he entered into the contract of sale, and rescinded the same when he ascertained that the representations which induced it were false and fraudulent.

The minority of the defendant who gave the note was a defence which he alone could plead; it was personal to himself, and would not relieve his surety.

If the plaintiff resold the property to a third person and collected the purchase-money from him after the rescission of the contract by the minor, there could be no recovery on the note, even against the surety, unless it be to recover the damages which the plaintiff sustained under the original contract.

If the minor disaffirmed the contract when he became of age, and the farm was still held by the vendor, the note was not collectible as purchase-money against the surety.

Motion for judgment for want of a sufficient affidavit of defence. C. P. Montgomery Co., March T., 1901, No. 39.

Evans, Holland & Detra, for plaintiff; *H. M. Brownback*, for defendants.

SWARTZ, P. J., May 20, 1901.—The plaintiff brought suit on a promissory note. Defendant, Cornelius M. Moyer, purchased a farm from the plaintiff and gave the note as part payment or down money under a written contract. Mary A. Hallman, the other defendant, joined in the note as surety for Moyer.

The affidavit is made by both defendants, and sets out the following grounds of defence: First, that Moyer was induced to enter into the contract by false and fraudulent representations on the part of the plaintiff; second, that Moyer rescinded the contract as soon as he ascertained the representations made were false and fraudulent; third, that the plaintiff afterwards sold the farm to another person; fourth, that the price obtained at the second sale was about the same as the defendant, Moyer, agreed to pay; and fifth, that the said Moyer was a minor at the time he entered into the contract of sale.

No copy of the written contract is attached to the affidavit. This absence is explained by the statement of defendants' counsel, at the argument, that the plaintiff holds in his possession the only paper that was made.

The allegations as to fraudulent representations are not as clearly made out as the law demands; and if this were the only matter offered in defence, we might well find that the affidavit is not sufficient.

Fritz v. Moyer and Hallman.

The minority of Moyer is a defence which he alone can plead; it is personal to himself, and will not relieve his surety. But if the plaintiff resold the property after the rescission or disaffirmance of the contract by Moyer, there can be no recovery on the note, even against the surety, unless it be to recover the damages which the plaintiff sustained under the original contract. If the plaintiff sold to a third person and collects the purchase-money from him, it will not do to allow him to collect it a second time by a suit against the surety.

If Moyer, now that he is of full age, disaffirms the contract, and the farm is still held by the plaintiff, the note is not collectible as purchase-money against the surety. "The undertaking of the surety goes to the whole consideration; and by the disaffirmance of the contract, the plaintiff gets back his land and the consideration which upheld the contract is extinguished. It would be a strange doctrine which would give him back his land and allow him to recover from the surety the purchase-money also." Brandt on Suretyship, § 128; Baker v. Kennett, 54 Mo. 82. In Kuns v. Young, 34 Pa. 60, the contract was enforced against the surety; but the reason given is found in the fact that the minor, after his majority, retained the property without any disaffirmance of the contract. The question of damages is not now before us.

We think there is enough in the affidavit to prevent judgment at this time even against the surety.

And now, May 20, 1901, the rule for judgment is discharged.

From Montgomery Evans, Norristown, Pa.

Washington German Building and Loan Ass'n v. Krauter.

Judgment—Revival—Amicable agreement—Sufficient identification of judgment.

An amicable revival of a judgment must sufficiently identify the original judgment as to parties, date and amount.

An amicable agreement to revive a judgment correctly named the parties, the amount, the year and the term, but gave the number of the case as 17 when it should have been 19. There already had been a valid revival of a judgment entered to No. 17 of the same year and term. The original judgment entry, the entry of the revived judgment, and the entry in the judgment index docket, all pointed to the correct judgment entry. *Held*, the judgment was sufficiently identified to be properly revived.

Case stated for distribution. C. P. Schuykill Co., Jan. T., 1901, No. 40, *fi. fa.*

W. P. Ramsay, for plaintiff; E. D. Smith, contra.

BECHTEL, P. J., April 15, 1901.—The above plaintiff obtained two judgments on Sept. 3, 1894; one to No. 17, November Term, the other to No. 19, November Term; the first for the payment of \$1000, the other for the payment of \$200. One of these judgments is against Jacob Lipp, and the other against N. Krauter. On Aug. 15, 1899, the judgment to No. 17, November Term, 1894, against said Jacob Lipp, was regularly revived by amicable revival. As to this we have no controversy in this case, and it is here referred to because of the bearing it seems to have upon the revival of the other judgment. On Sept. 1, 1899, the above plaintiff and defendant, by amicable revival, undertook to revive the judgment to No. 19, November Term, 1894, for \$200; the plaintiff claims the said judgment was, by agreement mentioned, regularly revived and its lien continued. This is denied by D. G. Yuengling & Son, who are next upon the record as creditors of N. Krauter, who was bail for John A. Weber, a debtor of said D. G. Yuengling & Son.

10 DIST. R.

Washington German Building and Loan Association v. Krauter.

It is contended by these parties that the attempted revival of said judgment is insufficient, in that it does not correctly recite the judgment sought to be revived, and that the lien thereof has not been thereby continued. The agreement to revive correctly names the plaintiff and defendant, the amount for which the judgment is to be revived, which is the same amount as the original judgment, gives the correct term, as to month and year, but gives the No. 17 instead of No. 19 as the number of the case. Seventeen is the number of the judgment against Jacob Lipp, already revived. It is a well-settled rule that an amicable revival, as well as a *scire facias* to revive, must sufficiently identify the judgment intended to be revived.

The whole question, therefore, is, does the agreement of revival and the record thereof sufficiently identify the judgment intended to be revived in this case; if the original judgment is substantially identified, as to parties, date and amount, it will be sufficient to continue its lien. This seems to be the drift or trend of the authorities, among which may be mentioned Dietrich's Appeal, 107 Pa. 174; Landon v. Brown, 160 Pa. 538, and Worman's Appeal, 110 Pa. 25. In addition to the facts hereinabove recited, tending to identify the judgment to No. 19, November Term, 1894, we have the revived judgment entered to No. 311, September Term, 1899, in which the No. "17" appears, but underneath the defendant's name the correct No. "19" appears. We also have the judgment index docket entry, showing a revived judgment for \$200; on the original judgment the prothonotary entered "Am. Rev., Sept. T., 1899, 311," and above these figures is the No. 19 in pencil, and crossed out. Every entry seems to show the revival of the judgment to No. 19, November Term, 1894. The original judgment entry, the judgment entry of the revived judgment, and the entry in the judgment index docket, as well as the names of the parties, the amount, the term and year, all point to the correct judgment entry. Nothing but the No. 17 is to the contrary; but that judgment is for \$1000, and shows upon its entry that it had been previously revived. In addition to this, it may be said that there is no other judgment against Krauter in favor of this plaintiff for \$200, and the judgment to No. 17 is for \$1000 and against Jacob Lipp. We think Fogelsville Loan and Building Association's Appeal, 89 Pa. 293, and Mellon's Appeal, 96 Pa. 475, certainly show that the revival in this case is sufficient to continue the lien of the judgment to No. 19, November Term, 1894. The later decisions do not seem to change the ruling found in these cases; hence, we consider them as decisive of the question presented in this case.

From J. O. Ulrich, Tamaqua, Pa.

Kindig v. Kahler.

Debtor's exemption—Waiver—Justice's transcript.

A defendant in an execution issued out of the Common Pleas on a transcript from a magistrate's judgment is not entitled to his \$300 exemption where his promissory note on which the judgment was obtained waives the exemption, although there is no reference in the transcript to the waiver.

Rule to set aside \$300 exemption. C. P. Lancaster Co., Nov. T., 1900, No. 42.

W. U. Hensel, for rule; T. J. Davis, contra.

LANDIS, J., March 2, 1901.—Suit was brought before Alderman Deen by the plaintiff against S. C. Kahler, the defendant, to recover the amount of a promissory note for \$125, dated Feb. 13, 1900, payable thirty days after date to the order of Milton Kindig. On May 16, 1900, judgment was entered in favor of the plaintiff for the sum of \$136.35. On Nov. 8, 1900, a transcript of this

Kindig v. Kahler.

judgment was entered in the Court of Common Pleas, and, on the same day, a writ of *fi. fa.* was issued, and certain personal property belonging to the defendant was levied upon. Upon the original note on which the suit was brought appear the words, "Waiving all exemption laws," but no reference to them is made in the alderman's transcript. When, therefore, the execution issued and the levy was made, the defendant claimed the benefit of the \$300 exemption law, and the sheriff appraised to him certain of the goods seized by virtue of his writ at the sum of \$179.37. The plaintiff thereupon presented his petition and obtained this rule, thus seeking to set aside the appraisement, which he claimed had been improperly made.

The Act of April 8, 1848, vests in a defendant in an execution issued on a judgment obtained on a contract, or on a distress for rent, an absolute right to have an exemption of his property to the value of \$300, and of this he cannot be deprived by the summary action of the court. He may voluntarily waive his right, or he may lose it by neglecting to claim it in the proper time. If, however, he demands of the officer levying the execution or distress for rent an appraisement, and it is refused, that officer must take upon himself the responsibility of such refusal: *Freeman v. Smith*, 30 Pa. 264; *Tasker v. Sheldon*, 115 Pa. 107. But where he has actually waived his right, he can make no claim, even though the waiver does not appear upon the record of the justice before whom proceedings to collect the indebtedness was commenced. In *Beatty v. Rankin*, 139 Pa. 358, it was shown that the Knoxville Land Improvement Company had obtained a judgment before an alderman against Fisher Beatty for \$192 and costs, with waiver of all laws or usages exempting property from execution. An execution attachment was issued on said judgment, and served on J. S. Rankin and Louisa G. Rankin as garnishees. They answered, admitting their indebtedness, and the alderman thereupon entered judgment against them as garnishees, and issued execution. The garnishees presented their petition to interplead, and the rule to pay the money into court, granted in response to that petition, was made absolute. An issue was then framed, and the court below, upon argument, ordered the money to be paid to the Knoxville Land Improvement Company, holding, among other things, that the waiver in the lease extended to the judgment and all manner of execution thereupon, and that, whether it appeared on the face of the judgment or not that the exemption was waived, made no difference. The Supreme Court, in affirming the lower court, said: "The fact that the magistrate recited the waiver in his judgment is immaterial. The waiver was in the lease, and need not necessarily appear on the justice's docket. That it was, does no harm." In *Rengier v. Salziger*, 10 Lanc. L. Rev. 323, the same doctrine was held by this court, though it is true that it appeared upon the alderman's transcript that the defendant "waives all privileges of law exempting property from levy and sale." With some industry I have sought to find authority to support the defendant's contention. The Act, being the kindness of the law for the poor and unfortunate debtor, should not be construed against him unless he has placed himself outside of its pale. None, however, was cited by his counsel, and I have failed in my search. The note upon which the suit was brought has plainly printed upon it, "Waiving all exemption laws." It would not, for a moment, be claimed that had the magistrate placed a copy of it upon the face of the transcript, the defendant could, nevertheless, have his exemption appraised to him in defiance of that record. Yet it appears in the original contract upon which the judgment was based, and he is on this account equally barred from establishing his claim. I am therefore of opinion that this rule should be made absolute, and the appraisement made by the sheriff set aside.

Rule made absolute.

From George Ross Eshleman, Lancaster, Pa.

10 Dist. R.

Hoyt & Sharpless v. Clearfield Traction Company.

Transcript of justice — Presumption of regularity — Motion to strike off — Control of record in Common Pleas — Laches.

The regularity of the judgment of a court having jurisdiction of the subject-matter cannot be questioned in a collateral proceeding; and although a judgment recovered before a justice of the peace be irregular, yet, if the justice has jurisdiction of the subject-matter, the only redress of the defendant therein is by *certiorari*.

The constable served the writ of summons on a director of the company defendant, in accordance with section 1 of the Act of March 17, 1856, P. L. 388. The transcript set forth such service in full and contained the further averment, "And so ans. H. Gunter, Cons't. on oath." The justice entered judgment against defendant by default. On application of defendant to strike off judgment entered in the Common Pleas by transcript, *held*, that the proof of service of summons was a sufficient compliance with the requirement of the Act of 1810, and did not render the judgment void, but voidable.

Where a defendant knows or should have known that a judgment had been obtained against him nearly five years before, and does nothing, either by appeal or *certiorari*, to determine its validity, and then makes application to strike off the judgment entered by transcript at a time when to do so may defeat plaintiff's claim by the statute of limitations, he is guilty of such laches as will warrant the court in refusing to strike off the judgment.

Motion to strike off judgment entered on transcript of justice. C. P. Centre Co., Aug. T., 1901, No. 88.

Blanchard & Blanchard, for motion.

Reeder & Quigley and George W. Zeigler, contra.

LOVE, P. J., Oct. 7, 1901.—This is a rule to show cause why the judgment in this case should not be stricken off for matters appearing of record. The judgment was obtained before a justice of the peace Dec. 31, 1896. The transcript was filed and entered in the Common Pleas June 4, 1901. The summons was issued Dec. 24, 1896. The return of service is as follows: "Served the within writ of summons Dec. 24, 1896, upon John G. Platt, one of the directors of the Clearfield Traction Company, by producing the original summons and informing him of the contents thereof, and giving to him a copy thereof, it appearing that the property of the said Clearfield Traction Company is situate wholly or in part within the county of Centre, and none of the officers residing therein, excepting the within-named director, namely, J. G. Platt, whom service is made as aforesaid, and so ans. H. Gunter, Cons't. on oath." The transcript further sets forth, "Now, Dec. 31, 1896, A. V. Hoyt, one of the firm of Hoyt & Sharpless, appears and produces bill for wages of manual labor, demand \$176.55. A. V. Hoyt sworn, and after hearing the proofs and allegations, judgment was publicly given at 10 o'clock and by default—neither of defendants. Judgment, \$176.55 for wages of manual labor, with costs of suit."

If this were a *certiorari* we would not hesitate to reverse the judgment. But being a motion to strike off, we do not have the full record before us. And can we say that the judgment on the face of the transcript is void? If not, but only voidable, then we cannot strike it off.

The reasons urged for striking off the judgment are:

1. Because there is no due proof of service of the summons.
2. Because the record fails to designate any period of time covered by the alleged claim for manual labor mentioned in the transcript. The transcript shows that the claim was for wages of manual labor, and for a sum within the jurisdiction of the justice.

That the claim was not set out with the accuracy and detail that a statement in proper pleading would require does not of itself render the judgment void. If it appear that the claim was one over the subject of which the justice had jurisdiction, and the amount was within the jurisdiction of the justice, it has

Hoyt & Sharpless v. Clearfield Traction Company.

been held sufficient. In entering the judgment, the justice is presumed to have been warranted in so doing under the proofs and allegations of the parties: *Wilson v. Wilson*, 3 Clark, 419; *McEntire v. McElduff*, 1 S. & R. 19; *Holden v. Wiggins*, 3 P. & W. 469; *Goodman v. Mogel*, 1 Woodward, 286; *Mulligan v. Knickerbocker Ice Co.*, 2 Kulp, 317; *Saxman v. Perkins*, 6 District Reps. 548.

We think the weight of authority sustains the view that the transcript in this case sets forth sufficient to give jurisdiction of the subject-matter. See, also, *Cooke v. Shoemaker*, 17 Pa. C. C. Reps. 641.

Is the return of service of summons sufficient under the Act of 1810 to give the justice jurisdiction of the defendant corporation? We admit that this raises a pretty close question, and that, upon a very extensive research of cases, we find that there is some variance in the decisions, both in the lower and the higher courts, owing to the peculiar facts of different cases, and the difference in the character of the proceedings. So that there does not as yet seem to be any well-defined rule established by the numerous decisions bearing on the question. It is a well-settled principle that the regularity of a judgment of a court having jurisdiction of the subject-matter cannot be questioned in a collateral proceeding. Although a judgment recovered before a justice of the peace be irregular, yet if he has jurisdiction of the subject-matter, the only redress of the defendants therein is by *certiorari*. The judgment of every court pronounced on a subject within its jurisdiction is conclusive and binding on all other courts, except only before which it comes by appeal, *certiorari* or writ of error: *McDonald v. Simcox*, 98 Pa. 619. The service of summons in this case was under the 1st section of the Act of March 17, 1856, P. L. 388, which authorizes service of summons in suit against corporations on any manager or director when the other officers upon whom service may be made do not reside in county where property of corporation is wholly or in part situate, and seems to be in accordance therewith. Is the return sufficient, setting forth personal service upon the director of the defendant company, as stated in the return, and the words "and so ans. H. Gunter, Cons't. on oath?"

Without undertaking to distinguish the numerous cases as to what the transcript should show as to "due proof by oath or affirmation of the service of summons," required by the Act of 1810, to warrant the justice in entering judgment by default, we are inclined to hold, in a proceeding to strike off the judgment, where the full record is not before us and which, in its nature, is collateral, that the return as made in this case in question and duly certified by the justice does not render the judgment void, but voidable. Were the whole record before us, the return on original summons might show that he was sworn to his return by the justice. If he did not, then the judgment on *certiorari* would be reversed. But may it not be presumed that the justice, when he certifies that the constable makes his return on oath, that he did so as prescribed by the Act of 1810? We think the following authorities sustain this view: *Sloan v. McKinstry*, 18 Pa. 120; *Phelps v. Cornog*, 4 Atl. Repr. 922; *Inquirer Printing Co. v. Wehrly*, 157 Pa. 415; *Enfield v. Squires Hardware Co.*, 14 Pa. C. C. Reps. 498; *Saxman v. Perkins*, 6 District Reps. 548; *Watson v. Timlin*, 3 Kulp, 316.

We, therefore, and in view of the fact that the defendant knew or should have known that this judgment was obtained nearly five years ago (and there is no allegation to the contrary), and did nothing, either by appeal or *certiorari*, to determine its validity, and comes in at this late day to have it stricken off, when, to do so, would, perhaps, defeat plaintiff's claim by the statute of limitations, are of the opinion that we would not be warranted in so doing, and that the rule should be discharged. The rule is therefore discharged, at cost of defendant.

From Wilbur F. Reeder, Bellefonte, Pa.

APPENDIX.

EDWARD P. ALLINSON, Esq.

Editorial from The Legal Intelligencer of January 18, 1901.

"EDWARD P. ALLINSON died on the morning of January 16, 1901, and his sudden and untimely death, after an illness of only three days, was a painful shock to the many members of the Bar and Bench, with whom his relations had ever been most cordial.

"Perhaps it may be said with truth that few men in the State had a larger or more extended circle of really close friends in the profession.

"Mr. Allinson was born at Burlington, New Jersey, on November 21, 1852, was educated at the old Westtown Academy, near Chester, and afterwards went to Haverford College, from which he was graduated in the Class of 1874. He studied law with James E. Gowen, Esq., of the Philadelphia Bar, and was admitted to practice in 1876.

"Always a man of public spirit and broad human interests, he took an active part in the Reform movement, extending from 1877 to 1882, and was thus brought into contact with S. Davis Page, and the two formed a co-partnership under the firm name of Page & Allinson. Some years later, Boies Penrose entered the firm, and the name was changed to that of Page, Allinson & Penrose.

"It was not, however, in the field of active practice that Mr. Allinson was most extensively or most favorably known, but rather as the editor of this journal, and as the one man through whose energy, perseverance and courage under most adverse circumstances, the State Bar Association was organized.

"Mr. Allinson took charge of the Legal Intelligencer in 1891, and, as the editor, adopted many improvements, with a view to increasing its usefulness both to the profession and the public, among which the most notable, perhaps, was the plan of publishing the reports, at first of the Supreme and afterwards of the Superior Court, in advance sheets, bearing the same paging as the respective cases would bear when published in permanent form. The difficulties met with in carrying out this plan, long since forgotten, were serious, and it is impossible to speak too highly of the persistent and resourceful industry with which they were gradually surmounted. He also conceived and carried out the admirable plan of publishing the more important decisions of the lower courts throughout the State in a permanent series, known as the District Reports, and indicating by star paging in this journal the paging which each case would have in the permanent series. Thus the practitioner, by the use of these two publications, could be kept fully advised at the earliest possible opportunity of the exact condition of the law in the State. He also introduced important changes in the method of reporting the Acts of Assembly, by which the profession were promptly advised of the course of legislation at Harrisburg.

"In the summer of 1894, Mr. Allinson, deeply impressed with the advantages, both to the profession and the community, of a State Bar Association,

with his usual indefatigable energy, put himself into communication with the leading lawyers throughout the Commonwealth, and, finding the idea well received, suggested the advisability of calling a convention with a view to organizing such an association. Such a call was made in November, 1894, signed by over 700 members of the Bar of Pennsylvania from every judicial district, and published in this journal, and on January 16th, 1895, from 175 to 200 members of the Bar from all over the Commonwealth assembled in the Supreme Court room at Harrisburg. M. E. Olmsted, Esq., of Dauphin County, called the meeting to order, and Hon. John W. Simonton was elected temporary chairman; Hon. W. U. Hensel, of Lancaster, James S. Young, of Allegheny, and Alex. Simpson, Jr., of Philadelphia, vice-presidents; Edward P. Allinson, secretary, and Hon. William Penn Lloyd, of Cumberland County, treasurer. A committee of five was appointed to report a temporary scheme of organization, and in pursuance of such report from said committee, the chairman appointed a president, three vice-presidents, secretary, treasurer, and an executive committee of twenty-one, to which was referred the matter of obtaining a charter and preparing the by-laws and programme for the next meeting.

"The Association was duly incorporated, and on July 10th, 1895, the Pennsylvania Bar Association held its first meeting at Bedford Springs.

"This is all ancient history to-day, but yet it may not be amiss to remind the profession that the Pennsylvania Bar Association owes its existence, its eminently creditable record, and the high position it holds to-day in the Commonwealth, and among like associations in other Commonwealths, very largely to the industry, tact and broad public spirit of its secretary, Edward P. Allinson.

"On the formation of the Superior Court, Mr. Allinson was appointed Assistant State Reporter, and upon the expiration of his term of office re-appointed. We believe he has performed the somewhat exacting duties of his position with a promptness and accuracy, satisfactory alike to the court and the profession.

"For the last four or five years he has served on the Board of Examiners, and his colleagues can testify as to the conscientious care with which he discharged the duties of the place.

"The fact is, whatever he undertook to do, he did thoroughly, and never shirked work, even though unremunerative.

"In his busy life he found time to take an active interest in the affairs of his *alma mater*, Haverford College, and was one of those who helped to raise funds for the gymnasium and library, and was for many years Secretary of its Alumni Association, and for two years President of the Association.

"His reading was by no means confined to his profession, and he was deeply interested in all historical and social questions, and his article upon the history of ground rents in Philadelphia, and the work which he and Senator Penrose did in their 'History of Municipal Development in Philadelphia,' published in 1887 in the Johns Hopkins University Study Series, attracted no small attention.

"He was a born organizer, and had wonderful ability in keeping different organizations running with a minimum of friction.

"His literary abilities were very considerable, and there was ever about him a genial kindness and sympathy, and an almost inexhaustible fund of quiet humor, which rendered him one of the best of companions, and drew men of apparently diverse gifts toward him, as if by some attraction, at first sight almost inexplicable.

"The loss of such a man is felt most deeply by those most closely associated with him.

H. W. P."

Minute adopted by the Philadelphia Bar, January 19, 1901.

"The Bar of Philadelphia county desires to express its unfeigned sorrow over the untimely death of Edward P. Allinson, who, for many years, was one of its honored and trusted members. The respect and confidence bestowed upon him in such large measure were abundantly justified by his ability as a lawyer, and by his character and conduct. He was manly, straightforward and sincere in his intercourse with his brethren, and he added to these qualities a courtesy of manner and a considerate regard for the feelings and opinions of others, that were repaid by the warm affection of his friends, and the kindly esteem of those who were no more than acquaintances. He was frank and outspoken in speech, but he did not wound those from whom he differed, for he was too modest to be scornful, and the habits and instincts of a gentleman governed his life. His capacity for business, and his industry in doing the work that came abundantly to his hands, were unusual, and his purely professional attainments entitled him to the high place among those of his generation that was awarded him without dissent. There were scholarly graces, too, about much that came from his pen that deserve to be mentioned—a lambent humor that was often fine, a wit that, upon occasion, could be keen, facility of expression, aptness in choosing the right word from his copious store, and, pervading the whole, the indescribable literary quality that is reminiscent of study and reflection.

"His activities were his pleasures. During many years they were too numerous to detail, but some of them should receive a brief mention. His services to the cause of good reporting were conspicuous. He brought decided improvements into the official volumes of the higher courts and the unofficial series of the lower courts, and it was he who originated, and carried on at a loss for several years, that great convenience to the profession, the Advance Reports. The Pennsylvania Bar Association was his child. He conceived the idea, and, in the face of much discouragement, made friends for it, and finally brought it to a successful issue. And not only was he its founder, but he was also its guiding hand during the years that have since passed. No one else was so influential, unobtrusive as was his skillful touch, in determining the policy of the Association and the course of its affairs; and to no one else is the Association so much indebted for ceaseless oversight, minute supervision of details, and unstinted effort to advance its interests. His valuable services in the Law Association and upon the Board of Examiners are well known and need not be dwelt upon. In whatever place he might be found, he came to the front with a restless energy that betokened a natural instinct for leadership. But he combined with his energy so much tact and good sense, such readiness to conciliate opposing views, such genuine deference to the opinions and personal claims of his associates, that his right to a foremost place was never questioned, but was acquiesced in cheerfully and without complaint or cavil.

"In these and in many other ways, public or more private, his life was happily and usefully spent. He has gone away in the midst of his years, but he leaves behind him many who will mourn him long and sincerely, and none of his brethren who will not remember him with cordial kindness and true respect.

"In order, therefore, to show its appreciation of his admirable qualities, and to preserve his memory, the Bar does now resolve, that a copy of this minute be sent to his family, and that the several courts of the county be requested to give it a place among their records."

Minute ordered to be entered upon the records of the Superior Court of the State of Pennsylvania.

"IN THE SUPERIOR COURT OF PENNSYLVANIA.

"Recognizing the ability, industry, integrity, conscientious care and discriminating zeal of EDWARD P. ALLINSON, Esq., the Reporter of the decisions of this Court since its organization, who died at Philadelphia on January 16, 1901, we desire to place upon record our appreciation of his services, our admiration of his character as a man, our affection for him as a friend, and our sorrow at his untimely death.

"It is, therefore, now ordered that this minute be entered upon the records of this Court.

"Done at Scranton, Pennsylvania, the twenty-second (22d) day of January, A. D. 1901. BY THE COURT.

"I hereby certify that the foregoing is a true copy from the records.

SAMUEL H. STEVENS,
Prothonotary."

[SEAL.]

Minute adopted by the Pennsylvania Bar Association, June 25, 1901.

"Upon the 16th day of last January, this Association encountered a loss which for a time seemed to threaten its continued existence, for on that day died, in the prime of his life and usefulness, after a few hours of illness, our first, and to that time, our only Secretary, Edward P. Allinson. The Bench and Bar of the city of Philadelphia, and of the State, expressed at the time, in terms of unsurpassed earnestness, their appreciation of our deceased brother in all his relations to the profession and the public, and their sincere sorrow at his loss. These tributes to his memory will form a part of the report of the proceedings of this year's meeting, and will constitute an imperishable monument to his memory. They will serve to preserve for us, and to transmit to those who are to come after us, the record of his character and attainments; but it is incumbent on us to make formal and emphatic acknowledgment of what he did for this Association.

"Having been one of its earliest and most persistent advocates, and done more than any other to create a sentiment throughout the State in its favor, he took an active and efficient part in its foundation, not only by his own contribution of work, but by compelling the co-operation of his friends who, under his lead, joined in the organization. From the preliminary meeting to the day of his death, he was its central and guiding force. His infinite capacity for labor enabled him to provide for the supervision of every detail, and his tact and patience secured from others the help which they were best qualified to give. The growth of the Association, in numbers and usefulness, was to him more than adequate reward, and nothing gave him more pleasure than the assurance that his exertions were appreciated and recognized. It is pleasant for us now to be able to recall the fact that such assurance was freely given him during life—for we were all his friends—and it only remains for us to adopt, as an enduring witness, this minute, declaring our gratitude for his part in creating and perpetuating this Association, and our respect and affection for him as a lawyer, as a man, and as a friend."

INDEX.

ACTS OF ASSEMBLY CONSTRUED.

- | | | |
|-----------------------------|------|---|
| 1794, April 22, 3 Sm. L. | 177. | SUNDAY LAWS. Com. v. McFadden, 718. |
| 1798, Feb. 27, 3 Sm. L. | 308. | PRODUCTION OF BOOKS. Langcliff Coal Co. v. Coal Co., 645. |
| 1810, March 20, 5 Sm. L. | 161. | PRACTICE, J. P. Goldman v. Teitlebaum, 53. |
| 1824, Feb. 3, P. L. | 18. | TAX LIENS. Woods v. VonBonnhorst, 640. |
| 1824, March 27, P. L. | 119. | SHERIFF'S SALE. Haas v. Fisher, 150. |
| 1830, April 6, P. L. | 277. | JOINT ACTIONS. Davis v. Sidle, 435. |
| 1831, Feb. 28, P. L. | 92. | COMMISSIONERS. Bliss v. Milholland, 201. |
| 1832, March 15, P. L. | 136. | WILLS. McKeown's Estate, 131. |
| 1832, March 29, P. L. | 190. | PRACTICE, O. C. Corbett's Estate, 59. |
| 1833, April 8, P. L. | 249. | AFTER-ACQUIRED REALTY. Williams v. Brice, 721. |
| 1834, March 11, P. L. | 122. | GAMBLING. Com. v. Conrad, 342. |
| 1834, April 15, P. L. | 509. | TAXATION. Wilkes-Barre Times v. Wilkes-Barre, 691. |
| 1834, April 15, P. L. | 511. | TAXATION. Shafer v. Marsh, 47. |
| 1834, April 15, P. L. | 552. | TOWN CLERK—Refusal to serve. Appointment of Town Clerk for Nether Providence Twp., 631. |
| 1836, June 13, P. L. | 551. | ROAD LAW. Public Road in Potter and Tioga Counties, 456. |
| 1836, June 13, P. L. | 556. | PRIVATE ROAD. Road in Lower Towamensing Township, 581. |
| 1836, June 13, P. L. | 580. | LUNATICS. In re Mary Wood, 374. |
| 1836, June 16, P. L. | 755. | SHERIFF'S SALE. Haas v. Fisher, 150. |
| 1838, April 16, P. L. | 464. | RAILROADS. Speese v. Railroad Co., 515. |
| 1840, April 13, P. L. | 320. | PARTITION—Jurisdiction, O. C. Lusch's Estate, 224. |
| 1840, Oct. 13, P. L. (1841) | 1. | REVIEW. Collins's Estate, 249. |
| 1842, July 12, P. L. | 339. | SERVICE OF PROCESS—Imprisonment for debt. Pavona v. Di Jorio, 83; Hotchkiss & Bro. v. Pinney, 219. |
| 1842, July 12, P. L. | 346. | ATTACHMENT. Keith v. Moore, 212. |
| 1843, April 17, P. L. | 273. | ASSIGNMENT FOR CREDITORS. Hart's Estate, 421. |
| 1844, April 29, P. L. | 486. | TAXATION. Wilkes-Barre Times v. Wilkes-Barre, 691. |
| 1845, April 16, P. L. | 488. | MUNICIPAL LIENS. Philadelphia v. Athow, 187. |
| 1846, March 26, P. L. | 175. | ROAD LAW, ERIE COUNTY. Richards v. Conneaut Twp., 274. |
| 1846, April 14, P. L. | 329. | COMMISSIONERS—Inter-state comity. Simpler's Petition, 141; Bliss v. Milholland, 201. |
| 1846, April 20, P. L. | 411. | SHERIFF'S SALES. Com. v. Knorr, 535. |
| 1849, March 21, P. L. | 216. | FOREIGN CORPORATIONS—Service of process. American Steel and Wire Co. v. Coal and Coke Co., 285; Sheetz v. Railway Co., 373. |
| 1851, April 3, P. L. | 320. | ANNEXATIONS TO BOROUGHs. Bethlehem Borough Extension, 690. |
| 1851, April 8, P. L. | 354. | SERVICE OF PROCESS—Foreign corporations. American Steel and Wire Co. v. Coal and Coke Co., 285; Sheetz v. Chesapeake and Ohio Ry. Co., 373. |
| 1851, April 15, P. L. | 708. | PITTSBURGH RIPARIAN RIGHTS. Pittsburgh v. Railroad Co., 531. |
| 1854, March 27, P. L. | 214. | SERVICE OF PROCESS. McCahan v. Reeder, 298. |
| 1854, April 13, P. L. | 308. | CONFIRMATION OF ACCOUNT. Pile's Estate, 356. |
| 1854, May 8, P. L. | 322. | SCHOOL LAW. Stroup's Petition, 301. |
| 1855, April 14, P. L. | 238. | MECHANIC'S LIEN. Harner v. Thomas, 487. |
| 1855, April 26, P. L. | 328. | CHARITIES. Conway's Estate, 509. |
| 1855, April 27, P. L. | 368. | INTESTACY. Smith's Estate, 92. |
| 1855, May 4, P. L. | 430. | WILLFUL AND MALICIOUS DESERTION. Grubb's Estate, 443. |

ACTS OF ASSEMBLY CONSTRUED (*Continued*).

- 1856, March 17, P. L. 388. CORPORATIONS—Service of process. Hoyt & Sharpless v. Traction Co., 767.
- 1856, April 9, P. L. 288. APPEALS FROM REPORTS OF VIEWERS. Brown v. Railway Co., 693.
- 1858, April 19, P. L. 336. PITTSBURGH RIPARIAN RIGHTS—Road law. Vacation of Toronto and other Streets, 349; Pittsburgh v. Railroad Co., 541.
- 1858, April 21, P. L. 403. FOREIGN CORPORATIONS. Sheetz v. Railway Co., 373.
- 1859, April 14, P. L. 661. WILKES-BARRE TOWNSHIP. Com. v. Rooney, 745.
- 1860, Feb. 27, P. L. 85. TAX LIENS. Woods v. Von Bonnhorst, 640.
- 1860, March 29, P. L. 341. COMMISSIONERS—Inter-state comity. Simpler's Petition, 141; Bliss v. Milholland, 201.
- 1860, March 31, P. L. 427. ACCESSORY AFTER FACT—Imposing costs on prosecutor. Com. v. Hollop, 85; Com. v. O'Neill, 227.
- 1860, March 31, P. L. 442. CRIMINAL LAW. Com. v. Clark, 641.
- 1861, May 1, P. L. 680. ENTERING SECURITY BY TRUSTEES. McDowell's Estate, 223.
- 1862, April 9, P. L. 402. MECHANIC'S LIEN. Harner v. Thomas, 487.
- 1863, April 22, P. L. 523. TERM OF OFFICE OF SCHOOL DIRECTORS. Stancliff & Co. v. School District, 697.
- 1863, April 22, P. L. 527. GARNISHEE'S COUNSEL FEE. Wanamaker v. Fitzpatrick, 291.
- 1866, May 17, P. L. 1096. PARTITION. Deckard's Estate, 377.
- 1868, March 31, P. L. 50. CORPORATIONS—Constitutionality. Bergdoll v. Bergdoll Brewing Co., 173.
- 1868, April 4, P. L. 62. RAILROADS—Increase of corporate indebtedness. Com. v. Railroad Co., 363; Pittsburgh v. Railroad Co., 541.
- 1868, April 9, P. L. 785. REMOVAL OF TESTAMENTARY TRUSTEE. Neale's Estate, 70.
- 1869, March 17, P. L. 8. SERVICE OF PROCESS. Hotchkiss & Bro. v. Pinney, 219.
- 1869, March 22, P. L. 478. COSTS. Waters v. Carr, 93.
- 1869, April 20, P. L. 78. POOR LAWS. Jefferson County v. Poor District, 685.
- 1871, May 9, P. L. 689. ROAD LAW. Vacation of Eastburn Road, 595.
- 1871, May 25, P. L. 1142. COSTS. Waters v. Carr, 93.
- 1871, June 2, P. L. 283. ANNEXATIONS TO BOROUGHs. Bethlehem Borough Extension, 600.
- 1872, June 14, P. L. 1175. LABOR UNION—Unlawful conspiracy. Erdmann v. Mitchell, 701.
- 1873, March 25, P. L. 402. ROAD LAW. Road in Rush Township, 650.
- 1873, April 4, P. L. 20. INSOLVENT INSURANCE COMPANIES—Service of process. Com. v. State Ins. Co., 339; McCann v. Insurance Co., 560.
- 1874, April 22, P. L. 108. FOREIGN CORPORATIONS. American Steel and Wire Co. v. Coal and Coke Co., 285.
- 1874, April 29, P. L. 73. Hall Association of Washington Camp, No. 435, P. O. S. of A., 621.
- 1874, May 8, P. L. 123. FOREIGN ATTACHMENTS. Sullivan & Co. v. Johnston & Co., 73.
- 1874, May 14, P. L. 164. ROAD LAW, ERIE COUNTY. Richards v. Conneaut Twp., 274; Road in Rush Twp., 650.
- 1874, May 23, P. L. 233. MUNICIPAL CONTRACT. Ryan v. Ashbridge, 158.
- 1874, June 13, P. L. 233. ROAD LAW. Richards v. Conneaut Twp., 274.
- 1876, April 17, P. L. 30. TELEPHONE COMPANIES—Assignment of rights. Lewistown Borough v. Telephone Co., 562.
- 1876, April 20, P. L. 45. LABOR UNION—Unlawful conspiracy. Erdmann v. Mitchell, 701.
- 1876, May 8, P. L. 145. ROAD LAW. Richards v. Conneaut Twp., 274.
- 1878, May 24, P. L. 129. CHANGE OF GRADE. McCurdy v. Lineaville Boro., 546.
- 1878, June 3, P. L. 160. KILLING BIRDS. Com. v. Boettcher, 101.
- 1879, June 4, P. L. 88. AFTER-ACQUIRED REALTY. Williams v. Brice, 721.
- 1879, June 11, P. L. 122. MECHANIC'S LIEN. Harner v. Thomas, 487.
- 1879, June 11, P. L. 142. GUARDIAN AND WARD. Scott's Estate, 213.
- 1879, July 7, P. L. 184. JUSTICE OF THE PEACE—Insufficient affidavit. Sullivan & Co. v. Johnston & Co., 73.
- 1883, June 20, P. L. 134. SERVICE OF PROCESS. McCann v. Insurance Co., 560.

ACTS OF ASSEMBLY CONSTRUED (*Continued*).

- | | | |
|-----------------------|------|--|
| 1885, June 1, P. L. | 43. | BULLITT BILL—Streets. Denison v. Ryan, 495. |
| 1885, June 11, P. L. | 107. | GARNISHEE'S COUNSEL FEE. Wanamaker v. Fitzpatrick, 291. |
| 1885, June 24, P. L. | 159. | PRACTICE, J. P.—Costs. Waters v. Carr, 93; De Noon Bros. v. Shaw, 200. |
| 1885, June 25, P. L. | 164. | EMINENT DOMAIN. Lewistown Borough v. Telephone Co., 562. |
| 1885, June 30, P. L. | 251. | INTESTACY. Smith's Estate, 92. |
| 1885, July 7, P. L. | 257. | PARTITION. Lyons v. Lyons, 594. |
| 1887, May 7, P. L. | 94. | INCREASE OF CORPORATE INDEBTEDNESS. Com. v. Railroad Co., 363. |
| 1887, May 13, P. L. | 108. | LIQUOR LAW. Com. v. Lukan, 95. |
| 1887, May 23, P. L. | 158. | EVIDENCE—Preliminary hearing. Brown v. McCroskey, 583. |
| 1887, May 25, P. L. | 271. | PRACTICE. Steelton Planing Mill v. Kunkel, 289. |
| 1887, June 1, P. L. | 287. | FORESTRY—Constitutionality. Luck v. Com., 500. |
| 1889, April 19, P. L. | 87. | TAXATION—Assessment—Constitutionality. White v. Venango County, 482. |
| 1889, May 14, P. L. | 211. | STREET RAILWAY CHARTERS—Extensions. Rock Glen Street Ry. Co., 592. |
| 1889, May 23, P. L. | 277. | LIEN OF TAXES—Powers of cities of third class. City of Chester v. Sinex, 620; Com. v. Gingrich, 747. |
| 1891, April 29, P. L. | 85. | GARNISHEE'S COUNSEL FEE. Wanamaker v. Fitzpatrick, 291. |
| 1891, May 14, P. L. | 61. | CORPORATIONS. Bergdoll v. Bergdoll Brewing Co., 173. |
| 1891, May 16, P. L. | 75. | ROAD LAW. Vacation of Toronto and other Streets, 349; Ebe's Appeal, 367; Ursinus College v. Collegeville Borough, 642. |
| 1891, June 2, P. L. | 176. | WASHERY. Com. v. The Brookwood Coal Co., 253. |
| 1891, June 16, P. L. | 300. | LABOR UNION—Unlawful conspiracy. Erdmann v. Mitchell, 701. |
| 1893, May 4, P. L. | 30. | LIQUOR LAW—Manufacturers as sureties. Retail Liquor License Sureties, 209. |
| 1893, May 18, P. L. | 94. | PRACTICING MEDICINE OR SURGERY. Com. v. Pierce, 335; Com. v. Thompson, 634. |
| 1893, May 31, P. L. | 185. | AFFIDAVIT OF DEFENCE. Swenk, Benson & Co. v. Irwin, 732. |
| 1893, June 6, P. L. | 339. | SCHOOL LAW. Petition of Certain Taxables of York Township School District, 687. |
| 1893, June 8, P. L. | 345. | MANDAMUS. Longenecker v. Barron, 429; Com. v. Knorr, 535. |
| 1893, June 8, P. L. | 348. | MANDAMUS. Plymouth Township Commissioners v. Sweeney, 617. |
| 1893, June 10, P. L. | 419. | ELECTION LAW. Barnes's and Heydrick's Nominations, 681. |
| 1895, May 16, P. L. | 75. | DUTIES OF ASSESSORS. Assessors' List of Voters, 624. |
| 1895, May 22, P. L. | 106. | ROAD LAW—Streets—Publication of ordinance. Ursinus College v. Collegeville Borough, 642. |
| 1895, June 18, P. L. | 199. | ROAD LAW—Appeal from commissioner's assessment. Richards v. Conneaut Twp., 274. |
| 1895, June 25, P. L. | 279. | TAKING DEPOSITIONS OUTSIDE OF STATE. Carter v. Blair, 749. |
| 1895, June 25, P. L. | 300. | WEAK-MINDED PERSONS. In re Mary Wood, 374; Pringle v. Second Nat. Bank of Wilkes-Barre, 674. |
| 1897, May 12, P. L. | 63. | POOR LAW. Lathrop Poor District v. Poor District, 324. |
| 1897, May 25, P. L. | 89. | COSTS. Com. v. Ruch, 648. |
| 1897, May 26, P. L. | 95. | INTERPLEADER. Ruffner v. Brown, 186. |
| 1897, May 27, P. L. | 111. | BLACKMAIL—Unconstitutional. Com. v. Hudusko, 230. |
| 1897, June 4, P. L. | 121. | BOROUGHs. Bolivar Borough v. Coulter, 171. |
| 1897, July 9, P. L. | 223. | ELECTION LAW. Barnes's and Heydrick's Nominations, 681. |
| 1897, July 12, P. L. | 256. | CLASS LEGACIES—Replication of will by codicil. Harrison's Estate, 45. |
| 1897, July 14, P. L. | 271. | APPEALS—Justice of the peace. Roush v. Moyer, 392. |
| 1897, July 15, P. L. | 276. | AFFIDAVIT OF DEFENCE. Swenk, Benson & Co. v. Irwin, 732. |

ACTS OF ASSEMBLY CONSTRUED (*Continued*).

1897, July 26, P. L.	420.	MUNICIPAL LIENS. Philadelphia v. Athow, 187, 352.
1899, April 3, P. L.	28.	ROAD LAW. Public Road in Potter and Tioga Counties, 456.
1899, April 6, P. L.	33.	ANNEXATIONS TO BOROUGHs. Bethlehem Borough Extension, 690.
1899, April 11, P. L.	36.	UNCONSTITUTIONAL—Sidepath commissioners. Keeler v. Westgate, 240.
1899, April 11, P. L.	38.	SCHOOL BOARD. West Wheatfield Township's Sanitary Agent, 76.
1899, April 28, P. L.	104.	TOWNSHIPS OF FIRST CLASS—Classification—Applies to Wilkes-Barre township. Plymouth Township Commissioners v. Sweeney, 617; Crawford v. Allegheny Co. Commissioners, 649; Com. v. Rooney, 745.
1899, April 28, P. L.	115.	ANNEXATIONS TO BOROUGHs. Bethlehem Borough Extension, 690.
1899, April 28, P. L.	133.	MILITARY CODE. Muhlbauer v. Infantry Battalion, State Fencibles, 585.
1899, May 2, P. L.	176.	ROAD LAW. Public Road in Potter and Tioga Counties, 456; Road in Rush Twp., 650.
1899, May 6, P. L.	254.	ELECTION LAW. Com. v. Brangan, 739.
1901, Feb. 9, P. L.	3.	CORPORATIONS—Increase of indebtedness. Com. v. Railroad Co., 363.
1901, Feb. 25, P. L.	11.	FORESTRY RESERVATION COMMISSION. Forestry Reservation Commission, 676.
1901, May 8, P. L.	150.	BONUS. Corporation Bonus, 646.
1901, June 4, P. L.	404.	INSOLVENCY—Constitutionality. Hull's Estate, 661; Smith & Son v. Speakman, 699.
1901, June 7, P. L.	514.	STREET RAILWAY CHARTERS—Extensions. Rock Glen Street Ry. Co., 592.
1901, July 11, P. L.	658.	COMPULSORY ATTENDANCE LAW. Compulsory Attendance Law, 576.

ABATEMENT.

TESTAMENTARY LIBEL—Rules of abatement of personal actions have no application to testamentary libel. *Gallagher's Estate*, 733.

ACCOUNTS.

1. ADMINISTRATOR'S DUTY TO ACCOUNT—When dismissed within year. *Lockard's Estate*, 192.
2. ALLEGED ERROR IN A PRIOR ACCOUNT must be corrected by a review of such account and not in a subsequent account. *Sinkler's Estate*, 399.
3. CLAIMS ADVERSE TO DECEDENT'S TITLE—Such claims cannot be made on audit of administrator's account—O. C. without jurisdiction. *Fry's Estate*, 493.
4. CREDIT CLAIMED BY ACCOUNTANT. When a credit claimed by the accountant is objected to, the onus is upon him to prove that it is a debt, either due by the decedent or properly incurred by the accountant in the course of the settlement of the estate. *Douglass's Estate*, 479.
5. DUTY OF EXECUTOR to account where only asset is rent from real estate of which he is trustee. *Yerkes's Estate*, 204.
6. "LUMPING ITEM"—Counsel fees. Where no proof is produced at the audit sustaining a lumping item for car-fare, meals and extra witnesses, and a counsel fee alleged to be for services rendered to accountant in his individual behalf, the credits allowed by the auditing judge under objection will be stricken out. *Witzel's Estate*, 462.
7. PARTNERSHIP ACCOUNTS—Allowance of interest discretionary. *Brenner v. Carter*, 457.
8. PETITION FOR ACCOUNT REFUSED. Where the personal estate coming to the hands of a deceased executrix does not exceed \$25, and she has been compelled to borrow money to pay funeral expenses, and the ten of debts has expired, a petition for an account will be refused. *Stoker's Estate*, 375.
9. PRACTICE, O. C. In accounting in the Orphans' Court, administration must not be blended with distribution nor principal with income, but a separate account must be given of each. *Hart's Estate*, 421.
10. PRACTICE, O. C.—Inaccuracies alleged by accountant—Petition for review. Burden of proof in such case rests on accountant to move for reference, and in case of unreasonable delay, court will enter a rule on him, on motion of distributee, to do so by day certain or dismiss petition. *Unruh's Estate*, 233.

ACCOUNTS (*Continued*).

11. PRACTICE, O. C.—Including value of real estate. It is improper for a trustee to include in his account real estate and ground rents at an appraised value, as if he had so much cash in his hands. Such a form of accounting is highly irregular and productive of annoyance and additional labor to the court. **Pile's Estate**, 358.
12. RES ADJUDICATA—Surcharge—Unexplained shrinkage of assets—Pennsylvania rents included in account filed in New Jersey. **Appleton's Estate**, 441.
13. RIGHT OF ATTACHING CREDITOR of legatee to cite executor to account. **Raeder's Estate**, 282.
14. RIGHT OF REMAINDERMAN to demand account from one who is both life-tenant and executor, after lapse of twenty-six years from first account. **Heath's Estate**, 281.
15. Surcharge—Executors—Moneys belonging to estate—Depositing same in individual account—Interest received thereon. **Bollinger's Estate**, 223.

ACTIONS.

1. ACTIONS OF DEBT—Procedure Act of 1887—Duties imposed by law—Statute of limitations. **Philadelphia v. Telegraph Co.**, 376.
2. CORPORATIONS—Rights of directors of—Secretary has no authority to bring suit. **Weir Furnace Co. v. Auschutz-Bradberry Co.**, 81.
3. PRACTICE, C. P.—Act of 1842, P. L. 339—Discharge on common bail. **Pavona v. Di Jorio**, 83.

ADVANCEMENTS.

1. CONSTRUCTION OF WILL in regard thereto. **Markle's Estate**, 756.
2. PURCHASE BY FATHER of land in name of son—Presumption. **Cooper v. Duval**, 475.

AFFIDAVIT OF DEFENCE.

1. APPORTIONED MECHANIC'S CLAIM—Rule for judgment for portion of claim under Acts of May 31, 1893, P. L. 185, and July 15, 1897, P. L. 276. **Swenk, Benson & Co. v. Irwin**, 732.
2. AVERMENTS HELD TO BE GOOD DEFENCE to an action on note—Principal and surety—Rescission of contract by minor when of age no defence to surety. **Fritz v. Moyer and Hallman**, 763.
3. DEFECTIVE AVERMENT OF PAYMENT. An affidavit of defence which merely avers that judgment has been obtained by plaintiff on a note held as collateral security, without also averring that the amount of the debt has been realized therefrom, is insufficient. **Stroheim & Romann v. Paek & Sons Manuf. Co.**, 668.
4. DEFECTIVE AVERMENTS OF SALE, warranty and measure of damage. **Howland Pulp Co. v. Jessup & Moore Paper Co.**, 623.
5. INSUFFICIENT STATEMENT. Although affidavit be insufficient, the rule will be discharged where damages cannot be liquidated without writ of inquiry. **Creighton v. Safe Co.**, 600.
6. JUDGMENT—Time for taking judgment for want of affidavit of defence. Where a statement has been filed and served on the defendant less than fifteen days before the return-day, the plaintiff is not required to file and serve another statement on or after the return-day, but may take judgment fifteen days after the return-day, if no affidavit of defence be filed. **Muir v. Insurance Co.**, 577.
7. STATEMENT—Sufficiency to sustain judgment for want of affidavit—"Justly due." **Steelton Planing Mill Co. v. Kunkel**, 289.

AMENDMENTS.

1. ADDITION OF PARTIES in appeal from register—Practice, O. C. **Atcheson's Estate**, 297.
2. JUSTICE OF THE PEACE—Transcript cannot be amended by adding thereto affidavit not entered at large on docket. **Lehman v. Winters**, 147.
3. JUSTICE'S RECORD—Certiorari. **Stambaugh v. Baker**, 79.
4. MECHANIC'S LIEN—Surplusage. The addition of the name of an agent as a defendant to a mechanic's lien claim, and his description therein as such, is mere surplusage, and is amendable under the Acts of April 9, 1862, § 1, P. L. 402, and June 11, 1879, § 2, P. L. 122. **Harner v. Thomas**, 487.
5. PARTIES—Act of May 16, 1891, P. L. 75—Road law—Appeal. **Ebe's Appeal**, 367.
6. PRACTICE, O. C.—Appeal from register—Defective petition—Amendments. **McKeown's Estate**, 131.
7. ROAD LAW—Defective appeal amended. **Brown v. Railway Co.**, 698.
8. SHERIFF'S RETURN—Amending same. **Whitman v. Higby**, 89.
9. UNITED STATES COURTS—Constitutional law—Jurisdiction—Suits between citizens of a territory and those of a state—Co-plaintiffs—Jurisdictional averments. **Weller v. Hansaur**, 123.

ANIMALS.

HORSE UNSOUND AT TIME OF HIRING—Buggy, harness, etc.—Bailments—Bailee's duty to return. **Miller v. Meyer**, 9.

ANNUITIES. SEE LEGACIES.

TIME WHEN ANNUITIES WERE HELD TO BEGIN under peculiar terms of will. **Hoffman's Estate**, 689.

APPEALS.

1. ALLOWING FURTHER TIME TO PERFECT APPEAL—Justice of the peace—Suit for wages—Ball—Act of April 20, 1876, P. L. 43. **Houck v. Whitaker**, 244.

2. ANNEXATIONS—Boroughs—Appeal from ordinance of town council annexing territory—Appeal taken in time—Specifications not filed until after expiration. **Bethlehem Borough Extension**, 690.

3. ATTACHMENT—Act of July 12, 1842, P. L. 339—Question of fraud may be raised on appeal—Service of process. **Hotchkiss & Bro. v. Pinney**, 219.

4. FILING APPEAL NUNC PRO TUNC—Misleading advice by justice. **Gable v. Bear**, 680.

5. FROM MAGISTRATES—Adjournments and continuances. The granting of an adjournment or continuance by the justice is a matter within his discretion, and no ground for reversal. **McCahan v. Reeder**, 298.

6. FROM REPORT OF VIEWERS—Sufficient if entered on docket—Formal paper unnecessary—Amendment. **Brown v. Railway Co.**, 693.

7. JUSTICE OF THE PEACE—Attachment cannot issue after judgment and appeal therefrom entered—Act of July 12, 1842, P. L. 346. **Keith v. Moore**, 212.

8. JUSTICE OF THE PEACE—*Certiorari* after twenty days—Void judgment. **Goldman v. Teitlebaum**, 53.

9. JUSTICE OF THE PEACE—Foreign corporations—Ball—Evidence. **Adams v. Paper Mills Co.**, 286.

10. PAYMENT OF COSTS—Act of June 24, 1885, P. L. 159. **Waters v. Carr**, 93.

11. PRACTICE, J. P.—Payment of costs *nunc pro tunc*—Misleading advice of justice—Filing affidavit—Act of July 14, 1897, P. L. 271. **Roush v. Meyer**, 392.

12. PRACTICE, J. P.—Payment of costs prerequisite to appeal. **De Noon Bros. v. Shew**, 200.

13. PRACTICE, J. P.—Payment of costs by administrator, defendant, not condition precedent to appeal. **Com. v. Swick**, 35.

14. PRACTICE, J. P.—Summary conviction—Evidence—Record. **Com. v. Manager of House of Correction**, 371.

15. PRACTICE, O. C.—Appeal from register—Defective petition—Amendments. **McKeown's Estate**, 131.

16. REGISTER OF WILLS—Addition of parties. **Atcheson's Estate**, 297.

17. ROAD LAW—Boroughs—Act of May 16, 1891, P. L. 75—Costs. **Ebe's Appeal**, 370.

18. SUMMARY CONVICTION—Transcript of justice—Review by appellate court—Insufficiency of complaint or information cured by trial. **Luck v. Com.**, 500.

19. TAXATION—Assessment—Act of April 19, 1889, P. L. 87—Method of valuation on appeal. **White v. Venango County**, 432.

20. TRANSCRIPT OF JUSTICE—Presumption of regularity—Motion to strike off—Control of record in Common Pleas—Laches. **Heyt & Sharpless v. Traction Co.**, 767.

ARBITRATION.

1. MUNICIPAL CONTRACT—Construction of clause of compulsory reference to chief of municipal bureau. **McManus v. Philadelphia**, 552.

2. SETTING ASIDE AWARD—Fraud. To set aside an award, it is insufficient to show that the arbitrator was partial and unfair and knowingly made an improper decision, without evidence that the party benefited colluded with the arbitrator or practiced a fraud to procure the award. **Lehigh Coal and Nav. Co. v. Zehner**, 380.

ASSIGNEES FOR CREDITORS.

TITLE IS SUCH ONLY as the assignor had himself. **Hetsel v. Sawyer**, 29.

ASSIGNMENTS.

1. ASSIGNABILITY OF SURETY'S BOND. **Citizens' Trust and Surety Co. v. Howell**, 65.

2. ASSIGNMENT OF FRANCHISES—Telephone companies—Act of April 17, 1876, P. L. 30. **Lewistown Borough v. Telephone Co.**, 562.

ASSIGNMENTS FOR CREDITORS.

1. ATTORNEY'S COMMISSIONS against assigned estate. **Linn's Assigned Est.**, 534.
2. CONSTRUCTION OF ACT OF APRIL 17, 1843, P. L. 273—Assignment of executor who has interest in estate and reassignment thereof. **Hart's Estate**, 421.
3. RIGHTS PASSING TO ASSIGNEE. **Heitzel v. Sawyer**, 29.
4. TIME OF VESTING OF CREDITORS' RIGHTS—Claims arising after appointment of assignee have no right to participate in distribution. **Com. v. State Ins. Co.**, 339.

ATTACHMENT. SEE FOREIGN ATTACHMENT.

1. ACTS OF JULY 12, 1842, P. L. 339, AND MARCH 17, 1869, P. L. 8—Construction—Practice—Service—Question of fraud—Appeal. **Hotchkiss & Bro. v. Pinney**, 219.
2. DECEDENT'S ESTATE—Issued after debtor's death—An attachment cannot be issued against the share of a deceased distributee after his death. **Carracher or Kiker's Estate**, 185.
3. EXECUTORS AND ADMINISTRATORS—Right of attaching creditor of legatee to cite executor to account—Practice, O. C. **Raeder's Estate**, 232.
4. GARNISHEE'S COUNSEL FEE—Acts of April 22, 1863, P. L. 527, June 11, 1885, P. L. 107, and April 29, 1891, P. L. 35. **Wanamaker v. Fitzpatrick**, 291.
5. JUSTICE OF THE PEACE—Attachment cannot issue after judgment and appeal therefrom entered—Act of July 12, 1842, P. L. 346. **Keth v. Moore**, 212.
6. PRACTICE, O. C.—Disobedience of order to pay—Guardian and ward—Gross negligence of guardian as ground for attachment. **Wallis's Estate**, 548.

ATTACHMENT EXECUTION.

ASSIGNMENT OF SHARE OF RESIDUE by legatee without consideration and to defeat creditors—Rights of attaching creditor to have share retained by accountant until final determination of the attachment execution. **Douglass's Estate**, 479.

ATTORNEY-AT-LAW.

1. ATTORNEY'S COMMISSIONS—Assigned estate. **Linn's Assigned Estate**, 534.
2. COUNSEL FEES—Allowance of claimant's counsel fee out of estate—Escheat—Practice, O. C. **Kelly's Estate**, 297.
3. COUNSEL FEES—Decedent's estate. **Hart's Estate**, 421; **Semple's Estate**, 605; **Sinkler's Estate**, 399; **Sunderland's Estate**, 358.
4. COUNSEL FEES—Lunacy. **Com. v. O'Shea**, 580.
5. GARNISHEE'S COUNSEL FEE—Acts of April 22, 1863, P. L. 527, June 11, 1885, P. L. 107, and April 29, 1891, P. L. 35. **Wanamaker v. Fitzpatrick**, 291.

ATTORNEY-GENERAL'S DEPARTMENT.

1. COMMUTATION OF SENTENCE for good behavior—Act of May 11, 1901—Constitutional law. **Construction of Act of May 11, 1901**, 361.
2. COMPULSORY ATTENDANCE LAW of July 11, 1901, P. L. 658. **Compulsory Attendance Law**, 576.
3. FORESTRY RESERVATION COMMISSION—Control of water supply—Act of Feb. 25, 1901, P. L. 11. **Forestry Reservation Commission**, 676.

BAIL.

1. FOREIGN CORPORATIONS—Appeals—Practice, J. P.—Evidence. **Adams v. Paper Mills Co.**, 286.
2. PRACTICE, C. P.—Actions—Act of 1842, P. L. 339—Discharge on common bail. **Pavona v. Di Jorio**, 83.
3. SUIT FOR WAGES—Act of April 20, 1876, P. L. 43—Appeal. **Houck v. Whitaker**, 244.

BAILMENTS.

1. DEPOSITS—Due bills—Receipts—Distinguished. **Lukens's Estate**, 294.
2. HORSE UNSOUND AT TIME OF HIRING—Buggy, harness, etc.—Bailor's duty to return. **Miller v. Moyer**, 9.
3. LEVY ON BAILOR'S INTEREST for default in payment of instalment of rent—Construction of agreement of bailment. **People's Supply Co. v. Goff**, 637.
4. OPENING JUDGMENT confessed under lease of chattel. **Sheasley v. Condrin**, 56.
5. PLEDGE—Private sale by pledges without notice. The common law rule that a pledgee of personal property can only sell it at public sale after reasonable notice to the pledgor, and cannot purchase it himself, may be waived by the parties by contract, but such contracts are to be strictly construed. That is, the authority claimed must be shown in the contract, and cannot depend upon interpretation or construction. **Granger v. Pigott**, 327.
6. PRESUMPTION is against negligence by bailor in case of accidental loss. **Balsley's Estate**, 398.

BANKRUPTCY.

EXEMPTIONS—Discharge—Levy on exempt property cannot be made for provable debt after discharge, although benefit of bankrupt law be waived. **Miller v. Black**, 255.

BANKS AND BANKING.

1. **BILLS AND NOTES—Certificates of deposit—Negotiability of—**Federal courts not bound by decisions of state courts on matters of the general commercial law. **Bank of Saginaw v. Title and Trust Co.**, 74.

2. **LIABILITY OF ENDORSER—**Demand note—Reasonable time—Release of. **Harrisburg Nat. Bank v. Moffitt**, 22.

BASE FEE.

1. **ROAD LAW—**Where a person agreed with a railroad company to convey to it for its use a strip of land, held, that such agreement passed a base fee in the land, determinable upon its ceasing to use it as a railroad, and therefore the signature of a subsequent sheriff's vendee of the land on both sides of the railroad was unnecessary to a petition for the vacation of a street crossing the railroad. **Ebe's Appeal**, 367.

2. **TITLE ACQUIRED BY EMINENT DOMAIN** by railroad in roadbed is in nature of base fee, terminable on cessor of use for railroad purposes. **Spese v. Railroad Co.**, 515.

BENEFICIAL ASSOCIATIONS.

1. **BY-LAWS—**Subsequently adopted. Where a contract of insurance is issued by a beneficial association, conditioned that it shall be subject to such by-laws as "are now in force or may in future be enacted," by-laws subsequently passed become a part of the contract. Where there is no such provision in the original contract, by-laws subsequently passed do not become a part thereof. **Reynolds v. Order of Heptasophs**, 528.

2. **MEMBERSHIP—**Disbandment of subordinate lodge—Assessments. **Lamb v. Knights of Birmingham**, 383.

3. **SUBSEQUENTLY ENACTED LAWS—**Power of association to alter terms of beneficial certificate by subsequently enacted laws. **Hipple v. Supreme Ruling of the Fraternal Mystic Circle**, 317.

4. **SUICIDE—Insanity—**Burden of proof. Where no provisions to the contrary exist in the contract, suicide by the insured, retaining his sound mind, is a full defence to an action on a certificate of insurance issued by a beneficial association. His sanity is presumed until disproved. **Reynolds v. Order of Heptasophs**, 528.

BICYCLES.

SIDEPATH COMMISSIONERS—Act of April 11, 1899, P. L. 36—Bicycle tax—Constitutionality. **Keeler v. Westgate**, 240.

BILLS AND NOTES.

CERTIFICATES OF DEPOSIT—Negotiability of—Federal courts not bound by decisions of state courts on matters of the general commercial law. **Bank of Saginaw v. Title and Trust Co.**, 74.

BIRDS. SEE GAME LAW.

BONDS.

1. **PRINCIPAL AND SURETY—**Surety company—Assignability of bond. **Citizens' Trust and Surety Co. v. Howell**, 65.

2. **REFUNDING BOND—**Surety—Releasing counter-indemnity. **Hoffman's Estate**, 758.

BONUS.

FOREIGN CORPORATIONS—Limited partnerships—Joint stock associations. Under the Act of May 8, 1901, P. L. 150, the bonus is to be paid by such foreign organizations upon the actual capital invested in Pennsylvania and any subsequent increase thereof. **Corporation Bonus**, 646.

BOROUGHES.

1. **ACT OF JUNE 4, 1897, P. L. 121—Certiorari—**Proceedings before burgess—Fine—Voluntary payment. **Boliver Borough v. Coulter**, 171.

2. **ANNEXATIONS—**Requirements of petition—Acts of April 3, 1851, P. L. 320, and April 23, 1899, P. L. 115—Words "freehold," "land"—Appeal—Practice—Acts of June 2, 1871, P. L. 238, and April 6, 1899, P. L. 33. **Bethlehem Borough Extension**, 690.

BOROUGHS (*Continued*).

3. **BOROUGH AUDITORS**—Powers of—Finality of report. Borough auditors have the power to audit the accounts of a tax receiver for former years, which have not been audited, but they cannot re-audit accounts which have been previously audited. Their report can be reviewed only by appeal within the statutory period, and is final if no appeal is taken within that time. **Scanlan's Appeal**, 448.
4. **CLASSIFICATION OF TOWNSHIPS**. Under the Act of April 28, 1899, P. L. 104, inmates of insane asylums, who are there for treatment for indefinite periods, whose homes are outside of township, are not to be included in estimating the population. **Crawford v. Allegheny County Commissioners**, 649.
5. **COMMISSION ON LIQUOR LICENSE MONEY**. **Schuylkill Haven Borough v. Schuylkill County**, 494.
6. **JUSTICE OF THE PEACE**—*Certiorari*—Jurisdiction—Service of summons where borough is defendant. **Brennan & Ward v. Borough**, 64.
7. **JUSTICE OF THE PEACE**. For election purposes and within the meaning of section 5 of the Act of July 9, 1897, P. L. 223, justices of the peace are borough or township officers. **Reed and Amour's Nominations**, 210.
8. **PEDDLERS' AND HAWKERS' LICENSES**—Butcher not subject to. **Com. v. Roenick**, 51.
9. **POWER OF BOROUGH AUTHORITIES** to vacate roads—Effect of adopting plan omitting road. **Lansdowne Borough v. Hoffman**, 660.
10. **POWER TO GRADE SIDEWALKS**—Change of grade—Act of May 24, 1878, P. L. 129. **McCurdy v. Linesville Borough**, 546.
11. **RAILROADS**—Grade crossings. **Norristown Borough v. Railway Co.**, 539.
12. **ROAD LAW**—Act of May 16, 1891, P. L. 75—Costs of appeal. **Ebe's Appeal**, 370.
13. **ROAD LAW**—Vacation of streets—Act of May 16, 1891, P. L. 75, construed—Appeals under. **Ebe's Appeal**, 367.
14. **TELEPHONE COMPANIES**—Exercise of right of eminent domain, subject to ordinance. **Lewistown Borough v. Telephone Co.**, 562.
15. **TOWN CLERK**—Refusal to serve. Under the Act of April 15, 1834, P. L. 552, if a person elected as town clerk refuses to serve before the beginning of his term, the court has authority to appoint a person to fill the vacancy. **Appointment of Town Clerk for Nether Providence Twp.**, 631.
16. **TOWNSHIPS OF FIRST CLASS**—Act of April 28, 1899, P. L. 104. **Plymouth Twp. Commissioners v. Sweeney**, 617.
17. **TOWNSHIPS OF FIRST CLASS**—Wilkes-Barre township—Essentials of quasi-corporate identity—Acts of April 14, 1850, P. L. 661, and April 28, 1899, P. L. 104. **Com. v. Rooney**, 745.

BRIDGES.

RETURN OF GRAND JURY—Setting aside—Surplusage. **Bridge in Centerville Borough**, 636.

BROKERS.

STOCKBROKERS' BOOKS, containing a running account with a customer of purchases and sales of stock, are not admissible as books of original entry. **Horner's Estate**, 729.

BUILDING ASSOCIATIONS.

INSOLVENCY—Reorganization—Reducing value of stock—Costs and expenses. **Com. v. Building and Loan Ass'n**, 263.

BUILDING LAW.

PARTY WALL—Main wall built within the lines of its own lot—Foundation wall extending into adjoining lot. **Lukens v. Lasher**, 385.

BUILDING AND LOAN ASSOCIATIONS.

1. **CONTRACT OF MEMBERSHIP**—Construction. **McKean v. N. Y. Nat. B. and L. Ass'n**, 197.
2. **LOANS**—Payments on account—Appropriation of—Credits on loan—Closing series—Stockholder transformed into creditor—President and directors becoming creditors of association—Proper care in performance of their duties. **Com. v. Building and Loan Ass'n**, 167.

BUILDING REGULATIONS.

FIRE POLICY—Construction. **Penna. Co. for Insur. on Lives, &c., v. Phila. Contributionship for Insur. of Houses, &c.**, 181.

BULLITT BILL.

MUNICIPAL CONTROL OF STREETS—Distinction between powers vested in councils and powers vested in the chief of the bureau of highways—Nuisance—Special injury to property-owners—Construction of railroad by municipal contractor. **Denison v. Ryan**, 495.

CERTIORARI.

1. **AFTER TWENTY DAYS**—Act of March 20, 1810, 5 Sm. Laws, 161—Void judgment. **Geldman v. Teitlebaum**, 53.
2. **JUSTICE OF THE PEACE**—Jurisdiction—Service of summons where borough is defendant. **Brennan & Ward v. Borough**, 64.
3. **JUSTICE'S RECORD**—Amendment of. **Stambaugh v. Baker**, 79.
4. **PRESUMPTION IN FAVOR OF REGULARITY** of magistrate's judgments. **Hershey & Bro. v. Mylin**, 551.
5. **PROCEEDINGS BEFORE BURGESS**—Voluntary payment of fine—Act of June 4, 1897, P. L. 121. **Bolliver Borough v. Coulter**, 171.

CHARITIES.

1. **GIFTS WITHIN THIRTY DAYS OF DEATH**—Act of April 26, 1855, P. L. 323. A gift for a religious use, whether made by transfer or by will, within thirty days of the donor's death, is void under the Act of April 26, 1855, § 11, P. L. 323. If an absolute estate is devised or transferred, but upon a secret trust, assented to by the devisee before the death of the testator, a court of equity will fasten a trust upon him upon the ground of fraud, and consequently the devise or gift will be void if the trust is in favor of a charity. But if the devisee has no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such trust upon him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator. **Conway's Estate**, 509.
2. **WILL**—Construction—Validity of trust for charity sustained. **Schleicher's Estate**, 678.

CHARTER.

1. **CORPORATIONS OF FIRST CLASS**—Necessity for charter must exist. **Junior Order of United American Mechanics**, 5.
2. **STREET RAILWAYS**—Application for charter. Extensions filed by another company before action—Acts of May 14, 1889, P. L. 211, and June 7, 1901, P. L. 514. **Rock Glen Street Railway Co.**, 592.
3. **UNINCORPORATED ASSOCIATION** as applicant—Averments essential to proper application for charter for a hall association. **Hall Ass'n of Washington Camp, No. 485, P. O. S. of A.**, 621.

CHATTEL.

BAILMENT—Opening judgment confessed under lease of chattel—Repossessing leased chattel and recovery of rent—Concurrent remedies. **Sheasley v. Condrin**, 56.

COLLATERAL INHERITANCE TAX. SEE TAXATION.

1. **CITATION TO DEVISEES**. Where the collateral inheritance tax is due on realty, the devisees and not the executors are the proper parties to whom to direct the citation. **Lisle's Estate**, 713.
2. **CLEAR RESIDUE**—Debts barred by statute of limitations. Such debts justly due, although barred by the statute of limitations, where neither creditors, legatees nor devisees desire to interpose such plea, are to be deducted from the gross assets of the estate in calculating the "clear residue." **McKee's Estate**, 538.

COMITY. SEE INTER-STATE COMITY.**COMMISSIONERS.**

1. **COMMISSIONERS OF OTHER STATES**—Acts of Feb. 26, 1831, April 14, 1846, and March 29, 1880. The Act of Feb. 26, 1831, P. L. 92, empowers commissioners appointed by any court of record in this Commonwealth to issue subpoenas to compel by attachment the attendance of witnesses. Under the statute, it rests in the discretion of the court to enforce obedience to a subpoena issuing by virtue of a commission or by virtue of letters rogatory. **Bliss v. Milbolland**, 201.
2. **COMMISSIONERS OF OTHER STATES**—Process in aid of subpoena. **Simpler's Petition**, 141.
3. **COUNTY COMMISSIONERS of Philadelphia**—Power to make contract with assessors for payment for services—Bills on which warrants were procured as evidence of contract with commissioners. **Seymour v. Philadelphia**, 439.
4. **UNITED STATES COMMISSIONER**—Commitment by—Sufficiency of evidence—*Habeas corpus*—Review. **United States v. Blair**, 106.

COMMISSIONS.

1. ACCOUNTANT'S COMMISSIONS. Circumstances under which claim to commissions was sustained, although he had failed to charge himself with securities belonging to the estate. **Conway's Estate**, 509.
2. ATTORNEY'S COMMISSIONS—Assigned estate. **Linn's Assigned Estate**, 584.
3. COMMISSIONS ON INCOME. Will be allowed trustee where no intentional fraud or misappropriation is shown. **Sinkler's Estate**, 899.
4. COMPENSATION OF DISCHARGED EXECUTRIX—Duty of—Deducting commissions before paying creditors—Costs of administration—Counsel fee of administrator *c. t. a.*—Preference. **Semple's Estate**, 605.
5. COMPENSATION—Distinguished from commissions—Allowed for accountant's services, irrespective of actual receipts. **Edenborn's Estate**, 184.
6. DECEDENT'S ESTATE—Circumstances under which $3\frac{1}{2}$ per cent. on principal and 5 per cent. on income allowed—Uncollected assets. Where the collection of a mortgage must precede any distribution, commissions are to be allowed on the mortgage precisely as if the amount was already held in cash. A commission of $3\frac{1}{2}$ per cent. on the principal and 5 per cent. on the income is sufficient when the estate is free from debt or complication, and is composed of a mortgage and a few items collected in cash. **Sunderland's Estate**, 358.
7. FAMILY SETTLEMENT—Will—Interest of executor. A family settlement supercedes a will, nor can executor oppose it by reason of prospective commissions. **Lloyd's Estate**, 207.
8. ON LIQUOR LICENSE MONEY. The county treasurer has no authority to charge and retain for the use of the county a commission on money received for liquor licenses. The borough is entitled to receive its full share, with no deduction for commission. **Schuylkill Haven Borough v. Schuylkill County**, 494.
9. RATE WHEN FUND CONSISTS OF PROCEEDS OF REALTY. **Singerly's Est.**, 258.
10. RIGHT TO SAME AT SETTLEMENT OF FINAL ACCOUNT. The failure of a trustee to claim the compensation to which he would have been entitled at the settlement of a prior account will not prevent him from claiming that compensation at the settlement of his final account. **Pile's Estate**, 358.
11. UNCOLLECTED SECURITIES—Trustees denied commission—Circumstances under which commissions will be reduced for unbusinesslike management of the trust and improperly stating account. **Hart's Estate**, 421.

CONFLICT OF LAWS.

1. BILLS AND NOTES—Certificates of deposit—Negotiability of—Federal courts not bound by decisions of state courts on matters of the general commercial law. **Bank of Saginaw v. Title and Trust Co.**, 74.
2. CONCURRENT ACTIONS IN DIFFERENT STATES—Effect of judgment in one state as a bar to further proceedings in another—Art. IV, § 1, Federal Constitution. **Levison v. Blumenthal**, 412.
3. DIVORCE—Extra-territorial effect of South Dakota divorce—Personal service on respondent in another state—Jurisdiction. **Com. v. Stevens**, 652.
4. DIVORCE BY COURTS OF SISTER STATE. **Com. v. Allport**, 659.
5. FOREIGN ATTACHMENT—Pennsylvania stockholder of insolvent New York building and loan association—Cannot maintain attachment after appointment of receiver in New York. **McKean v. Building and Loan Ass'n**, 197.
6. JUDGMENTS IN SISTER STATES—Entry of domestic judgment upon an exemplification of record. **Wilmer v. Lewis**, 137.
7. JURISDICTION—Foreign executor—Removal of estate and parties to Pennsylvania. **Leaming's Estate**, 389.
8. MARRIAGE. A marriage of Russian Jewish immigrants valid in Russia, which is incestuous in Pennsylvania, will not be recognized by the United States courts sitting in Pennsylvania. **United States v. International Nav. Co.**, 480.

CONSIDERATION. SEE CONTRACTS.

CONSPIRACY.

1. CRIMINAL LAW—Indictment—Count—Necessary averments—Verdict—Evidence to sustain same. **Com. v. Zuern**, 28.
2. LABOR UNIONS. The Acts of June 14, 1872, P. L. 1175, April 20, 1876, P. L. 45, and June 16, 1891, P. L. 300, merely relieve workmen from criminal prosecution in the case therein specified, and do not legalize a combination or conspiracy of union workmen to coerce employers or non-union workmen, which would have been illegal before their passage, so as to deprive persons injured by such combination or conspiracy of their civil remedies at law or in equity. **Erdmann v. Mitchell**, 701.

CONSTITUTIONAL LAW.

1. ACT OF MARCH 31, 1868, P. L. 50—Construction. **Bergdoll v. Bergdoll Brewing Co.**, 173.
2. CONSTITUTION, U. S.—Full faith and credit clause, art. IV, § 1—Effect of judgment in one state as a bar to further proceedings in another. **Levison v. Blumenthal**, 412.
3. CONSTITUTION, U. S.—Insolvency—Act of June 4, 1901, P. L., 404. **Smith & Son v. Speakman**, 699.
4. CONSTITUTION, U. S.—Insolvency—Act of June 4, 1901, P. L. 404—Constitutionality. **Hull's Est.**, 661.
5. CONSTITUTION, U. S.—Judgments in sister states—Entry of domestic judgment upon exemplification of record. **Wilmer v. Lewis**, 137.
6. CONSTITUTION, U. S.—Judgments of one state entitled to full faith and credit in another—Extra-territorial effect of South Dakota divorce—Personal service on respondent in another state—Jurisdiction. **Com. v. Stevens**, 652.
7. CONSTITUTION, U. S.—Municipal claims—Time of filing claim—Acts of July 26, 1897, P. L. 420, and April 16, 1845, P. L. 488—Retroactive. **Philadelphia v. Athow**, 187.
8. CONSTITUTION, U. S.—Retroactive legislation, not unconstitutional—Act of July 26, 1897, P. L. 420. **Philadelphia v. Athow**, 352.
9. CORPORATIONS—Organization—What constitutes a *bona fide* corporate organization under Section 1 of art. 16 of the Constitution of 1873. **Com. v. Continental Trust and Finance Co.**, 451.
10. "DUE PROCESS OF LAW"—Road Law—Luzerne county—Acts of June 13, 1836, and Feb. 24, 1845—Appointment of viewers—Evidence of—Substituted viewer. **Road in Ashley Borough and Hanover Township**, 288.
11. EX POST FACTO LAWS—Commutation of sentence for good behavior—Act of May 11, 1901, P. L. 166. **Construction of Act of May 11, 1901**, 361.
12. FEDERAL COURTS—Co-plaintiffs. **Weller v. Hansaur**, 123.
13. FORESTRY—Title of Act—Sections 3 and 4 of the Act of June 1, 1887, P. L. 287, are sufficiently indicated in title. **Luck v. Com.**, 500.
14. INCREASE OF INDEBTEDNESS OF SCHOOL DISTRICT. Where it is clearly shown that a school district has increased its indebtedness beyond the constitutional limitation, an injunction will be allowed, however small and insignificant the margin may be. **Dolan v. Lackawanna Township School District**, 694.
15. LABOR UNIONS—Right of workmen to seek employment—Coercion of non-union workmen—Injunction. **Erdmann v. Mitchell**, 701.
16. LIABILITY OF TOWNSHIP FOR OPENING ROADS—Taking private property for public use—Art. XVI, § 8, of Pennsylvania Constitution. **Richards v. Conneaut Twp.**, 274.
17. ORIGINAL AND AMENDATORY ACTS—Correspondence of Act with title—Act of May 27, 1897, P. L. 111—Blackmail. **Com. v. Hudusko**, 230.
18. RAILROADS—Municipal authority over streets—Right of railroads to cross streets without municipal consent—Act of April 4, 1868, P. L. 62, and Constitution, art. III, § 7. **Pittsburgh v. Railroad Co.**, 541.
19. SIDEPATH COMMISSIONERS—Act of April 11, 1890, P. L. 36—Bicycle tax. **Keeler v. Westgate**, 240.
20. TAXATION—Assessment—Act of April 18, 1869, P. L. 37—Constitutionality doubted. **White v. Venango County**, 482.
21. TELEPHONE AND TELEGRAPH COMPANIES—Turnpike company—Additional servitude—Interest in roadbed—Private property—Art. I, § 10, Constitution of Pennsylvania. **Lancaster and Susquehanna Turnpike Rd. Co. v. Telephone Co.**, 322.

CONTRACTS.

1. CERTIFICATE OF BENEFICIAL ASSOCIATION—Construction—Subsequently adopted by laws. **Reynolds v. Order of Heptasophs**, 528; **Hipple v. Fraternal Mystic Circle**, 317.
2. CONSIDERATION. The doctrine that the court will not measure the relative consideration moving between the parties to a contract, in the absence of some other cause furnishing equitable jurisdiction, applied to a bailment of chattels where levy had been made for failure to pay instalment in advance. **People's Supply Co. v. Goff**, 637.
3. CONSTRUCTION OF WRITTEN AGREEMENT—Between property-owner and railroad for overhead crossing. **Speese v. Railroad Co.**, 515.
4. CONSTRUCTION OF WRITTEN AGREEMENTS—Inconsistent clauses—Circumstances under which specific performance will be refused. **Sanson v. Steel Co.**, 726.
5. CONTRACT OF DEVISEMENT—Legacy given for services to be performed. **Kuhn's Estate**, 742.

CONTRACTS (*Continued*).

6. COUNTY COMMISSIONERS—Assessors—Power to make contract with assessors for payment for services—Bills on which warrants were procured as evidence of contract with commissioners. **Seymour v. Philadelphia**, 439.
7. FOR PERSONAL SERVICES—Specific performance—Equity—Injunction—Mutuality—**Lumley v. Wagner. Philadelphia Base-Ball Club v. Lajoie**, 309.
8. MUNICIPAL CONTRACT—Bidding—Municipal officer—Act of May 23, 1874, P. L. 233. **Ryan v. Ashbridge**, 153.
9. MUNICIPAL CONTRACT—Bids for municipal contracts—Compliance with requirements of advertisement—Refusal of official to schedule bids. **Shields v. Philadelphia, Prettyman v. Philadelphia**, 247.
10. MUNICIPAL CONTRACT—Construction of clause of compulsory reference to chief of municipal bureau. **McManus v. Philadelphia**, 552.
11. PLEDGE—Sale without notice—Waiver of common law rule—Construction. **Granger v. Pigott**, 327.
12. PLEDGE OF STOCK BY ASSIGNOR—Rights of pledgee—Standing of assignee for creditors to contest—Specific performance. **Hetzel v. Sawyer**, 29.

CONVERSION.

1. BLENDING OF REALTY AND PERSONALTY. Where there is an absolute necessity to sell to execute the will, and a blending of realty and personalty for the purpose of distribution, the direction works a conversion. **Keim's Estate**, 252.
2. WILLS—Effect of election to take real estate as realty on provision for maintenance of homestead. **Sunderland's Estate**, 358.

CORPORATIONS. SEE BENEFICIAL- ASSOCIATIONS; INSURANCE COMPANIES; RECEIVERS.

1. APPLICATION FOR CHARTER—Extensions filed by another company before action—Acts of May 14, 1889, P. L. 211, and June 7, 1901, P. L. 514. **Rock Glen Street Railway Co.**, 592.
2. BENEFICIAL ASSOCIATIONS—Disbandment of subordinate lodge—Assessment. **Lamb v. Knights of Birmingham**, 383.
3. BUILDING ASSOCIATIONS—Loans—Payments on account—Appropriation of—Credits on loan—Closing series—Stockholder transformed into creditor—President and directors becoming creditors of association—Proper care in performance of their duties—Duties of directors. **Com. v. Building and Loan Ass'n**, 167.
4. CORPORATE RIGHTS AND CORPORATE IDENTITY—National guard—Battalion State Fencibles—Military code—Act of April 23, 1899, P. L. 133. **Mihlbauer v. Infantry Battalion, State Fencibles**, 585.
5. CORPORATIONS OF FIRST CLASS—Necessity for charter must exist. **Junior Order of United American Mechanics**, 5.
6. DIRECTORS—Fiduciary relations—By-laws—Construction—Acts of March 31, 1868, P. L. 50, and May 14, 1891, P. L. 61. **Bergdoll v. Bergdoll Brewing Co.**, 173.
7. ELECTRIC LIGHT COMPANIES—Charges for service—Discrimination—Mandamus. **Mercur v. Light, Heat and Power Co.**, 10.
8. FOREIGN ATTACHMENT—Foreign corporation having agent in the state—Practice, C. P. A foreign corporation is subject to foreign attachment, although it has an agent in the state, or even in the very county in which suit is brought. **Diener v. Hotel Co.**, 57.
9. FOREIGN ATTACHMENT—Situation of debt. **Opdyke v. Iron Works**, 68.
10. FOREIGN CORPORATIONS—Appeals—Justice of the peace—Bail—Evidence. **Adams v. Paper Mills Co.**, 266.
11. FOREIGN CORPORATIONS—Bonus, under the Act of May 8, 1901, P. L. 150, is to be paid upon the capital actually employed in Pennsylvania, and any subsequent increase thereof. **Corporation Bonus**, 646.
12. FOREIGN CORPORATIONS—Engaging in business within meaning of Acts of March 21, 1849, P. L. 216, April 8, 1851, P. L. 354, and April 21, 1858, P. L. 403. **Sheetz v. Railway Co.**, 373.
13. FOREIGN CORPORATIONS—Insolvent New York building and loan association—Foreign attachment by Pennsylvania stockholder. **McKean v. N. Y. Nat. B. and L. Ass'n**, 197.
14. FOREIGN CORPORATIONS—Registration—Act of April 22, 1874, P. L. 108—Service of summons—Presumptions. **American Steel and Wire Co. v. Coal and Coke Co.**, 285.
15. FOREIGN CORPORATIONS—Service thereon. A foreign corporation, which has no agency or offices in the county of this state where suit is brought against it, and does no business outside the state of its domicile, is not amenable to process merely because its

CORPORATIONS (*Continued*).

president's permanent domicile is in Pennsylvania, as that domicile is personal to himself as an individual and not as an official of the corporation. **Cleveland Builders' Supply Co. v. Cement Co.**, 491.

16. FOREIGN INSURANCE COMPANY—Service of process—Acts of April 4, 1873, § 2, P. L. 20, and June 20, 1883, P. L. 134. **McCann v. Insurance Co.**, 560.

17. FOREIGN RECEIVER—Stockholder's liability—Equitable jurisdiction—Demurrer—Adequate remedy at law. **Hale v. Allison**, 13.

18. INSOLVENCY—Reorganization—Building and loan associations—Costs. **Com. v. Building and Loan Ass'n**, 263.

19. OFFICERS—Election. The legality of the election of officers of a corporation must be tried and determined in an action of *quo warranto* and not by a proceeding in equity. **O'Shea v. Flannery**, 356.

20. OFFICERS—Fiduciary relationship—Purchase by officer of property of which the corporation is trustee. **Granger v. Pigott**, 327.

21. ORGANIZATION—Constitutional law—What constitutes a *bona fide* corporate organization under section 1 of art. XVI of the Constitution of 1873. **Com. v. Continental Trust and Finance Co.**, 451.

22. PASSENGER RAILWAYS—Taxation—Property essential to the exercise of public franchises—Duplicate taxation—Injunction. **Peoples' Pass. Ry. Co. v. Taylor**, 343.

23. "PERSON"—Meaning of within Corporation Act of 1874—Unincorporated association not such person. **Hall Ass'n of Washington Camp, No. 485, P. O. S. of A.**, 621.

24. PRACTICE, C. P.—Service of process on corporation. **Samuel v. Iron and Steel Manuf. Co.**, 43.

25. RAILROAD—Freight agent—Serving summons on—Setting same aside—Practice, C. P. **Zablocki v. Railroad Co.**, 54.

26. RAILROADS—Increase of indebtedness—Bond issue—Outstanding stock—Status of paid-up stock of corporation held in its own treasury—Acts of April 4, 1868, § 3, P. L. 62, May 7, 1867, § 3, P. L. 94, and Feb. 9, 1901, P. L. 3. **Com. v. Buffalo and S. R. R. Co.**, 363.

27. RIGHTS OF DIRECTORS OF—Secretary has no authority to bring suit. Upon the directors of a corporation rests the duty of instituting legal proceedings in its name and behalf, and, consequently, a bill in equity in its behalf by the secretary, without their knowledge or consent, will be dismissed at his costs. **Weir Furnace Co. v. Anschutz-Bradberry Co.**, 81.

28. SPECIFIC PERFORMANCE—Pledge of stock by assignor—Rights of pledgee—Standing of assignee for creditors to contest. **Hetsel v. Sawyer**, 29.

29. STOCK DIVIDENDS—Principal and income. **Morrell's Estate**, 319.

30. STOCK SUBSCRIPTIONS—Validity of conditions. An affidavit of defence to an action by a corporation upon a subscription to stock, made after it had obtained its letters-patent and effected its organization, which avers that the subscription was conditional and that the condition has not been performed, is sufficient when it does not appear that any other subscribers were obtained by reason of the subscription of defendant or that the rights of third parties have intervened. **Quaker City Apartment House Co. v. Kirk**, 292.

COSTS.

1. APPEAL—Road law—Act of May 16, 1891, P. L. 75—Boroughs. **Ebe's Appeal**, 370.

2. APPEAL FROM JUDGMENT of Justice of the peace—Act of June 24, 1886, P. L. 159—Payment prerequisites to appeal. **De Noon Bros. v. Shew**, 200, but see **Waters v. Carr**, 98.

3. APPEAL FROM JUSTICE—Payment of costs by administrator not prerequisite to appeal. **Com. v. Swick**, 35.

4. COSTS IMPOSED ON PROSECUTOR—Acquittal improperly obtained—Verdict as to costs in such case set aside. **Com. v. Pfueger**, 717.

5. COSTS IMPOSED ON PROSECUTOR by grand jury where larceny is less than \$10—Act of May 25, 1897, P. L. 89. **Com. v. Buch**, 648.

6. COSTS IMPOSED ON PROSECUTOR—Cases of acquittal—Placing costs on prosecutor, though not named—Act of March 31, 1880, P. L. 427. **Com. v. Hollop**, 85.

7. COSTS OF ADMINISTRATION—Compensation of discharged executrix—Preference. **Sample's Estate**, 605.

8. DECEDENT'S ESTATE—Partition. **Salin's Estate**, 97.

9. EQUITY PRACTICE—Costs in equity are within the discretion of the court. **Kennedy v. Heebner**, 569.

10. INSOLVENCY—Building and loan associations—Reorganization. **Com. v. Building and Loan Ass'n**, 263.

COSTS (*Continued*).

11. LUNACY—Counsel fees—Costs. Where a proceeding in lunacy finds the respondent is of sound mind, he cannot be compelled to pay the relator's counsel fees; but court costs are within discretion of court. *Com. v. O'Shea*, 580.

12. PRACTICE, O. C.—Allowance of claimant's counsel fee out of estate—*Escheat, Kelly's Estate*, 297.

13. PRACTICE, O. C.—Life-tenant—Collection of income. Executor or remainderman who prevents life-tenant from collecting income must pay all costs. *Boyle's Estate*, 206.

14. SECURITY FOR. Non-residence of the defendant will not relieve a non-resident plaintiff from entering security for costs. *Muir v. Lewis*, 639; contra, *Breat v. Knight*, 140.

15. SECURITY FOR—Non-resident executor, plaintiff. *McPherson v. Blair*, 492.

16. VERIFICATION OF BILL in Philadelphia county. Under rule 14, section 2, of Courts of Common Pleas of Philadelphia county, bills of costs must be verified by parties to the record or their attorneys. *McGerrin v. Wanamaker*, 725.

CRIMINAL LAW.

1. ACCESSORY AFTER FACT—Act of March 31, 1860, P. L. 427—Larceny—Receiving stolen property—Substantive offence—Indictment. *Com. v. O'Neill*, 227.

2. ACQUITTAL IMPROPERLY OBTAINED—New trial—Costs. *Com. v. Pfueger*, 717.

3. ATTEMPT TO COMMIT CRIME—Section 50 of the Act of March 31, 1860, P. L. 442, providing that persons indicted for crimes may be convicted of attempts to commit the same, does not prevent an indictment under the common law for an attempt to commit a crime. *Com. v. Clark*, 641.

4. BLACKMAIL—Act of May 27, 1897, P. L. 111—Unconstitutional—Original and amendatory Acts—Correspondence of Act with title. *Com. v. Hudusko*, 230.

5. CONSPIRACY—Indictment—Count—Necessary averments—Verdict—Evidence to sustain same—Juror impeaching same. *Com. v. Zuern*, 26.

6. CONSPIRACY—Striking workmen—Inadequate remedy at law—Injunction. *York Manuf. Co. v. Oberdick*, 463.

7. CONVICTION UNDER FORESTRY ACT OF JUNE 1, 1887, P. L. 287—Requisites. *Luck v. Com.*, 500.

8. COSTS—Cases of acquittal—Placing same on prosecutor, though not named. Act of March 31, 1860, P. L. 427. *Com. v. Hollep*, 85.

9. COSTS—Charging costs on prosecutor by grand jury where larceny is less than ten dollars—Act of May 25, 1897, P. L. 89. *Com. v. Ruch*, 648.

10. EVIDENCE—Confessions—Cross-examination—Relevancy—Direct and circumstantial evidence. *Com. v. Perry*, 279.

11. EVIDENCE—Confessions. Statements made by one implicated in same homicide in defendant's presence, and to the correctness of which he had expressly assented, admissible. *Com. v. Ivory*, 277.

12. EVIDENCE—Relevancy. On a trial for homicide, evidence of the acts of the police authorities, in searching for the persons suspected of the crime, is admissible, on behalf of the prosecution, for the purpose of tallying with and corroborating self-incriminating statements made by the defendant at the trial. *Com. v. Ivory*, 277.

13. EX POST FACTO LAWS—Commutation of sentence for good behavior—Act of May 11, 1901, P. L. 166. *Construction of Act of May 11, 1901*, 361.

14. GAMBLING—Indictment—Summary conviction—Act of May 11, 1894, P. L. 122. *Com. v. Conrad*, 342.

15. GRAND JURY—Bill ignored—Review. *Com. v. Priestly*, 217.

16. HABEAS CORPUS—Commitment by United States commissioner—Sufficiency of evidence before commissioner—To what extent subject to review. *United States v. Blair*, 106.

17. HOMICIDE—Accessory before fact. *Com. v. Perry*, 279.

18. HOMICIDE—Evidence. Circumstances under which photograph of defendant was held inadmissible and new trial granted. *Com. v. Stirling*, 437.

19. INDICTMENT—When quashed—Defective complaint—Circumstances under which the court will consider the whole record, and not merely the face of the indictment. *Com. v. Boland*, 410.

20. JURORS—Disqualifying opinion. *Com. v. Ivory*, 277.

21. KILLING BIRDS—Jurisdiction, J. P.—Statutes—Practice, Q. S.—Indictment—Insectivorous birds. *Com. v. Beettcher*, 101.

22. LIQUOR LAW—Act of May 13, 1887, P. L. 106—Indictment—Sentence. *Com. v. Lukan*, 95.

23. MILK ADULTERATION—Prosecution must be at place where sale was completed. *Com. v. Weaver*, 533.

24. MODIFICATION OF SENTENCE after expiration of term. *Com. v. Gillespie*, 396.

CRIMINAL LAW (*Continued*).

25. PRACTICE, Q. S.—Constitutionality of Act on which indictment is based—Motion in arrest of judgment. *Com. v. Hudusko*, 230.
26. PRELIMINARY HEARING BEFORE MAGISTRATE—Right of accused to testify—Act of May 23, 1887, P. L. 158. *Brown v. McCroskey*, 583.
27. STATUTORY RAPE—Chastity of girl—Evidence—Reasonable doubt of defendant's guilt. *Com. v. Leonard*, 573.

DAMAGES.

CONTINUING TRESPASS—Failure of owner of city lots to remove surface water—Injunction. *Rieker v. Brewing Co.*, 406.

DEBTOR'S EXEMPTIONS. SEE EXEMPTIONS.

DECEDENTS' ESTATES. SEE ISSUE *d. v. n.*; PARTITION; WILL.

1. ACCOUNTS—Credit claimed by accountant—Onus of proof. *Douglass's Est.*, 479.
2. ACCOUNTS. In accounting in the Orphans' Court, administration must not be blended with distribution nor principal with income, but a separate account must be given of each. *Hart's Estate*, 421.
3. ACCOUNTS. It is improper for a trustee to include in his account real estate and ground rents at an appraised value. *Pile's Estate*, 356.
4. ACCOUNTS—"Lumping item"—Counsel fees. Lumping item for car-fare, meals and extra witnesses, and counsel fee alleged to be for services rendered to accountant in his individual behalf, will be stricken out. *Witzel's Estate*, 462.
5. ACCOUNTS—Unexplained shrinkage of assets—Surcharge—*Res adjudicata*. *Appleton's Estate*, 441.
6. ACQUIREMENT OF ASSETS BY EXECUTOR—Unexpired lease containing clause against assignment is an asset—An executrix cannot take new lease for her own benefit. *Furlong's Estate*, 527.
7. ADJUDICATION—Petition for review. *Claghorn's Estate*, 91.
8. ADMINISTRATOR'S DUTY TO ACCOUNT—May be required to account within year when dismissed. *Lockard's Estate*, 192.
9. ADMISSION OF DEBT by decedent insufficient where he did not state the amount nor in what manner the indebtedness was incurred. *Horner's Estate*, 729.
10. ALLOWANCE FOR TOMBSTONE. *Conway's Estate*, 509.
11. ATTACHMENT—Issued after debtor's death. *Carracher or Kiker's Est.*, 185.
12. CLAIMS ADVERSE TO DECEDENT'S TITLE—Such claims cannot be made on audit of administrator's account—O. C. without jurisdiction. *Fry's Estate*, 493.
13. CLAIMS AGAINST—Books of original entry—Physician's visiting list—Statute of limitations—Tolling—Evidence. *Haines's Estate*, 677.
14. CLAIMS AGAINST—Debt for third party. Entry in claimant's books, made in pursuance of a direction by telephone, not shown to have been transmitted by decedent, insufficient proof. *Baizley's Estate*, 398.
15. CLAIMS AGAINST—Statute of limitations—Tolling same. *Hoffman's Est.*, 669.
16. COLLATERAL INHERITANCE TAX—Legacy on condition that legatee act as executor and trustee. *Clark's Estate*, 378.
17. COMMISSIONS—Circumstances under which 3½ per cent. on principal and 5 per cent. on income allowed—Uncollected assets. *Sunderland's Estate*, 358.
18. COMMISSIONS—Lower on fund derived from real estate than from personal property. *Singerly's Estate*, 258.
19. COMMISSIONS—Right to same at settlement of final account. *Pile's Estate*, 356.
20. COMMISSIONS NOT ALLOWED on uncollected securities—Circumstances under which commissions will be reduced for unbusinesslike management of the trust and improperly stating account. *Hart's Estate*, 421.
21. CONTRACT OF DEVISEMENT—Legacy given for services to be rendered. *Kuhn's Estate*, 742.
22. COSTS OF ADMINISTRATION—Compensation of discharged executrix—Counsel fee of administrator *c. t. a.*—Preference. *Sample's Estate*, 605.
23. COUNSEL FEES. *Sunderland's Estate*, 358.
24. COUNSEL FEES—Circumstances under which counsel fees are presumed to have been included in executor's compensation. *Hart's Estate*, 421.
25. CREDITOR'S PETITION FOR ACCOUNT—Laches. *Baxter's Estate*, 97.
26. DISTRIBUTION BY ACCOUNTANT to himself of securities of the estate. *Hart's Estate*, 421.
27. DOWER—Agreement to pay a sum certain to widow in lieu thereof—Principal and income. *Campbell's Estate*, 497.
28. ELECTION—Accepting provisions of will—Validity of bequest otherwise void. *Fleming's Estate*, 259.

DECEDENTS' ESTATES (*Continued*).—

29. ELECTION TO TAKE REAL ESTATE IN UNCONVERTED FORM—Petition for confirmation of election and delivery of title papers—Claim of executor for allowance for care of real estate—Practice, O. C. **Buck's Estate**, 331.
30. EVIDENCE—Stockbroker's book held inadmissible against decedent as book of original entry. **Horner's Estate**, 729.
31. EXECUTORS AND ADMINISTRATORS—Acting by advice of counsel—Surcharge. **Hall's Estate**, 215.
32. EXECUTORS AND ADMINISTRATORS—Executor *de son tort*—Following goods purchased by same—Jurisdiction, O. C. **Fahy's Estate**, 399.
33. EXECUTORS AND ADMINISTRATORS. Executors by purchase of decedent's real estate obtain the legal title only, and can make no valid conveyance without the joinder or consent of the beneficial owners. **Finley's Estate**, 272.
34. EXECUTORS AND ADMINISTRATORS—Inventory—Purpose—Effect of filing on executor or administrator—Liability of—Including real estate. **Fleming's Estate**, 259.
35. EXECUTORS AND ADMINISTRATORS—Liability to account—Absence of assets. **Stuart's Estate**, 130.
36. EXECUTORS AND ADMINISTRATORS—Liability to account after lapse of twenty-six years. **Heath's Estate**, 281.
37. EXECUTORS AND ADMINISTRATORS—Moneys belonging to estate—Depositing same in individual account—Interest received thereon—Surcharge. **Bollinger's Estate**, 223.
38. EXECUTORS AND ADMINISTRATORS—Shrinkage of assets between two accounts—Supplemental accounts. **Jennings's Estate**, 90.
39. FAMILY SETTLEMENT—*Caveat* against probating will and issuing letters testamentary thereon—Interest of executor—Practice, O. C. **Lloyd's Estate**, 207.
40. FORECLOSURE OF MORTGAGE—Agreement to settle—Validity of—Facts known to testatrix and unknown to legatee—Finding of facts by auditing judge—Surcharge when insolvent debtor is residuary legatee. **Edenborn's Estate**, 184.
41. GIFTS TO CLASSES—Will—Construction of. **Reed's Estate**, 162.
42. HOLDING REAL ESTATE FOR RISE IN VALUE—When real estate should be sold—Rent service—Rent charge—Covenant to pay proportionate part of principal at death of each life-tenant. **Phillips's Estate**, 99.
43. HUSBAND PREVENTED FROM SHARING IN WIFE'S ESTATE—Willful and malicious desertion—What constitutes—Act of May 4, 1855, P. L. 430. **Grubbs's Est.**, 443.
44. IMPLIED TRUSTS—Evidence—Sufficiency of. **Bilderback's Estate**, 759.
45. TESTACY—Children and grandchildren of deceased uncles and aunts—Acts of April 27, 1855, P. L. 368, and June 30, 1855, P. L. 251. **Smith's Estate**, 92.
46. INVESTMENT BY TRUSTEE—Camden mortgages—Depreciation in value—Liability. **Gouldsey's Estate**, 216.
47. JURISDICTION, O. C.—Partnership—The Orphans' Court has no jurisdiction over the settlement of the accounts of a partnership of which the decedent was a member—Practice where decedent's books show a certain debt due to such a partnership. **Meyer's Estate**, 445.
48. LEGACIES—Abatement—Gifts in lieu of dower—Gifts over. **Forepaugh's Estate**, 144.
49. LEGACIES CHARGED ON LAND—Blending of real and personal estate. **Powell's Estate**, 46.
50. LIABILITY OF LEGATEES AND DISTRIBUTEES to refund after distribution. **Stough's Estate**, 547.
51. LIENS ON REAL ESTATE—Extending same. **Hall's Estate**, 215.
52. LIFE-TENANT—Collection of income—Interference by executor—Costs. **Boyle's Estate**, 206.
53. LIFE-TENANT AND REMAINDERMAN—Repairs—Finding of auditing judge—Executors and administrators. **Davenport's Estate**, 121.
54. LIQUOR LICENSE—Proceeds of sale of real estate by executor are realty, though greatly enhanced by fact that property had license. **Maguire's Estate**, 238.
55. MARRIAGE—Cohabitation and reputation. **Bott's Estate**, 122.
56. MARRIAGE—Presumptions—Legitimacy—Cohabitation and reputation—Sufficiency of evidence to rebut presumption—Declaration by claimant's mother that decedent had refused to marry her. **Homeyard's Estate**, 730.
57. MARRIED WOMAN—Separate estate—Active trusts—Contingent interests—Perpetuities—Remoteness. **Boyd's Estate**, 87.
58. MORTGAGE OF REAL ESTATE OF DECEDENT—Right of heirs to invoke relief. **Corbett's Estate**, 59.
59. PARTITION—Costs. **Salin's Estate**, 97.
60. PARTNERSHIP—Firm guarantee. **McCullough's Estate**, 353.

DECEDENTS' ESTATES (*Continued*).

61. PARTNERSHIP—Principal and income—Burden of proof. **Borda's Estate**, 117.
62. PAYMENT OF ANNUAL SUM—Apportionment—Filing account—Practice, O. C. **Powers's Estate**, 165.
63. PAYMENT OF MORE THAN PROPER SHARE to distributee—Personal estate distributed—Proceeds of realty remaining—Review—Practice, O. C. **Githens's Estate**, 375.
64. PETITION FOR ACCOUNT—Rent derived from real estate being only asset. **Yerkes's Estate**, 204.
65. PETITION FOR REVIEW—Onus of showing error on petitioner—Practice, O. C. **Brooke's Estate**, 447.
66. POSTPONING DISTRIBUTION pending litigation, and impounding assets to meet claims of creditors who elect to proceed in another jurisdiction—Circumstances under which the court refused to make postponement. **Borke's Estate**, 754.
67. PRACTICE, O. C.—Appeal from register—Defective petition—Amendments—Wills—Issue *d. v. n.*—When demurrer to petition will be sustained without prejudice. **McKeown's Estate**, 131.
68. PRACTICE, O. C.—Appeal from register—Parties—Addition of. **Atcheson's Estate**, 297.
69. PRACTICE, O. C.—Exceptions—Clerical error of auditing judge may be corrected without exception. **Hart's Estate**, 421.
70. PRACTICE, O. C.—Impounding assets—Assignment of share of residue by legatee without consideration and to defeat creditors—Rights of attaching creditor to have share retained by accountant until final determination of the attachment execution. **Douglass's Estate**, 479.
71. PRACTICE, O. C.—Petition to recommit adjudication to auditing judge. **Douglass's Estate**, 478.
72. PRINCIPAL AND INCOME—Construction of agreement to appropriate income to repay loan to principal. **Hart's Estate**, 421.
73. PRINCIPAL AND INCOME—Damages to freehold should be treated as belonging to principal. **Witzel's Estate**, 462.
74. PRINCIPAL AND INCOME—Stock—Proceeds of sale at auction—Express power to sell and reinvest given by will. **Kemble's Estate**, 320.
75. REFUNDING BOND—Surety—Releasing counter-indemnity. **Hoffman's Estate**, 758.
76. SURVIVING PARTNER—Custody of books—Evidence of partnership. **Stief's Estate**, 446.
77. TESTAMENTARY CAPACITY—Insane delusions—Spiritualism—Issue *d. v. n.* **McIlroy's Estate**, 78.
78. TESTAMENTARY CAPACITY—Test—Issue *d. v. n.* **Wright's Estate**, 183.
79. TESTAMENTARY TRUSTEES—Removal—Act of April 9, 1868, P. L. 785. **Neale's Estate**, 70.
80. TRUST AND TRUSTEES—Bailments—Deposit of trust funds in trustee's individual name—Notice to bailor—Fraud. **Lukens's Estate**, 294.
81. WIDOW CANNOT CONTEST WILL. **Kase's Estate**, 497.
82. WIDOW'S ELECTION—Sequestration for benefit of disappointed devisees. **Collins's Estate**, 219.
83. WIDOW'S EXEMPTION—Non-resident widow not entitled thereto as against domestic creditors. **Larocco's Estate**, 568.
84. WILL—Construction—Disinheriting whole class—"Or" read "and." **Hunter's Estate**, 120.
85. WILL—Construction—Estates for life—Spendthrift trusts. **Hoffman's Est.**, 77.
86. WILL—Discretion to sell real estate given to executors—Petition for order to sell for payment of debts—Protecting unsecured creditors. **Lukens's Estate**, 118.
87. WILL—Election by widow to take against—Laches—Absence of fraud—Ignorance of law—Petition for review. **Bolleau's Estate**, 213.
88. WILL—Gifts to classes—Lapse—Act of July 12, 1897, P. L. 256—Republication of will by codicil. **Harrison's Estate**, 45.
89. WILL—Probate—Domicile—Original and ancillary letters—Original will probated outside decedent's domicile—Duty of register in such case—Practice, O. C. **McKeown's Estate**, 332.
90. WILLS—Vested and contingent interests—Words importing death. **Campbell's Estate**, 287.

DEEDS.

RECORDING ACTS. Recording a deed duly executed, attested and acknowledged, which is entitled to record under the recording Acts, is equivalent to delivery. **Cooper v. Duval**, 475.

DEMAND.

GUARDIAN AND WARD—Demand by guardian upon ward for maintenance unnecessary. **Bouland's Estate**, 235.

DEPOSITIONS.

RULE TO TAKE DEPOSITIONS OUTSIDE OF STATE—Act of June 25, 1895, P. L. 279. A rule to take the testimony of witnesses residing out of the state, under the Act of June 25, 1895, P. L. 279, will only be allowed where there is a special or substantial reason for departing from the previously established practice. To give effect to this Act, the court should be fully informed as to the cause of action, the names and residences of the witnesses and the subject-matter of the expected testimony. **Carter v. Blair**, 749.

DESERTION. SEE HUSBAND AND WIFE.

1. HUSBAND PREVENTED FROM SHARING IN WIFE'S ESTATE—Willful and malicious desertion—What constitutes—Act of May 4, 1855, P. L. 430. **Grubb's Estate**, 443.
2. MORPHINE HABIT no justification—Foreign divorce. **Com. v. Allport**, 659.

DEVISE. SEE WILLS.

RESIDUARY DEVISE followed by specific description—After-acquired realty—Acts of April 8, 1833, P. L. 249, and June 4, 1879, P. L. 88. **Williams v. Brice**, 721.

DISCRETION OF COURT.

LIQUOR LAW—Duty of court in granting retail liquor licenses—Fitness of applicant—Public necessity for saloon—Stipulation by applicant of known unfit character to transfer license to fit person as soon as granted. **Howell's Application**, 504.

DIVORCE.

1. CONFLICT OF LAWS—Divorce by courts of sister state. **Com. v. Allport**, 659.
2. CONFLICT OF LAWS—Extra-territorial effect of South Dakota divorce—Personal service on respondent in another state—Constitutional provision in regard to full faith and credit to be given to judicial records in other states. **Com. v. Stevens**, 652.
3. DESERTION—Morphine habit no justification. **Com. v. Allport**, 659.
4. LIBEL SHOULD SET forth the residence of the libellant so that the jurisdiction may be apparent. **Logan v. Logan**, 733.

DOWER.

1. AGREEMENT TO PAY A SUM CERTAIN to widow in lieu thereof—Principal and income. **Campbell's Estate**, 497.
2. GIFTS IN LIEU OF DOWER—Gifts over—Abatement. **Forepaugh's Est.**, 144.

EJECTMENT.

1. EMINENT DOMAIN—Mortgage—Lien creditors—Equitable powers. **Mack v. Railroad Co.**, 102.
2. LEASE—Clause of amicable ejectment. **Reams v. Fye**, 242.
3. NON PROS—Laches. **Philadelphia v. Cleary**, 752.

ELECTION LAW.

1. ACT OF MAY 6, 1899, P. L. 255—Indictment of election officers. Where the judge and inspectors of an election division at a general election are indicted for neglect of their statutory duty under section 10 of the Act of Jan. 30, 1874, P. L. 31, as amended by the Act of May 6, 1899, P. L. 255, to require vouchers to be signed and sworn to in the case of voters whose names do not appear on the registry list, and the only evidence sustaining the indictment is the fact that the vouchers were not found in the envelope filed in the prothonotary's office, a verdict will be directed for the defendants. The failure to return such vouchers to the prothonotary's office, as required by law, is an entirely different offence from the neglect to take them in the first instance, as charged in the indictment. **Com. v. Brangan**, 760.
2. ASSESSOR AND ASSESSOR'S LIST—Jurisdiction of Court of C. P. to review assessor's list—Duties of assessor—Striking from list names of persons not added on personal application—Act of May 16, 1895, P. L. 75. **Assessor's List of Voters**, 624.
3. NAMES OF POLITICAL PARTIES—Acts of July 9, 1897, P. L. 223, and June 10, 1893, P. L. 419. Under the Act of July 9, 1897, § 1, P. L. 223, amending the Act of June 10, 1893, P. L. 419, the filing of the affidavit with the prothonotary of the proper county, and his certificate, showing compliance with the Act, in the office of the secretary of the Commonwealth, gives an exclusive right to the use of the political appellation therein adopted. **Barnes's and Heydrick's Nominations**, 681.
4. POLITICAL PARTIES—Expulsion of members of organization—Notice to persons proceeded against essential—Rules—Nominations. **Coray's Nomination**, 716.
5. PRODUCTION OF BALLOT-BOX. **Com. v. Brangan**, 739.

ELECTRIC LIGHT COMPANIES.

CORPORATIONS—Charges for service—Discrimination—Mandamus. **Mercur v. Light, Heat and Power Co.**, 10.

EMINENT DOMAIN.

1. LIEN CREDITORS—Damages—Equitable powers—Mortgage—Ejectment. **Mack v. Railroad Co.**, 102.

2. TELEPHONE COMPANIES—Boroughs—Rights of eminent domain subject to ordinance—Act of June 25, 1885, P. L. 164—Assignment of franchises—Act of April 17, 1876, P. L. 30. **Lewistown Borough v. Telephone Co.**, 562.

3. TITLE ACQUIRED thereby in roadbed by railroad—Construction of overhead crossing by property-owner whose land abuts on both sides of railroad—Act of April 16, 1888, P. L. 464—Injunction. **Spease v. Railroad Co.**, 515.

EQUITY. SEE ESTOPPEL; JURISDICTION, EQUITY; INJUNCTION; SPECIFIC PERFORMANCE; PRACTICE, EQUITY.

1. ELECTRIC RAILWAYS—Injunction by land-owner against occupation of turnpike—Street railways—Laches—Variance in route. **Minnich v. Railway Co.**, 123.

2. EMINENT DOMAIN—Lien creditors—Damages—Equitable powers. **Mack v. Railroad Co.**, 102.

3. EQUITABLE RELIEF—Demurrer—Gross laches as a defence. **Corbett's Estate**, 59.

4. EQUITY JURISDICTION—Relief for irregularities of assessment, etc. **Shafer v. Marsh**, 47.

5. INJUNCTION—Constitutional law—Just compensation—Servitudes—Electric railways. **Lancaster and Susquehanna Turnpike Road Co. v. Columbia Telephone Co.**, 322.

6. INJUNCTION—Taxes—Real estate—False return by collector—Sale of land to enforce collection of tax. **Harris v. Davis**, 7.

7. PLEADING, EQUITY—Bill in equity—Multifariousness—Demurrer. **Anderson v. Coal and Navigation Co.**, 14.

8. SCHOOL ORDERS—Negotiability of—Drawn in violation of law—Payment restrained. **Stephens v. School District**, 185.

9. SPECIFIC PERFORMANCE—Contracts for personal services—Mutuality—Lumley v. Wagner. **Philadelphia Base-Ball Club v. Lajoie**, 309.

10. SPECIFIC PERFORMANCE—Mutuality of remedy essential—Lease—Agreement to transfer liquor license—Adequate remedy at law. **Effinger v. Hain**, 107.

11. STATUTE OF LIMITATIONS—Trusts—Bailments—Deposits—Dues bills—Receipts for money—Construction. **Lukens's Estate**, 294.

EQUITY RULES.

SPECIAL REPLICATION—Practice, O. C. **Stoker's Estate**, 375.

ESCHEAT.

1. PRACTICE, O. C.—Allowance of claimant's counsel fee out of estate—Costs. **Kelly's Estate**, 297.

2. TAXES—Liability of Commonwealth. Real estate which has escheated to the state is liable for city and county taxes, and may be sold for the same. **Philadelphia v. Linton**, 329.

ESTOPPEL.

1. FACTS UNDER WHICH PRINCIPLE of equitable estoppel will be applied. Representation by treasurer of a trust company to one about to make a loan on bonds secured by mortgage, under which the company is trustee, that the bonds were duly certified by trustee, estops the company from proving that they were not in fact so certified. **Sprigg v. Trust Co.**, 267.

2. MUNICIPAL CLAIM—Estoppel of property-owner to set up illegality of municipal assessment. **Williamsport v. Hughes**, 607.

3. MUNICIPAL CLAIM—Payment to person designated by city, although assessment bills had not been issued to him. **City v. Gabell**, 528.

4. WILLS—Accepting benefit thereunder—Disputing validity thereof. **Nathans's Estate**, 205.

EVIDENCE.

1. APPEALS—Practice, J. P.—Bail—Foreign corporations—Circumstances under which evidence was held unnecessary to sustain petition for bail absolute. **Adams v. Paper Mills Co.**, 266.

2. BOOKS OF ORIGINAL ENTRY—Physician's visiting list not admissible—Entries made from contemporaneous memoranda. **Haines's Estate**, 677.

EVIDENCE (*Continued*).

8. BOOKS OF ORIGINAL ENTRY. Stockbrokers' books containing a running account with a customer of purchases and sales of stock are not admissible as books of original entry. **Horner's Estate**, 729.
4. BURDEN OF PROOF—Credit claimed by accountant. **Douglass's Estate**, 479.
5. BURDEN OF PROOF rests on party alleging insanity. **Reynolds v. Order of Heptasophs**, 528.
6. COMPETENCY OF WITNESSES—Suit against administrator—Incompetency of witness not cured by subsequent calling of enabling witness. **Magoffin's Estate**, 478.
7. CRIMINAL LAW—Confessions—Relevancy—Cross-examination—Direct and circumstantial evidence distinguished. **Com. v. Perry**, 279.
8. CRIMINAL LAW—Confessions—Statement in hearing of defendant to which he assents—Relevancy. **Com. v. Ivory**, 277.
9. CRIMINAL LAW—Conspiracy—Verdict—Evidence to sustain same. **Com. v. Zuern**, 26.
10. HABEAS CORPUS—Commitment by United States commissioner—Sufficiency of evidence before commissioner—To what extent subject to review. **United States v. Blair**, 106.
11. HOMICIDE—Circumstances under which the photograph of defendant was held inadmissible and new trial granted. **Com. v. Stirling**, 437.
12. IMPLIED TRUSTS—Sufficiency of evidence required to establish—Decedent's estate. **Bilderback's Estate**, 759.
13. ISSUE d. v. n.—Burden of proof. **Brady v. McEnroe**, 115; **Wright's Est.**, 183.
14. JUDGMENT OF JUSTICE must be based on evidence and not on facts ascertained by personal investigation in absence of parties. **Muir v. Baker**, 700.
15. MALICIOUS PROSECUTION—Plaintiff's character—Presumptions—Burden of proof. **Glace v. Hummel**, 110.
16. MARRIAGE—Legitimacy—Cohabitation—Reputation—Presumption—Sufficiency of evidence to rebut presumption—Declaration by claimant's mother that decedent had refused to marry her. **Homeyard's Estate**, 730.
17. PAROL EVIDENCE—Joinder of husband in wife's bond and mortgage. **Cooke v. Jones**, 283.
18. VARIANCE—Joint torts—Judgment—Joint tort declared on, separate tort proved—Judgment against one defendant erroneous. **Harris v. Richardson**, 460.
19. WILLS—Contemporaneous interpretation of parties in interest. **Pearson's Estate**, 189.

EXCEPTIONS.

- CLERICAL ERROR OF AUDITING JUDGE may be corrected without exception. **Hart's Estate**, 421.

EXECUTION.

1. DEBTOR'S EXEMPTION—Appraisalment—Time when claim must be made—Laches. **Barrett v. Smith**, 531.
2. DEBTOR'S EXEMPTION—Waiver—Justice's transcript. **Kindig v. Kahler**, 765.
3. FOREIGN ATTACHMENT—*Situs* of debt. **Opdyke v. Iron Works**, 68.
4. ISSUING OF FI. FA. where prothonotary failed to sign the assessment of damages. **People's Supply Co. v. Goff**, 637.

EXECUTORS AND ADMINISTRATORS.

1. ACCOUNT—Citation dismissed. **Stuart's Estate**, 130. Petition for refused. **Stoker's Estate**, 375. Petition granted after lapse of twenty-six years since filing of first account. **Heath's Estate**, 281.
2. ACCOUNT—Practice, O. C.—Blending administration and distribution, principal and income condemned. **Hart's Estate**, 421.
3. ACCOUNT—Supplemental accounts. **Jennings's Estate**, 90.
4. ACCOUNTING—Rent derived from real estate being only asset. An account must be filed by an executor, even where the property which came into his hands consists only of rents derived from real estate. **Yerkes's Estate**, 204.
5. ACQUIREMENT OF ASSETS BY EXECUTOR—Unexpired lease containing clause against assignment is an asset—An executrix cannot take new lease for her own benefit. **Furlong's Estate**, 527.
6. ACTIONS—Security for costs—Non-resident executor. **McPherson v. Blair**, 492.
7. APPEAL FROM JUSTICE—Precedent payment of costs by administrator, defendant. **Com. v. Swick**, 35.
8. APPOINTMENT OF EXECUTORS AS GUARDIANS by implication. **Scully's Estate**, 731.

EXECUTORS AND ADMINISTRATORS (*Continued*).

9. ASSIGNMENT BY EXECUTOR of his interest in the personal estate and reassignment. **Hart's Estate**, 421.
10. CLAIMS ADVERSE TO DECEDENT'S TITLE—Such claims cannot be made on audit of administrator's account—O. C. without jurisdiction. **Fry's Estate**, 498.
11. COMMISSIONS. An executor will not be deprived of commissions because he refused to charge himself with bonds given to a charity by the decedent until the title of the estate was established. **Conway's Estate**, 509.
12. COMMISSIONS—Circumstances under which $3\frac{1}{2}$ per cent. on principal and 5 per cent. on income allowed—Uncollected assets. **Sunderland's Estate**, 358.
13. COMMISSIONS—Interest of an executor in prospective commissions does not entitle him to oppose a family settlement which supersedes the will. **Lloyd's Est.**, 207.
14. COMMISSIONS—Right to same at settlement of final account. **Pile's Estate**, 356.
15. COMMISSIONS NOT ALLOWED on uncollected securities—Circumstances under which commissions will be reduced for unbusinesslike management of the trust and improperly stating account. **Hart's Estate**, 421.
16. COMMISSIONS WHERE PRINCIPAL consists of proceeds of sale of real estate. **Singerley's Estate**, 258.
17. COMPENSATION OF DISCHARGED EXECUTRIX—Duty of deducting commissions before paying creditors—Costs of administration—Counsel fees of administrator *c. t. a.*—Preference. **Sample's Estate**, 605.
18. COUNSEL FEES—Circumstances under which counsel fees are presumed to have been included in executor's compensation. **Hart's Estate**, 421.
19. DISTRIBUTION BY ACCOUNTANT to himself of securities of the estate. **Hart's Estate**, 421.
20. DUTY TO ACCOUNT—Absence of assets. Where all assets are consumed by widow's claim and payment of preferred debts, an accounting will not be required. **Stuart's Estate**, 180. See **Stoker's Estate**, 875. Compare **Heath's Estate**, 281.
21. DUTY TO ACCOUNT. The statutory provision which allows a year to elapse before the rendering of an account by an administrator does not apply where the administrator has been dismissed within the year. He cannot evade duty by alleging that he has paid out all moneys that have come to hand. **Lockard's Estate**, 192.
22. DUTY TO SELL REAL ESTATE—Surcharge—Advice of counsel. Where an executor had reason to believe the estate was solvent, and did not unduly delay the sale of realty, and acted by advice of counsel, he will not be surcharged with payments made for its preservation, although such belief proved erroneous. **Hall's Estate**, 215.
23. EXECUTOR DE SON TORT—Following goods purchased by same—Jurisdiction, O. C. **Fahy's Estate**, 399.
24. FOREIGN EXECUTORS. A non-resident, who has been appointed executor under the will of a citizen of Pennsylvania, resident within the jurisdiction, and has given security within the jurisdiction for the performance of his duties as executor, and taken the oath of office and assumed its duties, is not to be regarded as a foreign executor. Suit may be brought against such non-resident executor before a justice of the peace, and jurisdiction acquired by serving process upon the resident sureties, under the Act of March 27, 1854, P. L. 214. **McCahan v. Reeder**, 288.
25. INSOLVENCY—Entering security—Act of May 1, 1861, P. L. 680. **McDowell's Estate**, 223.
26. INVENTORY—Effect of filing on liability of executor or administrator—Including real estate. **Fleming's Estate**, 259.
27. INVESTMENTS—Liabilities—Surcharge—Act of April 13, 1854, P. L. 368. **Pile's Estate**, 356.
28. LIFE-TENANT—Collection of income—Interference by executor—Costs. **Boyle's Estate**, 206.
29. LIFE-TENANT AND REMAINDERMAN—Repairs—Decedent's estate—Finding of auditing judge. **Davenport's Estate**, 121.
30. MONEYS BELONGING TO ESTATE—Depositing same in individual account—Interest received thereon—Surcharge. **Bollinger's Estate**, 223.
31. PARTITION—Costs—Counsel fees and commissions allowed, although no sale effected. **Salin's Estate**, 97.
32. PRACTICE, O. C.—Right of attaching creditor of legatee to cite executor to account. **Raeder's Estate**, 282.
33. SET-OFF—Indebtedness of distributee to accountant. **Gallen's Estate**, 262.
34. SURCHARGE—Insolvent debtor—Residuary legatee—Commissions and compensation distinguished. **Edenborn's Estate**, 184.
35. WILL—Discretion to sell real estate given to executors—Petition for order to sell for payment of debts—Protecting unsecured creditors. **Lukens's Estate**, 118.

EXEMPTIONS.

1. APPRAISEMENT—Rule of court requiring sheriff to file appraisement before the return-day of writ inapplicable where a valid claim is made on or after the return-day. **Barrett v. Smith**, 531.
2. BANKRUPTCY LAW—Waiver—Levy on exempt property cannot be made for provable debt after discharge, although benefit of bankrupt law be waived. **Miller v. Black**, 255.
3. WAIVER—Justice's transcript. A defendant in an execution, issued out of the Common Pleas on a transcript from a magistrate's judgment, is not entitled to his \$300 exemption where his promissory note on which the judgment was obtained waives the exemption, although there is no reference in the transcript to the waiver. **Kindig v. Kahler**, 765.
4. WHEN CLAIM MUST BE MADE—Generally before expense of advertising is incurred—Circumstances excusing delay. **Barrett v. Smith**, 531.

FAMILY SETTLEMENTS.

WILLS. A family settlement made by all parties in interest, if they are *sui juris*, supersedes the will, and an executor's interest in prospective commissions gives him no standing to oppose it. **Lloyd's Estate**, 207.

FEES.

1. COUNSEL FEES—Circumstances under which counsel fees are presumed to have been included in executor's compensation. **Hart's Estate**, 421.
2. COUNSEL FEES—Lunacy. **Com. v. O'Shea**, 580.
3. COUNSEL FEES—Services rendered trustee in individual capacity. **Sinkler's Estate**, 890.
4. DECEDENT'S ESTATE—Counsel fee. **Sunderland's Estate**, 358.

FINES.

VOLUNTARY PAYMENT—Proceedings before burgess—*Certiorari*. **Bolivar Borough v. Coulter**, 171.

FIXTURES.

LANDLORD AND TENANT—Machinery attached to building. **Wilkes-Barre Times v. Wilkes-Barre**, 691.

FOREIGN ATTACHMENTS.

1. FOREIGN CORPORATION having agent in the state—Practice, C. P. **Diener v. Hotel Co.**, 57.
2. JUSTICES OF THE PEACE—Jurisdiction of justices in foreign attachment. **Sullivan & Co. v. Johnston & Co.**, 73.
3. PENNSYLVANIA STOCKHOLDER OF INSOLVENT New York building and loan association. A citizen of Pennsylvania who is a member of a corporation organized for the mutual benefit of its members, chartered by, and having its domicile in, the state of New York, and being subject to and governed by the laws of that state, cannot maintain a foreign attachment against the company in Pennsylvania when the association was insolvent at the time the writ issued, and a court of competent jurisdiction at the place of domicile had determined the fact of insolvency and appointed a receiver. **McKean v. New York Nat. B. and L. Ass'n**, 197.
4. SITUS OF DEBT. A debt due by one foreign corporation to another, which is not expressly payable within the jurisdiction, cannot be attached, even though the debtor corporation (garnishee) is engaged in doing business within the jurisdiction under the Pennsylvania statute. **Opdyke v. Iron Works**, 68.

FOREIGN CORPORATIONS. SEE CORPORATIONS.**FORESTRY.**

RESERVATION COMMISSION—Control of water supply—Act of Feb. 25, 1901, P. L. 11. **Forestry Reservation Commission**, 676.

FRAUD.

1. ATTACHMENT—Acts of July 12, 1842, P. L. 339, and March 17, 1869, P. L. 8—Construction—Practice—Question of fraud—Appeal. **Hotchkiss & Bro. v. Pinney**, 219.
2. BAILMENT—Change of place and form of deposit—Constructive notice to bailor. **Lukens's Estate**, 294.
3. CANCELLATION OF MORTGAGE—Laches. **Corbett's Estate**, 59.
4. SERVICE OF PROCESS—Decoying non-resident into jurisdiction. **Trattner v. Forman & Barsh**, 566.
5. TRUST AND TRUSTEES—Accounts—*Res adjudicata*—Surcharge. **Appleton's Estate**, 441.

GAMBLING.

ACT OF MARCH 11, 1834—Indictment. Sections 18 and 19 of the Act of March 11, 1834, P. L. 122, relating to gambling in inns and taverns, contemplate a summary conviction in an action of debt to recover the penalty of \$14, and not an indictment. **Com. v. Conrad**, 342.

GAME LAW.

KILLING BIRDS—Jurisdiction, J. P.—Statutes—Practice, Q. S.—Criminal law—Indictment—Insectivorous birds. **Com. v. Boettcher**, 101.

GARNISHMENT. SEE ATTACHMENT.

GIFTS.

1. CHARITIES—Transfer of title—Delivery—Act of April 26, 1855, P. L. 328. **Conway's Estate**, 509.
2. GIFTS TO CLASSES—Will—Construction—Vested and contingent interests—Definite and indefinite failure of issue. **Reed's Estate**, 162.
3. GIFTS INTER VIVOS. A gift *inter vivos*, made by a person *sui juris*, with a full understanding of the nature of the transaction, without fraud or duress, is irrevocable. **Pinner v. Widson**, 551.

GRAND JURY.

1. BILL IGNORED—Review. In the absence of irregularity or fraud, the Court of Quarter Sessions has no jurisdiction to review the investigations of a grand jury, and, hence, cannot entertain an application to refer a bill ignored by one grand jury to the next grand jury. **Com. v. Priestly**, 217.
2. RETURN OF—Setting aside—Surplusage—Bridges—Road law. **Bridge in Centerville Borough**, 636.

GROUND RENT.

RENT SERVICE—Rent charge—Covenant to pay proportionate part of principal at death of each life-tenant. **Phillips's Estate**, 99.

GUARANTEE.

DECEDENT'S ESTATE—Partnership—Firm guarantee. **McCullough's Estate**, 353.

GUARDIAN AND WARD.

1. APPOINTMENT of executors as guardians by implication. **Scully's Estate**, 731.
2. ATTACHMENT FOR DISOBEDIENCE of order to pay—Gross negligence in failing to secure fund. **Wallis's Estate**, 548.
3. AWARD TO FOREIGN GUARDIAN without advising auditing judge of non-residence—Payment by executor—Practice, O. C. **Buck's Estate**, 330.
4. JURISDICTION, C. P. The Court of Common Pleas is without jurisdiction to enter judgment against a guardian, as guardian, to charge the estate of his ward. An affidavit of defence by a guardian, in which he avers that he had no dealings with the plaintiff, and never purchased any goods from him or authorized the purchase on behalf of the minor, is sufficient to prevent the entry of judgment against him personally. **Hale v. Capp**, 285.
5. MAINTENANCE OF WARD BY GUARDIAN—Presumption as to compensation to be paid—Demand on ward for compensation—Guardian's right to reimbursement—Personal decree for deficiency. **Boulard's Estate**, 235.
6. REMOVAL OF GUARDIAN—Feeling of animosity toward guardian by minor—Estrangement resulting insufficient for removal. **Sheetz's Estate**, 461.
7. SOCIETY FOR THE PREVENTION of cruelty to children—Act of June 11, 1879, P. L. 142. **Scott's Estate**, 213.
8. STATUTE OF LIMITATIONS—Laches—Ratification of investment. **Magomin's Estate**, 473.

HABEAS CORPUS.

1. COMMITMENT BY UNITED STATES COMMISSIONER—Sufficiency of evidence before commissioner—To what extent subject to review. **United States v. Blair**, 106.
2. IMMIGRATION LAW—Marriage—Validity of—Conflict of laws—Finding of immigration officials. **United States v. International Nav. Co.**, 480, and note.
3. SECRET SERVICE—Agents of—When they may make a search or arrest without warrant. **United States v. Fuelhart**, 194.

HAWKING AND PEDDLING. SEE PEDDLER.

HIGHWAYS.

1. GRADE CROSSINGS—Railroads. **Abington Township v. Railway Co.**, 719; **Norristown Borough v. Railway Co.**, 539.
2. MUNICIPAL AUTHORITY OVER STREETS—Right of railroads to cross streets without municipal consent—Act of April 4, 1868, P. L. 62, and Pennsylvania Constitution, art. III, § 7. **Pittsburgh v. Railroad Co.**, 541.

HOMICIDE.

1. ACCESSORY BEFORE FACT. **Com. v. Perry**, 279.
2. EVIDENCE—Circumstances under which the photograph of defendant was held inadmissible and new trial granted. **Com. v. Stirling**, 437.
3. EVIDENCE—Relevancy—Confessions—Distinction between direct and circumstantial evidence. **Com. v. Perry**, 279.
4. EVIDENCE—Relevancy—Confessions—Statements by one implicated in same homicide, made in defendant's presence, and to correctness of which he has assented. **Com. v. Ivory**, 277.
5. JURORS—Disqualifying opinion. **Com. v. Ivory**, 277.

HORSE. SEE ANIMALS.

HUSBAND AND WIFE.

1. CURTESY INITIATE—Vacation of streets—Appeal from borough councils. The husband of a woman whose land will be injured by a proposed vacation of a street is not the proper person to appeal in his own name, either as tenant by the curtesy initiate, or as agent for his wife, from the action of councils in enacting such an ordinance, and the adding of his wife's name as an appellant by amendment after the time given by the Act for an appeal is of no avail to remedy the matter. **Ebe's Appeal**, 367.
2. DESERTION—Morphine habit no justification—Foreign divorce. **Com. v. Allport**, 650.
3. HUSBAND'S DUTY TO SUPPORT WIFE. A husband is not bound to support his wife when, during his absence, she has been living with another man, and was supported by him, nor can he be compelled to support his children so long as they remain with their mother if she continues to live with her paramour. **Com. v. Ely**, 647.
4. HUSBAND PREVENTED FROM SHARING IN WIFE'S ESTATE—Willful and malicious desertion—What constitutes—Act of May 4, 1855, P. L. 430. **Grubb's Estate**, 443.
5. INTERPLEADER—Wife's affidavit—Claimant's bond—Act of May 26, 1897, P. L. 95. **Ruffner v. Brown**, 186.
6. SEPARATE ESTATE—Joinder of husband in wife's bond and mortgage—His personal liability on the bond—Parol evidence. **Cooke v. Jones**, 283.

IMMIGRATION LAW.

- HABEAS CORPUS—Marriage—Conflict of laws—Finding of immigration officials. **United States v. International Nav. Co.**, 480, and note.

INDICTMENT.

1. ATTEMPT TO COMMIT CRIME—Indictment at common law—Act of March 31, 1860, P. L. 442. **Com. v. Clark**, 641.
2. CONSPIRACY—Count—Necessary averments. **Com. v. Zuern**, 26.
3. INSECTIVOROUS BIRDS—Killing birds—Jurisdiction, J. P.—Statutes—Practice, Q. S. **Com. v. Boetteher**, 101.
4. LIQUOR LAW—Act of May 13, 1887, P. L. 108—Sentence. **Com. v. Lukan**, 95.
5. QUASHING—Practice, Q. S.—Circumstances under which indictment will be quashed for defects in complaint. **Com. v. Roland**, 410.

INFANTS.

- WAGES—Debts of parent—Set-off. **Beresford v. Coal Co.**, 243.

INJUNCTION. SEE SPECIFIC PERFORMANCE.

1. CONSTITUTIONAL LAW—Just compensation—Servitudes—Electric railways. **Lancaster and Susquehanna Tpk. Road Co. v. Columbia Telephone Co.**, 322.
2. CONTINUING TRESPASS—Duty of owner of city lots to remove surface water—Rights of adjoining lot-owners. **Rieker v. Brewing Co.**, 406.
3. CONTINUOUS INJURY—Remedy at law inadequate—Deposit of garbage. **Sitzman v. Heikel**, 673.
4. ELECTRIC RAILWAYS—Injunction by land-owner against occupation of turnpike—Street railways—Laches—Variance in route. **Minnich v. Railway Co.**, 126.

INJUNCTION (*Continued*).

5. INCREASE OF INDEBTEDNESS of school district beyond constitutional limitation. **Dolan v. Lackawanna Township School District**, 694.
6. LABOR UNIONS—Coercion of non-union workmen—Constitutional right of workman to seek employment—Unlawful conspiracies—Acts of June 14, 1872, P. L. 1175, April 20, 1876, P. L. 45, and June 16, 1891, P. L. 300. **Erdmann v. Mitchell**, 701.
7. LANDLORD AND TENANT—Waste—Lease—Unauthorized use. **Rector Christ Church v. Bala Golf Club**, 686.
8. RAILROADS. An injunction is not of right and will not be issued when, upon a broad consideration of the situation of all the parties in interest, good conscience does not require it. In this case the court refused to enjoin the employees of a railroad from tearing down an overhead crossing erected by a property-owner whose land abutted on both sides of its right of way. **Speese v. Railroad Co.**, 515.
9. RAILROADS—Permitting grade crossings. **Abington Township v. Philadelphia and Reading Ry. Co.**, 719.
10. RESTRAINING PAYMENT OF CHECK drawn by weak-minded person, under Act of June 25, 1895, § 8, P. L. 300. **Pringle v. Second Nat. Bank of Wilkes-Barre**, 674.
11. SCHOOL ORDERS—Negotiability of—Drawn in violation of law—Payment restrained. **Stephens v. School District**, 185.
12. SPECIAL INJURY TO PROPERTY-OWNER—Impairment of access. **Denison v. Ryan**, 495.
13. SPECIFIC PERFORMANCE—Contracts—Personal service—Mutuality—**Lumley v. Wagner. Philadelphia Base-Ball Club v. Lajoie**, 309.
14. STRIKES—Conspiracy—Refusal of members of union, employed by persons other than the employer against whom strike is directed, to handle material intended for latter—Attempts to persuade remaining workmen to cease work—Picketing—inadequate remedy at law. **York Manuf. Co. v. Oberdick**, 463.
15. TAXATION—Equity jurisdiction. Where a tax is lawfully assessed, or where the matters complained of are mere irregularities in the valuation or assessment, equity will not interfere, and will leave the party aggrieved to his statutory remedy by appeal from the assessment; but where there is want of power to tax or a disregard of the constitution in the mode of assessment, a court of equity will restrain the collection of the tax. Hence, where a municipality imposes a local tax upon the horses of a street passenger railway, essential to the exercise of its public purposes and corporate franchise, a court of equity will enjoin its collection. **People's Passenger Ry. Co. v. Taylor**, 343.
16. TAXES—Real estate—False return by collector—Sale of land to enforce collection of tax. **Harris v. Davis**, 7.

INSANITY.

1. INSANE DELUSIONS—Spiritualism—Testamentary law—Issued. *v. n.* **McIlroy's Estate**, 78.
2. PRESUMPTIONS—Sanity presumed. **Reynolds v. Order of Heptasophs**, 528.
3. TESTAMENTARY CAPACITY—Delusions—Misconception of facts essential—Unsoundness of testator's point of view immaterial. **Bennett's Estate**, 145.

INSOLVENCY.

1. ACT OF JUNE 4, 1901, P. L. 404—Constitutionality. **Hull's Estate**, 661.
2. ACT OF JUNE 4, 1901, P. L. 404, not retroactive. **Smith & Son v. Speakman**, 699.
3. INSURANCE COMPANIES—Appointment of receiver in insolvency proceedings under Act of April 4, 1873, § 5, clause 8, P. L. 20, implies finding of insolvency. **Com. v. State Insur. Co.**, 339.
4. TRUSTEES—Entering security—Act of May 1, 1861, P. L. 630. **McDowell's Estate**, 223.

INSOLVENCY PROCEEDINGS. SEE INSOLVENCY.

INSURANCE.

1. FIRE POLICY—Construction—Building Regulations. **Penna. Co. for Insur. on Lives, &c., v. Phila. Contributionship for Insur. of Houses, &c.** 181.
2. FOREIGN INSURANCE COMPANY—Service of process—Sheriff's return—Acts of April 4, 1873, § 2, P. L. 20, and June 20, 1883, P. L. 134. **McCann v. Insurance Co.**, 560.
3. LIFE INSURANCE—Suicide—Insanity—Burden of proof. **Reynolds v. Order of Heptasophs**, 528.
4. POLICY OF LIFE INSURANCE—Construction. **House v. Life Assur. Co.**, 41.
5. SUBROGATION OF INSURER OF MORTGAGE—Right of action against mortgagor. **Utter v. Lewis**, 50.

INSURANCE COMMISSIONER.

SERVICE OF PROCESS ON DEPUTY—Sheriff's return—Acts of April 4, 1873, § 2, P. L. 20, and June 20, 1883, P. L. 134. **McCann v. Insurance Co.**, 560.

INSURANCE COMPANIES.

INSOLVENCY PROCEEDINGS under § 5, clause 8, of the Act of April 4, 1873, P. L. 20. The appointment of a receiver under the Act for the purpose of winding up a corporation implies a finding of insolvency. **Com. v. State Insur. Co.**, 339.

INTEREST.

1. MONEYS BELONGING TO ESTATE—Depositing same in individual account—Interest received thereon—Surcharge. **Bollinger's Estate**, 223.
2. PARTNERSHIP CONTRIBUTIONS—Loans by liquidating partner—Settlement of account. **Brenner v. Carter**, 457.
3. TRUST AND TRUSTEES—Surcharge—Interest on deficiency of capital and income withheld. **Sinkler's Estate**, 399.

INTERPLEADER.

WIFE'S AFFIDAVIT—Act of May 26, 1897—Claimant's bond. To entitle a wife claiming goods levied on to file her own bond, under the Act of May 26, 1897, P. L. 95, she must show that the goods were in her possession and not in the joint possession of herself and husband, and aver in her affidavit how she obtained title. **Ruffner v. Brown**, 186.

INTER-STATE COMITY. SEE CONFLICT OF LAWS.

1. COMMISSIONERS OF OTHER STATES—Process in aid of subpoena—Acts of March 29, 1860, P. L. 341, and April 14, 1846, P. L. 329. **Simpler's Petition**, 141.
2. CONFLICT OF LAWS—Foreign attachment—Pennsylvania stockholder of insolvent New York building and loan association cannot maintain attachment after appointment of receiver in New York. **McKean v. Building and Loan Ass'n**, 197.

INTER-STATE LAW. SEE CONFLICT OF LAWS.

JUDGMENTS IN SISTER STATES—Constitutional law—Entry of domestic judgment upon exemplification of record. **Wilmer v. Lewis**, 137.

INTESTACY.

1. DECEDENT'S ESTATE—Children and grandchildren of deceased uncles and aunts—Acts of April 27, 1855, P. L. 368, and June 30, 1885, P. L. 251. **Smith's Estate**, 92.
2. MARRIED WOMAN DYING INTESTATE—Mortgage to pay debts. **Corbett's Estate**, 59.

INVESTMENTS. SEE EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

TRUSTEES—Liabilities—Surcharge—Act of April 13, 1854, P. L. 368. **Pile's Estate**, 356.

ISSUE.

1. DEFINITE FAILURE—"Without leaving lawful issue"—Shelley's Case—Executed and executory trusts. **Osborne's Estate**, 191.
2. DEFINITE AND INDEFINITE FAILURE OF ISSUE. **Reed's Estate**, 162.
3. DIE WITHOUT LEAVING ISSUE of children surviving. **Horner's Estate**, 729.

ISSUE *d. v. n.*

1. AWARDING ISSUE—Issue cannot be had at place of ancillary administration—Act of March 15, 1882, §§ 12 and 13, P. L. 135—When demurrer to petition for issue will be sustained without prejudice. **McKeown's Estate**, 131.
2. AWARDING ISSUE—Testamentary capacity—Insane delusions—Spiritualism. **McIlroy's Estate**, 78.
3. BURDEN OF PROOF—Circumstances casting burden on proponent—Undue influence. **Brady v. McEnroe**, 115.
4. BURDEN OF PROOF. Upon a petition for an issue *devisavit vel non*, every presumption is in favor of the validity of the will, and the burden of proof is upon those who assert the contrary. **Wright's Estate**, 123.

JOINT AND SEPARATE TORTS.

CONCERT—Variance—Judgment against one of two defendants erroneous when no concert appears. **Harris v. Richardson**, 460.

JUDGMENTS.

1. EFFECT OF JUDGMENT IN ONE STATE as a bar to further proceedings in another—Full faith and credit clause, art. IV. § 1, Federal Constitution. **Levison v. Blumenthal**, 412.
2. ENTRY ON INDEX—Lien of a judgment is dependent upon its being properly indexed. **Rusterholtz v. Brown**, 21.
3. IN SISTER STATES—Constitutional law—Entry of domestic judgment upon exemplification of record. **Wilmer v. Lewis**, 187.
4. JOINT AND SEPARATE TORTS—Concert—Variance—Joint tort declared on, separate tort proved—Judgment against one defendant erroneous. **Harris v. Richardson**, 460.
5. JUDGMENT FOR WANT OF APPEARANCE—"Quarto die post." **Vollmer and Register v. Marble Co.**, 434.
6. OPENING JUDGMENT—Practice, C. P.—Promissory note—Affidavit of defence—Delay in filing same. **Garman v. Charlier**, 38.
7. OPENING JUDGMENT CONFESED under lease of chattel—Bailment. **Sheasley v. Condrin**, 56.
8. PRACTICE, J. P.—Judgment reversed when based on independent investigation of justice and not on the evidence. **Muir v. Baker**, 700.
9. PRESUMPTION IN FAVOR OF REGULARITY—Magistrates' judgments—Defects of record—*Certiorari*. **Hershey & Bro. v. Mylin**, 551.
10. PRINCIPAL AND SURETY—Municipal bonds for use of sub-contractors and materialmen. Judgment in favor of city in action by principal contractor for contract price is *res inter alios acta* in action by sub-contractor or materialman against surety on bond. **Philadelphia v. Stewart and Trust Co.**, 395.
11. REVIVAL—Amicable agreement—Sufficient identification of judgment. **Washington German B. and L. Ass'n v. Krauter**, 764.
12. SCIRE FACIAS—Judgment for want of appearance. **Lessing Building Ass'n v. Lentz**, 257.
13. TIME FOR TAKING JUDGMENT for want of affidavit of defence. **Muir v. Insurance Co.**, 577.
14. TRANSCRIPT OF JUSTICE—Presumption of regularity—Motion to strike off—Control of record in Common Pleas—Laches. **Hoyt & Sharpless v. Traction Co.**, 767.

JURISDICTION, C. P.

1. ASSESSOR'S LIST—Jurisdiction of court to review—Act of May 16, 1895, P. L. 75. **Assessor's List of Voters**, 624.
2. DIVORCE—Libel—Jurisdictional averments. **Logan v. Logan**, 738.
3. FOREIGN ATTACHMENT—Pennsylvania stockholder of insolvent New York building and loan association cannot maintain attachment after appointment of receiver in New York. **McKean v. Building and Loan Ass'n**, 197.
4. FOREIGN CORPORATIONS—Acts of March 21, 1849, P. L. 216; April 8, 1851, P. L. 354, and April 21, 1858, P. L. 408. **Sheetz v. Railway Co.**, 373.
5. FOREIGN CORPORATIONS—Service on. Corporation whose president lives in Pennsylvania, but which has no office and does no business here, not subject to jurisdiction here. **Cleveland Builders' Supply Co. v. Cement Co.**, 491.
6. GUARDIAN AND WARD. The Court of Common Pleas is without jurisdiction to enter judgment against a guardian, as guardian, to charge the estate of his ward. **Hale v. Capp**, 285.
7. MANDAMUS—Jurisdiction of Common Pleas over chairman of Republican county committee—Act of June 8, 1893, P. L. 345—Party rules—Construction. **Longenecker v. Barron**, 429.
8. WEAK-MINDED PERSON—Act of June 25, 1895, P. L. 300. **Pringle v. Second Nat. Bank of Wilkes-Barre**, 674.

JURISDICTION, EQUITY.

1. AGREEMENT TO TRANSFER LIQUOR LICENSE—Specific performance. **Eminger v. Hain**, 107.
2. CONTINUING TRESPASS—Duty of owner of city lots to remove surface water—Rights of adjoining lot-owners. **Rieker v. Brewing Co.**, 406.
3. CONTINUOUS INJURY—Injunction. **Sitzman v. Heikel**, 673.
4. CORPORATE ELECTIONS. The legality of the election of officers of a corporation must be tried and determined in an action of *quo warranto* and not by a proceeding in equity. **O'Shea v. Flaunery**, 356.
5. FOREIGN RECEIVER—Stockholder's liability—Equitable jurisdiction—Demurrer—Adequate remedy at law. **Hale v. Allinson**, 13.

JURISDICTION, EQUITY (*Continued*).

6. INJUNCTION—Corporations—Passenger railways—Taxation—Property essential to the exercise of public franchises. **People's Passenger Ry. Co. v. Taylor**, 343.

7. INJUNCTION—Labor unions—Coercion of non-union workman—Constitutional right of workman to seek employment—Unlawful conspiracies—Acts of June 14, 1872, P. L. 1175: April 20, 1876, P. L. 45, and June 18, 1891, P. L. 800. **Erdmann v. Mitchell**, 701.

8. RELIEF FROM ASSESSMENT FOR TAXATION. **Shafer v. Marsh**, 47.

9. REMEDY AT LAW. A party cannot maintain a bill in equity against a trustee under a mortgage or deed of trust to recover the value of coupons and interest thereon for having falsely certified to him that it held bonds, duly executed under a mortgage and moneys deposited to meet the coupons, as in such case the true remedy is by an action of trover or *assumpsit*. **Sprigg v. Trust Co.**, 267.

10. STRIKES—Conspiracy—Refusal of members of union employed by persons other than the employer against whom strike is directed to handle material intended for latter—Attempts to persuade remaining workmen to cease work—Picketing—Injunction. **York Manuf. Co. v. Oberdick**, 463.

11. VENDOR AND PURCHASER—Assumption of mortgage debt—Bill in equity against vendee for deficiency—Adequate remedy at law. **Thompson v. Lodge**, 802.

JURISDICTION, FEDERAL COURT.

CONSTITUTIONAL LAW—Co-plaintiffs. **Weller v. Hanauer**, 123.

JURISDICTION, J. P.

1. CERTIORARI—Service of summons where borough is defendant. **Brennan & Ward v. Borough**, 64.

2. DEPOSITIONS—Account-render. **Wise v. Wright**, 152.

3. FOREIGN ATTACHMENT. **Sullivan & Co. v. Johnston & Co.**, 73.

4. KILLING BIRDS—Statutes—Practice, Q. S.—Criminal law—Indictment—Insectivorous birds. **Com. v. Boettcher**, 101.

5. MAGISTRATES OF THE CITY OF PHILADELPHIA, aldermen and justices of the peace exercise same jurisdiction and are subject to same limitations. **Wolf v. Sailer**, 601.

6. NON-RESIDENT EXECUTOR—Service of process on sureties—Act of March 27, 1854, P. L. 214. **McCahan v. Reeder**, 298.

JURISDICTION, O. C.

1. ASSIGNMENT OF LEGACY—The Orphans' Court has jurisdiction to pass upon the validity of the assignment of a part of a legacy upon petition for a citation, without regard to the reasons for its non-production at the audit. **Craig's Estate**, 755.

2. CLAIMS ADVERSE TO DECEDENT'S TITLE—Such claims cannot be made on audit of administrator's account—Orphans' Court without jurisdiction. **Fry's Estate**, 493.

3. CONFLICT OF LAWS—Foreign executor—Removal of estate and parties to Pennsylvania. **Leaming's Estate**, 389.

4. DECEDENT'S ESTATE—Distribution of a decedent's estate is solely within the jurisdiction of the Orphans' Court—Postponement pending litigation. **Rorke's Estate**, 754.

5. EXECUTOR *d. s. t.*—Following goods purchased by such executor and the proceeds thereof. **Fahy's Estate**, 899.

6. GUARDIAN'S APPOINTMENT. When the duties of guardian are imposed on executors, they become testamentary guardians, and the court is without authority to make a further appointment. **Scully's Estate**, 731.

7. GUARDIAN AND WARD—Judgment against guardian as guardian. **Hale v. Capp**, 285.

8. PARTITION—Act of May 17, 1866, P. L. 1006—Owerty—Recognizance—Set-off. **Deckard's Estate**, 377.

9. PARTITION. Under the Act of April 13, 1840, § 4, P. L. 320, the Orphans' Court has jurisdiction to make partition when a decedent dies leaving a will. **Lusch's Est.**, 224.

10. PARTNERSHIP—The Orphans' Court has no jurisdiction over settlement of accounts of a partnership of which decedent was a member—Practice where decedent's books show a debt due to such a partnership. **Meyers's Estate**, 445.

11. TESTAMENTARY LIBEL—Orphans' Court has jurisdiction of claims for damages in testamentary libel. **Gallagher's Estate**, 733.

12. VACATION OF DECREE after term of entry. **Corbett's Estate**, 59.

JURISDICTION, Q. S.

1. ACCESSORY AFTER FACT—Act of March '81, 1860, P. L. 427—Larceny—Receiving stolen property—Substantive offence—Indictment. *Com. v. O'Neill*, 227.
2. GRAND JURY—Bill ignored—Review. *Com. v. Priestly*, 217.
3. MODIFICATION OF SENTENCE after expiration of term. *Com. v. Gillespie*, 398.
4. REFUSAL OF TOWN CLERK, AFTER ELECTION, TO SERVE. Under the Act of April 15, 1884, P. L. 552, if a person elected as town clerk refuses to serve before the beginning of his term, the court has authority to appoint a person to fill the vacancy. **Appointment of Town Clerk for Nether Providence Twp.**, 681.
5. ROAD LAW—Special Jurisdiction in Montgomery county—Act of May 9, 1871, P. L. 639. **Vacation of Eastburn Road**, 595.
6. SUNDAY OBSERVANCE—Sufficiency of complaint—Act of April 22, 1794, 3 Sm. Laws, 177. *Com. v. McFadden*, 718.

JURY AND JUROR.

1. CRIMINAL LAW—Disqualifying opinion of juror. *Com. v. Ivory*, 277.
2. CRIMINAL LAW—New trial—Reading improper newspaper article by juror—License of the press. *United States v. Ogden*, 1.
3. CRIMINAL LAW—Verdict—Juror impeaching same. A juror cannot be called to testify that he misunderstood the evidence and thus impeach his verdict. *Com. v. Zuern*, 28.
4. MISCONDUCT OF JUROR—Knowledge of facts not in evidence—Prejudice—Waiver Statement by juror of what occurred in jury-room—Impeaching verdict. *Com. v. Reber*, 683.

JUSTICE OF THE PEACE. SEE PRACTICE, J. P., AND JURISDICTION, J. P.

1. APPEAL FROM JUSTICE—Payment of costs by administrator, defendant. *Com. v. Swick*, 35.
2. APPEAL FROM JUSTICE—Payment of costs, whether prerequisite. *Waters v. Carr*, 93.
3. ATTACHMENT—Act of July 12, 1842, P. L. 346—Attachment cannot issue after judgment and appeal therefrom entered. *Keith v. Moore*, 212.
4. ATTACHMENT—Act of July 12, 1842, P. L. 339—Question of fraud may be raised on appeal—Service of process. *Hutchkiss & Bro. v. Pinney*, 219.
5. CERTIORARI—Jurisdiction—Service of summons where borough is defendant. *Brennan & Ward v. Borough*, 64.
6. FOREIGN ATTACHMENT—Jurisdiction of justices in. *Sullivan & Co. v. Johnston & Co.*, 78.
7. JURISDICTION—Depositions—Account-render. *Wise v. Wright*, 152.
8. JUSTICE'S RECORD—Amendment of—*Certiorari*. A justice of the peace has no right to amend his record after it is removed to the Court of Common Pleas by *certiorari*. Therefore, a proposed amendment will be refused, which, if allowed, would show the cause of action to have been within his jurisdiction, and where the amendment would defeat an appeal and trial by jury. *Stambaugh v. Baker*, 79.
9. MAGISTRATE'S COURTS—Service of summons—Return—Computation of time—When summons should be returnable—Act of March 20, 1810, 5 Sm. Laws, 161—Void judgment—*Certiorari* after twenty days. *Goldman v. Teitlebaum*, 53.
10. POOR LAW—Order of removal signed by justice of the peace of removing district—Act of May 12, 1897, P. L. 63—Motion to quash—Jurisdictional defect. *Lathrop Poor District v. Poor District*, 324.
11. TOWNSHIP OFFICERS—Act of July 9, 1897, § 5. For election purposes and within the meaning of § 5 of the Act of July 9, 1897, P. L. 223, justices of the peace are borough or township officers. *Reed and Amour's Nominations*, 210.

LABOR UNIONS.

1. COERCION OF NON-UNION WORKMEN—Constitutional right of workmen to seek employment—Unlawful conspiracies—Acts of June 14, 1872, P. L. 1175, April 20, 1876, P. L. 45, and June 16, 1891, P. L. 300. *Erdmann v. Mitchell*, 701.
2. CONSPIRACY—Striking workmen—Inadequate remedy at law—Injunction. *York Manuf. Co. v. Oberdick*, 468.

LACHES.

1. BANKS AND BANKING—Promissory note—Demand—Endorser. *Harrisburg National Bank v. Moffitt*, 22.
2. DECEDENT'S ESTATE—Creditor's petition for account. *Baxter's Estate*, 97.
3. EJECTMENT—*Non pros*—Practice, C. P. *Philadelphia v. Cleary*, 752.
4. ELECTRIC RAILWAYS—Injunction by land-owner against occupation of turnpike—Street railways—Injunction—Variance in route. *Minnich v. Railway Co.*, 126.

LACHES (Continued).

5. **EQUITABLE RELIEF**—Demurrer—Gross laches as a defence—Cancellation of mortgage—Fraud. **Corbett's Estate**, 59.
6. **EXEMPTION**—Appraisement—Circumstances excusing delay in making claim. **Barrett v. Smith**, 531.
7. **GUARDIAN AND WARD**—Ratification of investment—Circumstances showing laches. **Mageffin's Estate**, 473.
8. **MOTION TO STRIKE OFF JUDGMENT** entered on justice's transcript five years after entry. **Hoyt & Sharpless v. Traction Co.**, 767.
9. **ORPHANS' COURT**—Adjudication—Petition for review. **Claghorn's Estate**, 91.
10. **PETITION FOR REVIEW OF ACCOUNT**—Unreasonable delay by petitioner in moving for examiner. **Unruh's Estate**, 293.
11. **PRACTICE, C. P.**—Promissory note—Affidavit of defence—Delay in filing same—Opening judgment. **Garman v. Charlier**, 38.
12. **PRACTICE, O. C.**—Decedent's estate—Right of remainderman to demand account from one who is both life-tenant and executor after lapse of twenty-six years from first account. **Heath's Estate**, 281.
13. **STATUTE OF LIMITATIONS**—Circumstances under which statute was held to run from time when party could have perfected his cause of action, and not from time he actually did perfect it—Principle applied to an action by county against poor district to recover payments made in support of inmate of state insane hospital. **Jefferson County v. Poor District**, 685.
14. **WILLS**—Election by widow to take against—Absence of fraud—Ignorance of law—Petition for review. **Boileau's Estate**, 213.

LANDLORD AND TENANT.

1. **DISTRESS**—Clause in lease. Remedy by distress for rent, provided by common law, may be enlarged by contract. **Dinner v. McAndrews**, 221.
2. **FIXTURES**—Machinery attached to building. **Wilkes-Barre Times v. Wilkes-Barre**, 691.
3. **LEASE**—Clause of amicable ejectment. **Reams v. Fye**, 242.
4. **LEASE**—Rent accruing after assignment—Set-off. Rent accruing after an assignment of the lease by the lessor accrues to the assignee of the lessor in his own right, and is not subject to abatement by way of set-off of an indebtedness due by the lessor to the lessee at the time of the assignment. **Kiefaber v. Armour & Co.**, 383.
5. **LEASE**—Unauthorized use of freehold—Waste—Injunction. **Rector Christ Church v. Bala Golf Club**, 666.
6. **REPLEVIN**—Pleading. **Lutz v. Brown**, 355.

LEASE.

1. **ASSIGNMENT OF LEASE**—After-accruing rent—Debt due from lessor to lessee—Set-off. **Kiefaber v. Armour & Co.**, 383.
2. **CONSTRUCTION OF**—Landlord and tenant—Distress. **Dinner v. McAndrews**, 221.
3. **EJECTMENT**—Clause of amicable ejectment. **Reams v. Fye**, 242.
4. **LEASE OF PERSONAL CHATTELS**—Bailment—Levy on bailee's interest for default in payment of instalment of rent—Construction of lease. **People's Supply Co. v. Goff**, 637.
5. **UNAUTHORIZED USE**—Waste—Injunction. **Rector Christ Church v. Bala Golf Club**, 666.
6. **UNEXPIRED LEASE**—Clause against assignment—New lease by executor for his own benefit—Surcharge. **Furlong's Estate**, 527.

LEGACIES.

1. **ABATEMENT**—Gifts in lieu of dower—Gifts over. A gift over on death of testator's widow, to whom an interest for life in the fund had been given by the will in lieu of dower, is subject to abatement on her decease. **Forepaugh's Estate**, 144.
2. **ANNUITIES**—Time when annuities were held to begin under peculiar terms of will. **Hoffman's Estate**, 669.
3. **ANNUITY DISTINGUISHED FROM PAYMENT** of annual sum—Apportionment. **Powers's Estate**, 165.
4. **ASSIGNMENT OF PART OF LEGACY**—Consideration—Jurisdiction, O. C. **Craig's Estate**, 755.
5. **CHARGED ON LAND**—Blending of real and personal estate. **Powell's Est.**, 46.
6. **CHARGED ON LAND BY IMPLICATION**. **Root's Estate**, 712.

LEGACIES (*Continued*).

7. COLLATERAL INHERITANCE TAX. Legacy given executor or trustee, in consideration of his acceptance of the trust, not being gratuitous, is not subject to tax. **Clark's Estate**, 378.
8. CONDITIONS—Lapse—Bequest of residuary estate—Construction of will. **Corr's Estate**, 740.
9. CONDITIONS—Performance—Contract of devise. **Kuhn's Estate**, 742.
10. GIFTS—Particular purpose—Ademption. **Johnson's Estate**, 233.
11. GIFTS FOR A PARTICULAR PURPOSE—Ademption—Construction. **Armstrong's Estate**, 670.
12. GIFTS TO CLASSES—Distribution *per stirpes*. Where a testatrix gave a share of her estate to her sister and the sons of a brother living at the time of her decease, *held*, that the latter designated a class and the distribution must be *per stirpes*. **Thompson's Estate**, 276.
13. GIFTS TO CLASSES—Mistake in number of class legatees—Construction. **Good's Estate**, 598.
14. GIFTS TO CLASSES—Vested and contingent interests—Definite and indefinite failure of issue. **Reed's Estate**, 162.
15. LAPSE—Legacy given to parent for care of invalid son. **Elmslie's Estate**, 397.
16. LIABILITY OF LEGATEES AND DISTRIBUTEES to refund after distribution. **Stough's Estate**, 547.
17. SPECIFIC AND DEMONSTRATIVE LEGACIES DISTINGUISHED. **Devine's Estate**, 273.
18. SPECIFIC OR DEMONSTRATIVE—Proceeds of sale of seat in stock exchange and life-policy. **Fleming's Estate**, 259.
19. TESTAMENTARY LAW—Gifts to classes—Lapse. **Harrison's Estate**, 45.
20. VESTED AND CONTINGENT INTERESTS—Life-tenant and remainderman. **Borda's Estate**, 117.
21. VESTED AND CONTINGENT INTERESTS. Where interests are limited, not simply in default of the execution of a power, but in default also of a failure of a prior estate, they are contingent. **Boyd's Estate**, 87.
22. VESTED AND CONTINGENT LEGACIES—Gift over, in default of exercise of power. **Evans's Estate**, 261.

LEGITIMACY.

1. MARRIAGE—Cohabitation—Reputation—Presumption—Sufficiency of evidence to rebut presumption—Declaration by claimant's mother that decedent had refused to marry her. **Homeyard's Estate**, 730. Compare **Bott's Estate**, 122.
2. MARRIAGE—Presumptions—Cohabitation and reputation. **Leaming's Est.**, 339.

LEX LOCI.

FOREIGN ATTACHMENT—Situs of debt. **Opdyke v. Iron Works**, 68.

LIBEL IN DIVORCE.

JURISDICTIONAL AVERMENTS—Libel must set forth the residence of the libellant, so that the jurisdiction may be apparent. **Logan v. Logan**, 738.

LIBEL AND SLANDER.

TESTAMENTARY LIBEL—The Orphans' Court has jurisdiction of claims for damages in testamentary libel. The rules of abatement of personal actions have no application to such case. Though the language used be not, *per se*, libellous, there being special averment of malice and injury, claimant has a right to be heard on proof. **Gallagher's Estate**, 733.

LIENS. SEE MUNICIPAL LIENS.

1. DECEDENT'S ESTATE—Creditors—Extending same. To extend the lien of debts on a decedent's estate there must be a proceeding at law. An award to creditors of a dividend while their liens are alive will not operate to revive them, nor entitle their holders to another dividend after the statutory period has ended. **Hall's Estate**, 215.
2. EMINENT DOMAIN—Rights of lien creditors—Application to equitable powers of court. **Mack v. Railroad Co.**, 102.
3. ENTRY ON INDEX—Lien of judgment is dependent upon its being properly indexed. **Rusterholts v. Brown**, 21.
4. LEGACIES CHARGED ON LAND—Blending of real and personal estate. **Powell's Estate**, 46.
5. LEGACIES CHARGED ON LAND—Implication. **Root's Estate**, 712.
6. TAXES—Cities of third class—Act of May 23, 1889, art. xv, § 11, P. L. 277. **Chester v. Sinex**, 620.

LIFE-ESTATES.

1. LIFE-TENANT AND REMAINDERMAN—Repairs—Decedent's estate—Finding of auditing judge—Executors and administrators. **Davenport's Estate**, 121.
2. WILLS—Construction—Estates for life—Spendthrift trusts. A bequest to executors in trust to pay interest to testator's son for life, without anticipation, neither principal nor income to be liable for debts, with a limitation to children or their issue on his decease, and, in default of children or issue him surviving, over, creates an active trust, and the son takes but a life-estate. **Hoffman's Estate**, 77.

LIFE-TENANTS.

COLLECTION OF INCOME—Interference by executor—Costs. A life-tenant is entitled to collect her income without interference by executor or remainderman. And an executor or remainderman who prevents a life-tenant from collecting her own income must pay all costs incurred by her in the enforcement of her right so to do. **Boyle's Estate**, 206.

LIQUOR LAW.

1. AGREEMENT TO TRANSFER LIQUOR LICENSE—Lease—Specific performance—Mutuality of remedy essential—Adequate remedy at law. **Efinger v. Hain**, 107.
2. COMMISSION ON LIQUOR LICENSE MONEY cannot be retained by treasurer for county. **Schuykill Haven Borough v. Schuykill County**, 484.
3. CRIMINAL LAW—Liquor license—Act of May 13, 1887, P. L. 108—Indictment—Sentence. **Com. v. Lukan**, 95.
4. DUTY OF COURT IN GRANTING RETAIL LIQUOR LICENSES—Fitness of applicant—Public necessity for saloon—Stipulation by applicant of known unfit character to transfer license to fit person as soon as granted. **Howell's Application**, 504.
5. LICENSE—Real estate—Enhancement in value. The proceeds of a sale of real estate by the executor under a power in a will are to be regarded as realty, although greatly enhanced by the fact that the property had a retail liquor license. **Maguire's Estate**, 238.
6. LIQUOR LICENSE—Sureties—Act of May 4, 1893, § 5, clause 9, P. L. 30. Manufacturers may become sureties on bonds for retailers. **Retail Liquor License Sureties**, 209.
7. PRESUMPTIONS ON APPLICATION for retail license. The fact that a place has been heretofore licensed is *prima facie* evidence of its necessity until the contrary is established by proof. The fitness of the applicant will be presumed from the application and certificate of twelve reputable electors, unless it is attacked by exceptions. **Howell's Application**, 504.
8. WHOLESALE LIQUOR LICENSE—Judicial discretion—When exercised in favor of application. **In re Hallman Wholesale Liquor License**, 447.

LUNATICS.

1. COSTS IN LUNACY are within discretion of court. **Com. v. O'Shea**, 580.
2. COUNSEL FEES. Where a proceeding in lunacy finds the respondent is of sound mind, he cannot be compelled to pay the relator's counsel fees. **Com. v. O'Shea**, 580.
3. WEAK-MINDED PERSON—Act of June 25, 1895, P. L. 300—Proper tribunal—Jurisdiction, C. P.—Injunction. **Pringle v. Bank of Wilkes-Barre**, 674.
4. WEAK-MINDED PERSONS. Act of June 25, 1895, P. L. 300, only applies where a person "shall become or be so weak in mind that he or she is utterly unable to take care of his or her property, and is therefore liable to dissipate or lose the same, and to become the victim of designing persons." It does not apply where the evidence shows that the condition of the person for whom protection is sought is one of *mental disease*, either mania or dementia, whether such unsoundness of mind has existed from the nativity of such person, or has been subsequently occasioned from any cause whatever; such cases fall within the Act of June, 13, 1836, P. L. 589, and the proceedings must be as therein provided. **In re Mary Wood**, 374.

MALICIOUS PROSECUTION.

EVIDENCE—Plaintiff's character—Presumptions—Burden of proof. **Glaze v. Hummel**, 110.

MANDAMUS.

1. BASIS OF APPLICATION. To lay the basis for the application for a writ of mandamus, the law requires that the applicant establish a specific legal right as well as the want of a specific legal remedy. **Brown v. McCroakey**, 583.
2. CORPORATIONS—Electric light companies—Charges for service—Discrimination. **Mercur v. Light, Heat and Power Co.**, 10.

MANDAMUS (*Continued*).

3. **DEMURRER TO PETITION.** A demurrer to a petition for a mandamus will not be sustained. The practice under the Act of June 8, 1893, § 11, P. L. 348, is to move to supersede or quash the writ. **Plymouth Twp. Commissioners v. Sweeney**, 617.

4. **GRANTING PEREMPTORY WRIT**—Act of June 8, 1893, P. L. 345. Where the facts are such that an alternative writ of mandamus should issue, and there is no reason to expect that the return of the writ will bring to the attention of the court any new facts, while the awarding of such writ will be productive of useless delay, prejudicial to the relator, and the views of counsel representing all parties have been heard by the court on the application for the writ, a peremptory writ of mandamus will be awarded under the Act of June 8, 1893, P. L. 345. **Com. v. Knorr**, 535.

5. **JURISDICTION OF COMMON PLEAS** over chairman of Republican county committee—Act of June 8, 1893, P. L. 345—Party rules—Construction. **Longenecker v. Barron**, 429.

6. **PROCEEDINGS AGAINST CLAIMANT OF DEFUNCT OFFICE.** Mandamus lies to compel a claimant of a defunct office to hand over the papers and property thereof to the incumbent of such office as supersedes it. A pretended intrusion into a defunct office will not warrant withholding township property and thereby forcing the officer who should legally execute its duties to resort to *quo warranto*. **Plymouth Twp. Commissioners v. Sweeney**, 617.

MARRIAGE.

1. **COHABITATION AND REPUTATION**—Decedent's estate. **Bott's Estate**, 122.

2. **CONFLICT OF LAWS.** A marriage of Russian Jewish immigrants valid in Russia, which is incestuous in Pennsylvania, will not be recognized by the United States courts sitting in Pennsylvania. **United States v. International Nav. Co.**, 480.

3. **LEGITIMACY**—Presumptions—Cohabitation and reputation. **Leaming's Estate**, 389.

4. **PRESUMPTIONS**—Legitimacy—Cohabitation and reputation—Sufficiency of evidence to rebut presumption—Declaration by claimant's mother that decedent had refused to marry her. **Homeyard's Estate**, 730. Compare **Bott's Estate**, 122.

MARRIED WOMEN.

1. **DYING INTESTATE**—Mortgage to pay debts. **Corbett's Estate**, 59.

2. **SEPARATE ESTATE**—Active trusts. A trust which imposes active duties on a trustee for the separate use for life of testator's daughter, remainder to her heirs, is an active trust and not merely a trust for her separate use, and continues after the death of her husband. **Boyd's Estate**, 87.

3. **SEPARATE ESTATE**—Joinder of husband in wife's bond and mortgage—His personal liability on the bond—Parol evidence. **Cooke v. Jones**, 283.

MECHANICS' CLAIMS. SEE **MECHANICS' LIENS.****MECHANICS' LIENS.**

1. **AMENDMENTS**—Surplusage—Acts of April 9, 1882, § 1, P. L. 402, and June 11, 1879, § 2, P. L. 122. **Harner v. Thomas**, 487.

2. **APPORTIONED CLAIM**—Rule for judgment for part of claim under Acts of May 31, 1893, P. L. 185, and July 15, 1897, P. L. 276. **Swenk, Benson & Co. v. Irwin**, 732.

3. **MOTION TO STRIKE OFF**—Practice, C. P. The court will not, on motion, strike off a mechanic's lien at the instance of a person claiming to be the owner, against the reputed owner, who is in possession. The actual ownership of a property cannot be determined in such a method. **Cutter & Bro. v. Magaw**, 146.

4. **MOTION TO STRIKE OFF**—Right to file lien for part performance of uncompleted contract. A claimant has the right to file a lien for part performance of an uncompleted entire contract. The question whether he has any right to recover by reason of his default in performance of the contract, or whether such default was necessitated by a breach on the part of the owner, is not one to be determined on a motion to strike off the claim, but by a jury on the trial of the case. **Harner v. Thomas**, 487.

5. **WHEN LIEN ATTACHES**—Successive liens—Act of April 14, 1855, P. L. 283. **Harner v. Thomas**, 487.

MEDICINE AND SURGERY.

OSTEOPATHY—Act of May 18, 1893, § 14, P. L. 94. **Com. v. Pierce**, 335; **Com. v. Thompson**, 634.

MILITARY CODE.

MAINTAINING ORGANIZATION—Right of members of military organization to resign when necessary to preserve its identity and prevent disruption—Act of April 28, 1899, P. L. 133. **Mihlbauer v. Infantry Battalion, State Fencibles**, 585.

MINES AND MINING.

WASHERY—Act of June 2, 1891. A washery is a coal mine or colliery within the meaning of the mine law of June 2, 1891, P. L. 176, and subject to its provisions. **Com. v. The Brookwood Coal Co.**, 258.

MINORS. SEE INFANTS.

MORTGAGES.

1. EMINENT DOMAIN—Apportioning damages to liens. **Mack v. Railroad Co.**, 102.

2. FORECLOSURE OF MORTGAGE—Decedent's estate—Agreement to settle—Validity of—Facts known to testatrix and unknown to legatee. **Edenborn's Estate**, 184.

3. OF DECEDENT'S REAL ESTATE TO PAY DEBTS—Right of heirs to invoke relief—Cancellation of mortgage—Fraud—Laches. **Corbett's Estate**, 59.

4. SUBROGATION OF INSURER OF MORTGAGEE—Right of action against mortgagor. **Utter v. Lewis**, 50.

MUNICIPAL CLAIMS. SEE MUNICIPAL LIENS.

MUNICIPAL CONTRACT. SEE MUNICIPAL LAW.

MUNICIPAL LAW.

1. BIDS FOR MUNICIPAL CONTRACTS—Compliance with requirements of advertisement—Refusal of official to schedule bids. **Shields v. Philadelphia; Prettyman v. Philadelphia**, 247.

2. BIDS FOR MUNICIPAL CONTRACTS—Secret explanatory letters from bidder to municipal officer—Duty of municipal officer—Act of May 23, 1874, P. L. 233. **Ryan v. Ashbridge**, 153.

3. BONDS TO MUNICIPALITIES for use of sub-contractors and materialmen—Principal and surety. Judgment in favor of city in action by principal contractor for contract price is *res inter alios acta* in action by sub-contractor or materialman against surety on bond. **Philadelphia v. Stewart and Trust Co.**, 395.

4. CITIES OF THIRD CLASS—Powers—Appropriation to entertain guests *ultra vires*—Act of May 23, 1889, P. L. 277, construed. **Com. v. Gingrich**, 747.

5. MUNICIPAL CONTRACT—Construction of clause of compulsory reference to chief of municipal bureau. **McManus v. Philadelphia**, 552.

6. MUNICIPAL CONTROL OF STREETS—Philadelphia—Bullitt Bill—Distinction between powers vested in councils and powers vested in the chief of the bureau of highways—Nuisance—Special injury to property-owners—Construction of railroad by municipal contractor. **Denison v. Ryan**, 495.

7. MUNICIPAL CONTROL OF STREETS—Right of railroads to cross streets without municipal consent—Act of April 4, 1868, P. L. 62, and Constitution, art. III, § 7. **Pittsburgh v. Railroad Co.**, 541.

8. ORDINANCE—Construction of ordinance of Philadelphia directing vacation of street and releasing benefits. **Vacation of Delaware Avenue, Ball Street and other Streets**, 753.

9. ORDINANCE—Construction of ordinance of Philadelphia of March 31, 1884 (Ordinances, 54), providing for the widening of Chestnut street. **Bornot v. Benschur**, 415.

MUNICIPAL LIENS.

1. ESTOPPEL—Payment to person designated by city, although assessment bills had not been issued to him. **City v. Gabell**, 526.

2. LIENS FOR MUNICIPAL TAXES—Allegheny and Philadelphia—When lien attaches—Acts of Feb. 3, 1824, P. L. 18, and Feb. 27, 1860, P. L. 85. **Woods v. Von Bunnhorst**, 610.

3. SEWERS—Assessment for cost of construction—Private sewer—Adoption of by city. **Construction of Sewer on Evans Avenue**, 633.

4. STREETS—Paving—Assessment—including costs of repairs—Estoppel. The cost of paving a city street may be imposed by local assessment on the property along its line, but the assessment should include the cost of paving only, and cannot include the cost of keeping the pavement in repair for a term of years and the expense of erecting and maintaining a plant where repairs can be made after the expiration of the term, and in

MUNICIPAL LIENS (*Continued*).

such case the whole assessment is bad. A property-holder objecting to the assessment, on the ground that it includes more than the cost of the pavement, is not estopped from so doing by the fact that he joined in the petition asking for the pavement, and that he made two payments on account of the assessment against him, nor by the fact that the city engineer made the assessment, of which he had notice, and on which he had an opportunity to be heard. He is, however, estopped from asserting the invalidity of the assessment, because of its having been made in accordance with the foot-front rule, when he suggested in his petition that the cost should be assessed against the property according to that rule. **Williamsport v. Hughes**, 607.

5. TAXES—Cities of third-class—Act of May 23, 1889, art. xv, § 11, P. L. 277. **Chester v. Sinex**, 620.

6. TIME OF FILING—Act of July 26, 1897, P. L. 420—Constitutionality—Construction. **Philadelphia v. Athow**, 187; S. C. 352.

NAME.

JUDGMENT—Entry on index—Lien of a judgment is dependent upon its being properly indexed. **Rusterholtz v. Brown**, 21.

NATIONAL GUARD.

CORPORATE RIGHTS AND CORPORATE IDENTITY—Battalion of State Fencibles—Maintaining organization—Right to resign—Military code—Act of April 23, 1899, P. L. 133. **Mihlbauer v. Infantry Battalion, State Fencibles**, 585.

NEGLIGENCE.

1. JOINT AND SEPARATE TORTS—Concert—Variance—Joint tort declared on, separate tort proved—Judgment against one defendant erroneous. **Harris v. Richardson**, 460.

2. TEST OF NEGLIGENCE IN MACHINERY, ETC.—Usage in business—Proof of. **Luck v. Com.**, 500.

NEGOTIABLE INSTRUMENTS.

1. BILLS AND NOTES—Certificates of deposit—Negotiability of—Federal courts not bound by decisions of state courts on matters of the general commercial law. **Bank of Saginaw v. Title and Trust Co.**, 74.

2. SCHOOL ORDERS—Negotiability of—Drawn in violation of law—Payment restrained. **Stephens v. School District**, 135.

NEW TRIAL.

1. IMPEACHING VERDICT—Juror cannot be called to testify that he misunderstood the evidence, and thus impeach the verdict. **Com. v. Zuern**, 26.

2. MISCONDUCT OF JUROR—Knowledge of facts not in evidence—Prejudice—Waiver—Statement by juror of what occurred in jury-room—Impeaching verdict. **Com. v. Reber**, 683.

3. PRACTICE, Q. S.—Acquittal improperly obtained no ground for new trial, but where costs have been imposed upon the prosecutor by the jury, a rule to set aside the verdict as to costs will be made absolute. **Com. v. Pfueger**, 717.

4. PRACTICE, Q. S.—Offer of incompetent testimony in hearing of jury—Adverse comment by district-attorney on failure of defendants to testify in their own behalf. **Com. v. Clark**, 641.

5. PRACTICE, Q. S.—When granted for evidence not offered, although previously known. **Com. v. Leonard**, 573.

6. READING IMPROPER NEWSPAPER ARTICLE BY JUROR—License of the press. **United States v. Ogden**, 1.

7. REASONS—New matter—Introduction of new matter, not covered by reasons filed, permitted under special circumstances. **Com. v. Reber**, 683.

NEWSPAPER.

NEW TRIAL—Juror—Reading of improper newspaper article—License of the press. **United States v. Ogden**, 1.

NOTARIES PUBLIC.

FOREIGN NOTARIES. In the absence of proof to the contrary, it will be presumed that a notary of another state has power to take an affidavit, and the certificate of a notary public under his notarial seal is *prima facie* evidence that the person who uses it and signs the certificate is a duly commissioned notary. **Stroheim & Romann v. Pack & Sons Manuf. Co.**, 668.

NOTICE.

1. BAILMENT—Change of place and form of deposit—Constructive notice to bailor—**Fraud. Lukens's Estate, 294.**
2. GUARDIAN AND WARD—Notice by guardian to ward of claim for maintenance unnecessary. **Bouland's Estate, 235.**
3. TO PROPERTY-OWNERS—Road law. **Road in Winslow and Washington Townships, 750.**
4. TO PROPERTY-OWNERS and supervisors of proceedings to view and lay out a public road. **Road in Rush Township, 650.**

NUISANCE.

1. CONTINUING TRESPASS—Duty of owner of city lot to remove surface water—Rights of adjoining lot-owners—Injunction. **Ricker v. Brewing Co., 406.**
2. DEPOSIT OF GARBAGE ON ONE'S LAND—Rights of neighboring property-owners—Circumstances under which equity will enjoin continuance of such deposit. **Sitzman v. Helkel, 673.**
3. SPECIAL INJURY TO PROPERTY-OWNER. An abutting property-owner, threatened with a special injury, due to interference with access, may maintain a bill in equity to prevent the laying of a railroad track. **Denison v. Ryan, 495.**

ORDINANCES.

1. CONSTRUCTION—Ordinance of Philadelphia of March 31, 1884 (Ordinances, 54), providing for the widening of Chestnut street. **Bornet v. Bonschur, 415.**
2. CONSTRUCTION OF ORDINANCE of Philadelphia directing vacation of street and releasing benefits. **Vacation of Delaware Avenue, Ball Street and other Streets, 753.**

OSTEOPATHY.

- PRACTICE OF MEDICINE OR SURGERY—Act of May 18, 1893, P. L. 94. **Com. v. Pierce, 335; Com. v. Thompson, 634.**

OWELTY. SEE PARTITION.

PARENT AND CHILD.

1. DUTY OF FATHER TO SUPPORT CHILDREN—Circumstances under which he is relieved from such duty. **Com. v. Eley, 647.**
2. RESULTING TRUST—Purchase by father of land in name of son—Advancement—Presumptions. **Cooper v. Duval, 475.**
3. WAGES OF MINOR CHILD—Debts of parent—Set-off. **Beresford v. Coal Company, 243.**

PARTIES.

1. APPEAL FROM REGISTER—Practice, O. C. **Atcheson's Estate, 297.**
2. JOINT AND SEPARATE TORTS—Variance—Judgment. When a plaintiff, in an action of trespass to recover damages for negligence, declares for a joint tort by two defendants, and the evidence, instead of showing a joint tort by both defendants, shows only a separate tort by one, a verdict and judgment against such defendant for the separate tort will not be sustained. If no concert is shown, and therefore no joint tort, and the case is one of separate tort or torts upon the part of one or of several defendants, the action is not sustained, and there should be no verdict against any one. **Harris v. Richardson, 460.**
3. ROAD LAW—Act of May 16, 1891, P. L. 75—Appeals. **Ebe's Appeal, 367.**

PARTITION.

1. AFTER-DISCOVERED WILL—Jurisdiction, O. C.—Proceedings in partition will not be set aside by an after-discovered will when the heirs take the same estate under the will they would have taken had decedent died intestate. Under Act of April 13, 1840, § 4, P. L. 320, O. C. has jurisdiction. **Lusch's Estate, 224.**
2. APPOINTMENT OF MASTER. **Lyons v. Lyons, 594.**
3. DECEDENT'S ESTATE—Costs. **Salin's Estate, 97.**
4. JURISDICTION, O. C.—Act of May 17, 1866, P. L. 1096—Owerty—Recognizance—Set-off. **Deckard's Estate, 377.**
5. RIGHT THERETO—How affected by direction to sell—Smallness of petitioner's interest—Petition may not be filed within year of death. **Keim's Estate, 252.**
6. SETTING ASIDE RETURN—Right of lien creditor to file exceptions. **Horne's Estate, 226.**

PARTNERSHIP.

1. CONTRIBUTIONS—Interest. Contributions by partners to the capital of the firm do not carry interest, in the absence of express agreement to that effect. **Brenner v. Carter**, 457.

2. DECEDENT'S ESTATE—Firm guarantee. A claim against a decedent will not be allowed when it is not for materials furnished to a firm for the debts of which he had, as alleged, made himself liable as a general partner, but on an agreement in writing, expressed in the first person, but signed by one of the partners in the firm name, guaranteeing payment by a third party for materials furnished to the latter, there being no proof that such agreement was made in the regular course of business of the firm, or that it was subsequently ratified by the partner sought to be charged. **McCullough's Estate**, 353.

3. DECEDENT'S ESTATE—Principal and income—Burden of proving whether particular payment by surviving partners to deceased partner's executors was upon principal or income. **Borda's Estate**, 117.

4. JURISDICTION, O. C.—The Orphans' Court has no jurisdiction over the settlement of accounts of a partnership of which decedent was a member—Practice where decedent's books show a debt due the partnership of which he was a member. **Meyer's Est.**, 445.

5. LIMITED PARTNERSHIPS—Act of June 2, 1874, P. L. 271—Contracts. A contract signed by the secretary of a limited partnership association, under the Act of June 2, 1874, P. L. 271, and afterwards endorsed by two managers "within contract approved," is executed by two managers of the association within the meaning of the Act. **Philadelphia Base-Ball Club v. Lajole**, 309.

6. LOANS BY LIQUIDATING PARTNER—Interest. Interest earned by loans made to strangers by a liquidating partner from the firm's money is an asset of the firm, and to be so treated in adjusting the accounts between the members of the firm. **Brenner v. Carter**, 457.

7. LOSSES—Contribution thereto. An agreement to share the profits of a business, nothing being said about the losses, *prima facie*, implies an agreement to share the losses also in the same proportion as the profits, unless the capital of one partner is staked against the skill of the other, when the partner supplying the capital must sustain the whole loss. But, in the absence of evidence showing that the case falls within the exception, the partner who did not contribute the capital is not relieved, unless there is an agreement to that effect, from his obligation to share the losses. **Brenner v. Carter**, 457.

8. SURVIVING PARTNER—Custody of books—Evidence of partnership. **Stief's Estate**, 446.

PARTY RULES.

CONSTRUCTION—Mandamus—Act of June 8, 1893, P. L. 345. **Longenecker v. Barron**, 429.

PARTY-WALL.

MAIN WALL built within the lines of its own lot—Foundation wall extending into adjoining lot. A party-wall is a wall erected on the line between two adjoining estates, belonging to different persons, for the use of both estates. The character of the wall is not altered because of the fact that the main wall of a building erected on one of two lots does not project over the division line, but instead is eight inches distant therefrom, and constructed wholly within the lines of its own lot, when such wall is built upon a foundation which extends into the adjoining lot for the distance of eleven inches from the lowest point to the surface of the ground. **Lukens v. Lasher**, 385.

PAVING. SEE MUNICIPAL LIENS.

ASSESSMENT—Including cost of repairs—Municipal liens—Estoppel. **Williamsport v. Hughes**, 607.

PEDDLERS.

BOROUGH—Peddlers' and hawkers' licenses—Butcher not subject to. **Com. v. Roenick**, 51.

PERPETUITIES.

1. REMOTENESS—Married woman—Separate estate—Active trusts—Contingent interests. **Boyd's Estate**, 87.

2. WILL—Construction—Issue. A gift by testator to his brother in trust for his own use for life, etc., and at his death in trust for testator's two nieces for life (they being in life at testator's death) and the life of the survivor, and upon the death of the survivor in further trust for the children and issue of his two nieces, to be paid to them when they attained full age, etc., with a gift over in case either niece should die without leaving children or issue surviving, does not violate the rule against perpetuities. **Horner's Estate**, 729.

PHILADELPHIA.

MUNICIPAL CONTROL OF STREETS—Bullitt Bill—Distinction between powers vested in councils and powers vested in the chief of the bureau of highways—Nuisance—Special injury to property-owners—Construction of railroad by municipal contractor. **Denison v. Ryan**, 495.

PHYSICIANS.

PRACTICE OF MEDICINE OR SURGERY—Osteopathy—Act of May 18, 1893, P. L. 94. **Com. v. Pierce**, 385; **Com. v. Thompson**, 634.

PLEADING.

1. AFFIDAVIT OF DEFENCE—Defective averments of sale, warranty and measure of damages. **Howland Pulp Co. v. Jessup & Moore Paper Co.**, 623.

2. BURDEN OF PROOF—Credit claimed by accountant. **Douglass's Estate**, 479.

3. EQUITY—Bill in equity—Demurrer. A bill must state the names of all parties by whom an injury complained of is done, and is multifarious when it joins defendants who have not conspired together or joined in committing the wrong complained of. **Anderson v. Coal and Nav. Co.**, 14.

4. EQUITY RULES—Special replication—Practice, O. C. **Stoker's Estate**, 375.

5. JOINT AND SEPARATE TORTS—Concert—Variance—Judgment—Joint tort declared on, separate tort proved—Judgment against one defendant erroneous. **Harris v. Richardson**, 460.

6. PLEA IN ABATEMENT. A plea in abatement is the correct way to raise the question of jurisdiction. The practice is unchanged by the Act of 1887. **Sheets v. Railway Co.**, 373.

7. PLEA IN ABATEMENT—Practice, C. P.—Rules of court—General issue—Illegal entry of same by prothonotary—Abandonment of same. **Daly v. Iselin**, 193.

8. PRACTICE, Q. S.—Circumstances under which indictment will be quashed for defects in complaint. **Com. v. Roland**, 410.

9. REPLEVIN—Landlord and tenant—Demurrer to plea to avowry. **Lutz v. Brown**, 355.

10. STATEMENT—Sufficient to sustain judgment for want of affidavit of defence—"Justly due." **Steelton Planing Mill Co. v. Kunkel**, 289.

11. STATEMENT SHOULD BE DEFINITE and show amount of demand, otherwise rule for judgment will be discharged. **Creighton v. Safe Co.**, 600.

POLITICAL PARTIES.

1. EXPULSION OF MEMBERS OF ORGANIZATION—Notice to persons proceeded against essential—Nominations—Circumstances under which Democratic state central committee was held illegally constituted. **Coray's Nomination**, 716.

2. NAMES—Election law—Filing affidavit with prothonotary and certificate with secretary of Commonwealth—Acts of July 9, 1897, P. L. 22, and June 10, 1898, P. L. 419. **Barnes's and Heydrick's Nominations**, 681.

POOR LAW.

1. PRACTICE, J. P.—Order of removal signed by justice of the peace of removing district—Act of May 12, 1897, P. L. 63—Motion to quash. **Lathrop Poor District v. Poor District**, 324.

2. STATE INSANE HOSPITAL—Liability of poor district for support of inmates of state insane hospital placed there by county, under Act of April 20, 1869, P. L. 78. **Jefferson County v. Poor District**, 685.

POWERS.

1. EXECUTION—Under what circumstances a will is to be regarded as in execution of a power. **Lisle's Estate**, 713.

2. EXERCISE OF POWER BY WILL. An intention on the part of the donee of a power to exceed the same is not to be presumed, and where the donee exercises the power by a will which also disposes of the donee's own estate, what could not be done by virtue of the power is to be attributed to the estate as to which the authority was unrestricted. **Van Syckel's Estate**, 744.

3. GIFTS OVER, in default of exercise of power. **Evans's Estate**, 281.

4. WILL—Discretion to sell real estate given to executors—Petition for order to sell for payment of debts—Protecting unsecured creditors. **Lukens's Estate**, 118.

PRACTICE, C. P. SEE ABATEMENT; AFFIDAVIT OF DEFENCE; AMENDMENT; JURY AND JUROR; NEW TRIAL.

1. **ABSCONDING TRUSTEE**—Compromise—Decree authorizing compromise **refused**. **Reiff's Estate**, 450.
2. **APPEAL FROM JUDGMENT** of justice of the peace — Payment of costs — **Act of June 24, 1885, P. L. 159. Waters v. Carr**, 93; **Com. v. Swick**, 35; **De Noon Bros. v. Shew**, 200.
3. **APPEAL FROM REPORT OF VIEWERS** entered on docket sufficient, although no formal paper filed—**Act of April 9, 1856, § 3, P. L. 288. Brown v. Railway Co.**, 696.
4. **APPORTIONED MECHANIC'S CLAIM**—Rule for judgment for portion of claim under Acts of May 31, 1893, P. L. 185, and July 15, 1897, P. L. 276. **Swenk, Benson & Co. v. Irwin**, 732.
5. **BAILMENT** — Repossessing leased chattel and recovery of rent — Concurrent remedies. **Sheasley v. Condrin**, 56.
6. **BOOKS**—Production of—**Act of Feb. 27, 1798, 3 Sm. Laws, 803, in force—Practice on return of rule considered. Langcliff Coal Co. v. Coal Co.**, 645.
7. **CAPIAS**—Contractual obligation—**Act of July 12, 1842, P. L. 839—Discharge on common bail. Pavona v. Di Jorio**, 83.
8. **CORPORATIONS**—**Act of April 22, 1874, P. L. 109—Service of summons—Presumptions. American Steel and Wire Co. v. Coal and Coke Co.**, 285.
9. **CORPORATIONS**—Railroad—Freight agent—Serving summons on—Setting same aside. **Zablocki v. Railroad Co.**, 54.
10. **COSTS**—Verification of bill in Philadelphia must be by parties to the record or their attorneys. **McGerrin v. Wanamaker**, 725.
11. **DIVORCE**—Libel. A libel in divorce should set forth the residence of the libellant so that the jurisdiction may be apparent. **Logan v. Logan**, 738.
12. **EJECTMENT**—*Non pros*—Laches. **Philadelphia v. Cleary**, 752.
13. **EXECUTION**—Issuing *fi. fa.* where prothonotary failed to sign assessment of damages. **People's Supply Co. v. Goff**, 637.
14. **FOREIGN ATTACHMENT**—Foreign corporation having agent in the state. **Diemer v. Hotel Co.**, 57.
15. **FOREIGN CORPORATIONS** — Service on — Corporation, whose president lives in Pennsylvania, but which has no office and does no business here, not subject to jurisdiction here. **Cleveland Builders' Supply Co. v. Cement Co.**, 491.
16. **FOREIGN INSURANCE COMPANY**—Service of process—Acts of April 4, 1873, § 2, P. L. 20, and June 20, 1883, P. L. 131. **McCann v. Insurance Co.**, 560.
17. **FOREIGN NOTARIES**—Presumption in favor of authority to take affidavits—Denial of such authority essential in affidavit of defence. **Stroheim & Romann v. Pack & Sons Manuf. Co.**, 668.
18. **GUARDIAN AND WARD**—Suit against guardian for supplies furnished ward—Personal liability—Sufficiency of affidavit. **Hale v. Capp**, 285.
19. **LUNACY**—Counsel fees—Costs. **Com. v. O'Shea**, 580.
20. **MANDAMUS**—Granting peremptory writ—**Act of June 8, 1893, P. L. 345. Com. v. Knorr**, 535.
21. **MANDAMUS**—Proceedings against claimant of defunct office—Demurrer to petition—**Act of June 8, 1893, § 11, P. L. 348. Plymouth Township Commissioners v. Sweeney**, 617.
22. **MECHANIC'S CLAIM**—Motion to strike off—Title cannot be so determined. **Cutter & Bro. v. Magaw**, 146.
23. **PRIVILEGE OF WITNESS** from service of process while attending court—Setting aside premature service. **Ferree & Co. v. Pierce**, 746.
24. **PROMISSORY NOTE**—Affidavit of defence—Delay in filing same—Opening judgment. **Garman v. Charlier**, 38.
25. "**QUARTO DIE POST**"—Judgment for want of appearance. The allowance of the *dies gratia* or *quarto die post* is in force in Pennsylvania. **Vollmer and Register v. Marble Co.**, 434.
26. **REMOVAL OF CAUSES**—Time for filing petition—Time cannot be extended by agreement or order—United States Statute of Aug. 13, 1888, ch. 886. **Muir v. Insurance Co.**, 577.
27. **REVIVAL OF JUDGMENT** by amicable agreement — Sufficient identification. **Washington German B. and L. Ass'n v. Krauter**, 764.
28. **SCIRE FACIAS**—Entering judgment for want of appearance. **Leasing Building Ass'n v. Lentz**, 257.
29. **SEAL OF COURT** issuing writ essential to validity. **Road in Lower Town-mensing Twp.**, 581.

PRACTICE, C. P. (Continued).

30. SECURITY FOR COSTS—Non-residence of the defendant will not relieve a non-resident plaintiff from entering security for costs. **Muir v. Lewis**, 639; *contra*, **Broat v. Knight**, 140.
31. SECURITY FOR COSTS—Non-resident executor, plaintiff. **McPherson v. Blair**, 492.
32. SERVICE OF PROCESS on corporation. **Samuel v. Iron and Steel Manuf. Co.**, 43.
33. SHERIFF'S RETURN—Amending same. **Whitman v. Higby**, 39.
34. SHERIFF'S RETURN—Conclusiveness. **Daly v. Iselin**, 193.
35. SUFFICIENCY OF COMPLAINT or information before justice—Insufficiency cured by trial—Transcript—Review by appellate court. **Luck v. Com.**, 500.
36. SURETYSHIP—What amounts to—Affidavit of defence. **Main Belting Co. v. Fewkes**, 6.
37. TAKING DEPOSITIONS outside of state—Act of June 25, 1895, P. L. 279. **Carter v. Blair**, 749.
38. TESTAMENTARY LIBEL—Orphans' Court has jurisdiction. **Gallagher's Estate**, 733.
39. TRANSCRIPT OF JUSTICE—Presumption of regularity—Motion to strike off—Control of record in C. P.—Laches. **Hoyt & Sharpless v. Traction Co.**, 767.

PRACTICE, EQUITY.

1. COSTS WITHIN THE discretion of the court. **Kennedy v. Heebner**, 569.
2. DEMURRER TO BILL on the ground of multifariousness. **Anderson v. Coal and Nav. Co.**, 14.
3. EQUITABLE RELIEF—Demurrer—Gross laches as a defence. **Corbett's Est.**, 59.
4. FOREIGN RECEIVER—Stockholder's liability—Equitable jurisdiction—Demurrer—Adequate remedy at law. **Hale v. Allinson**, 18.
5. MULTIFARIOUSNESS OF BILL—Bill in equity against vendee for deficiency—Assumption of mortgage debt by purchaser. **Thompson v. Lodge**, 602.
6. PARTITION—Appointment of master. **Lyons v. Lyons**, 594.
7. RESPONSIVE AVERMENTS IN ANSWER. A responsive averment in the answer is to be taken as verity at the trial until overcome by proof. **Cooper v. Duval**, 475.
8. SERVICE OF PROCESS—Decoying non-resident into jurisdiction. **Trattner v. Forman & Barsh**, 568.

PRACTICE, J. P.

1. APPEAL FROM JUDGMENT OF JUSTICE OF THE PEACE—Payment of costs—Act of June 24, 1885. The Act of June 24, 1885, P. L. 159, is mandatory and requires that, before an appeal is taken from the judgment of a justice of the peace, the appellant pay all the costs that have accrued prior to the time of the taking of the appeal. **De Noon Bros. v. Shew**, 200. But see **Waters v. Carr**, 33; **Com. v. Swick**, 35.
2. APPEALS—Allowing further time to perfect appeal—Suit for wages—Ball—Act of April 20, 1876, P. L. 43. **Houck v. Whitaker**, 244.
3. APPEALS—Payment of costs *nunc pro tunc*—Misleading advice of justice—Filing affidavit—Act of July 14, 1897, P. L. 271. **Roush v. Meyer**, 392.
4. ATTACHMENT—Act of July 12, 1842, P. L. 539—Question of fraud may be raised on appeal—Service of process. **Hotchkiss & Bro. v. Pinney**, 219.
5. COSTS—Appeal—Precedent payment of costs by administrator. **Com. v. Swick**, 35.
6. EVIDENCE—Sufficiency of—Sworn statement—Docket entries. **Wolf v. Sailer**, 601.
7. FILING APPEAL *NUNC PRO TUNC*—Misleading suggestion by justice. **Gable v. Bear**, 630.
8. JOINT ACTIONS—Act of April 6, 1830, P. L. 277. **Davis v. Sidle**, 435.
9. JUDGMENT OF JUSTICE must be based on evidence adduced before him and not facts ascertained by personal investigation in absence of parties. **Muir v. Baker**, 700.
10. NON-SUIT—Adjournments and continuances. A justice of the peace cannot enter a judgment of non-suit after an appearance by the plaintiff. The granting of an adjournment or continuance by the justice is a matter within his discretion, and is not a valid reason for reversing the judgment. **McCahan v. Reeder**, 298.
11. POOR LAW—Order of removal signed by justice of the peace of removing district—Act of May 12, 1897, P. L. 63—Motion to quash. **Lathrop Poor District v. Poor District**, 324.
12. PRELIMINARY HEARING BEFORE A MAGISTRATE—Right of accused to testify—Act of May 23, 1887, P. L. 158. **Brown v. McCroskey**, 583.

PRACTICE, J. P. (*Continued*).

13. RECORD—Defects and omissions—Judgment—Presumptions in favor of regularity—*Certiorari*. **Hershey & Bro. v. Mylin**, 551.
14. RECORD—Docket entries—Presumptions in favor of regularity. **Wolf v. Sailer**, 601.
15. SUMMARY CONVICTION—Information—Evidence—Record—Appeal. **Com. v. Manager of House of Correction**, 371.
16. SUMMARY CONVICTION—Sufficiency of complaint—Transcript of justice—Review by appellate court—Insufficiency of complaint cured by trial. **Luck v. Com.**, 500.
17. SUMMONS—Contents. In cities where the streets are named and the houses numbered, the summons should contain the name of the street and the number of the alderman's office. **Griffith v. Hendler**, 682.
18. SUNDAY OBSERVANCE—Sufficiency of complaint—Jurisdictional averments—Act of April 22, 1791, 3 Sm. Laws, 177. **Com. v. McFadden**, 718.
19. TRANSCRIPT CANNOT BE AMENDED by adding thereto affidavit not entered at large on docket. **Lehman v. Winters**, 147.
20. TRANSCRIPT OF JUSTICE—Presumption of regularity—Motion to strike off—Control of record in Common Pleas—Laches. **Hoyt & Sharpless v. Traction Co.**, 767.

PRACTICE, O. C.

1. ACCOUNTANT'S COMMISSIONS. See *Commissions*.
2. ACCOUNTS—Alleged error in a prior account must be corrected by a review of such account and not in a subsequent account. **Sinkler's Estate**, 399.
3. ACCOUNTS—Credit claimed by accountant—Onus of proof. **Douglass's Est.**, 479.
4. ACCOUNTS—Filing account dispensed with, no necessity appearing to warrant expense. **Powers's Estate**, 165.
5. ACCOUNTS. In accounting in the Orphans' Court, administration must not be blended with distribution nor principal with income, but a separate account must be given of each. **Hart's Estate**, 421.
6. ACCOUNTS—Inaccuracies alleged by accountant—Petition for review. Burden of proof in such case rests on accountant to move for reference, and in case of unreasonable delay, court will enter a rule on him, on motion of distributee, to do so by day certain or dismiss his petition. **Unruh's Estate**, 298.
7. ACCOUNTS. It is improper to include therein real estate and ground rents at appraised value. **File's Estate**, 356.
8. ACCOUNTS—Petition for account refused where personal estate insufficient to pay funeral expenses and lien of debts had expired. **Stoker's Estate**, 375.
9. ACCOUNTS—Right of remainderman to demand account from one who is both life-tenant and executor, after lapse of 28 years from first account. **Heath's Est.**, 281.
10. ADJUDICATION—Petition for review. **Claghorn's Estate**, 91.
11. ALTERING ADJUDICATION—Award to foreign guardian without advising auditing judge of non-residence—Payment by executor. **Buck's Estate**, 330.
12. APPEAL FROM REGISTER—Addition of parties. A contestant in an appeal from the register who avers in his petition that he is the only party interested in the estate, but subsequently admits that there are other parties, cannot make them parties to the suit upon his petition. The practice in such case is for such parties to file their own petition, asking leave to join in the appeal, or else the contestant should bring them into court by a citation to show cause why the appeal should not be sustained and the will set aside. **Atcheson's Estate**, 297.
13. APPEAL FROM REGISTER—Defective petition—Amendments. **McKeown's Estate**, 131.
14. ASSIGNMENT OF LEGACY—The Orphans' Court has jurisdiction to pass upon the validity of the assignment of a part of a legacy, upon petition for a citation, without regard to the reasons for its non-production at the audit. **Craig's Estate**, 755.
15. ATTACHMENT FOR DISOBEDIENCE of order to pay—Guardian and ward—Gross negligence of guardian as ground for attachment. **Wallis's Estate**, 548.
16. COSTS—Allowance of claimant's counsel fee out of estate—Escheat. **Kelly's Estate**, 297.
17. COSTS—Executor or remainderman who prevents life-tenant from collecting income, must pay all costs. **Boyle's Estate**, 206.
18. DISTRIBUTION—Account thereof when required—Awarding distribution subject to payments already made. **Fleming's Estate**, 259.
19. ELECTION TO TAKE REAL ESTATE as realty—Petition for confirmation of election and delivery of title papers—Claim of executor for allowance for care of real estate. **Buck's Estate**, 331.
20. EQUITY RULES—Special replication. **Stoker's Estate**, 375.

PRACTICE, O. C. (*Continued*).

21. EXCEPTIONS—Clerical error of auditing judge may be corrected without exception. **Hart's Estate**, 421.
22. EXCEPTIONS TO ADJUDICATION—Party having no interest in estate has no right to except. **Adams's Estate**, 296.
23. EXECUTORS—Liability to account—Absence of assets. **Stuart's Estate**, 180.
24. EXECUTORS—Right of attaching creditor of legatee to cite executor to account. **Raeder's Estate**, 282.
25. FACTS FOUND BY AUDITING JUDGE—Correction of clerical errors. **Fleming's Estate**, 259.
26. FINDING OF AUDITING JUDGE has precisely the effect of the verdict of a jury. **Davenport's Estate**, 121.
27. FINDING OF FACTS BY AUDITING JUDGE—Disallowance of claim. **Lukens's Estate**, 294.
28. IMPOUNDING ASSETS—Assignment of share of residue by legatee without consideration and to defeat creditors—Rights of attaching creditor to have share retained by accountant until final determination of the attachment execution. **Douglass's Estate**, 479.
29. LIABILITY OF LEGATEES AND DISTRIBUTEES to refund after distribution. **Stough's Estate**, 547. See **Githens's Estate**, 375.
30. MORTGAGING DECEDENT'S REAL ESTATE. **Corbett's Estate**, 59.
31. PARTITION—Exceptions to return—Right of lien creditors and administrators to file same. **Horne's Estate**, 226.
32. PARTNERSHIP—Practice where decedent's books show a debt due a partnership of which he was a member—Jurisdiction, O. C. **Meyer's Estate**, 445.
33. PAYMENT OF MORE THAN PROPER SHARE to distributee—Review. **Githens's Estate**, 375. See **Stough's Estate**, 547.
34. PETITION TO RECOMMIT ADJUDICATION TO AUDITING JUDGE. **Douglass's Estate**, 478.
35. POSTPONING DISTRIBUTION pending litigation and impounding assets to meet claims of creditors who elect to proceed in another jurisdiction—Circumstances under which the court refused to make postponement. **Rorke's Estate**, 754.
36. PROBATE OF WILL—Contract—Family settlement—*Caveat*. **Lloyd's Estate**, 207.
37. PUTTING NON-RESIDENT CLAIMANT UPON TERMS. The Orphans' Court may, in its discretion, refuse to entertain a claim by a non-resident against a decedent, unless the claimant agrees to pay such sum as the court may find due by him to the executors. **Gallagher's Estate**, 733.
38. REFUNDING BOND — Surety — Releasing counter indemnity. **Hoffman's Estate**, 758.
39. REVIEW — Distribution — Fund under control of court — Act of Oct. 13, 1840. **Collins's Estate**, 249.
40. REVIEW—Onus of showing error in adjudication is on petitioner. **Brooke's Estate**, 447.
41. REVIEW — Petition for — Laches — Recovering back payments made under improper award due to executor's laches. **Nathans's Estate**, 205.
42. REVIEW — Petition for — Necessary precision. Petition for review, even when presented promptly, must point out with exact precision the errors requiring correction. **Van Syckel's Estate**, 744.
43. SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN — Act of June 11, 1879, P. L. 142—Appointment of guardian. **Scott's Estate**, 213.
44. WILL—Probate—Original will probated outside of decedent's domicile—Duty of register in such case—Original and ancillary letters. **McKeown's Estate**, 382.

PRACTICE, Q. S. SEE ROAD LAW.

1. ACCESSORY AFTER FACT—Indictment—Larceny—Receiving stolen property—Substantive offence—Act of March 31, 1860, P. L. 427. **Com. v. O'Neill**, 227.
2. GRAND JURY—Return of—Setting aside—Surplusage. **Bridge in Centerville Borough**, 636.
3. INDICTMENT—When quashed—Defective complaint—Circumstances under which the court will consider the whole record, and not merely the face of the indictment. **Com. v. Roland**, 410.
4. INDICTMENT OF JUDGES AND INSPECTORS of election division for failure to return vouchers—Binding instructions. **Com. v. Brangan**, 760.
5. KILLING BIRDS — Jurisdiction, J. P. — Statutes — Criminal law — Indictment—Insectivorous birds. **Com. v. Boettcher**, 101.
6. MILE ADULTERATION—Prosecution must be at place where sale was completed. **Com. v. Weaver**, 533.

PRACTICE, Q. S. (*Continued*).

7. MODIFICATION OF SENTENCE after expiration of term. **Com. v. Gillespie**, 398. Compare **Com. v. Leonard**, 578.
8. MOTION IN ARREST OF JUDGMENT. The constitutionality of an Act of Assembly upon which the indictment is based is properly raised by a motion in arrest of judgment. **Com. v. Hudusko**, 230.
9. NEW TRIAL—Acquittal improperly obtained—Costs. **Com. v. Pfleger**, 717.
10. NEW TRIAL—Offer of incompetent testimony in hearing of jury—Adverse comment by district-attorney on failure of defendants to testify in their own behalf. **Com. v. Clark**, 641.
11. NEW TRIAL—When granted for evidence not offered, although previously known. **Com. v. Leonard**, 578.
12. POOR LAW—Motion to quash order of removal may be made for jurisdictional defect at any stage of proceedings. **Lathrop Poor District v. Poor District**, 324.
13. REVOCATION OR ALTERATION OF SENTENCE. The court can alter or revoke a sentence, and order a new trial after sentence, at any time during the term at which the sentence was passed. **Com. v. Leonard**, 578. Compare **Com. v. Gillespie**, 398.
14. SEAL OF COURT issuing writ essential to validity. **Road in Lower Towa-mensing Twp.**, 581.

PRESUMPTIONS.

1. BAILMENTS—Presumption is against negligence by bailee in case of accidental loss. **Baizley's Estate**, 398.
2. FOREIGN NOTARIES—Presumption arises that foreign notary has authority to take affidavits when a notary's certificate is properly attached. **Stroheim & Romann v. Pack & Sons Manuf. Co.**, 668.
3. GUARDIAN AND WARD—Maintenance of ward by guardian. **Boulard's Estate**, 235.
4. INSANITY—Sanity presumed. **Reynolds v. Order of Heptasophs**, 528.
5. ISSUE *d. v. n.*—Burden of proof—Presumption in favor of validity of will. **Wright's Estate**, 183. Compare **Brady v. McEnroe**, 115.
6. LIQUOR LAW—Public necessity and fitness of applicant—When presumed. **Howell's Application**, 504.
7. MALICIOUS PROSECUTION—Evidence—Plaintiff's character—Burden of proof. **Glace v. Hummel**, 110.
8. MARRIAGE—Legitimacy—Cohabitation and reputation. **Leaming's Est.**, 389.
9. MARRIAGE—Legitimacy—Cohabitation and reputation—Sufficiency of evidence to rebut presumption—Declaration by claimant's mother that decedent had refused to marry her. **Homeyard's Estate**, 730. Compare **Bott's Estate**, 122.
10. PARENT AND CHILD—Resulting trust—Purchase by father of land in name of son—Advancement. **Cooper v. Duval**, 475.
11. POWERS—An intention on the part of the donee of a power to exceed the same is not to be presumed. **Van Syckel's Estate**, 744.
12. PRESUMPTION IN FAVOR OF REGULARITY—Magistrate's docket. **Wolf v. Sailer**, 601.
13. PRESUMPTION IN FAVOR OF REGULARITY—Transcript of justice—Motion to strike off. **Hoyt & Sharpless v. Traction Co.**, 767.
14. PRESUMPTIONS IN FAVOR OF REGULARITY of magistrate's judgments. **Hershey & Bro. v. Mylin**, 551.
15. PRESUMPTION OF REGULARITY—Applied where grand jury taxed prosecutor with costs under Act of May 25, 1897, P. L. 89, but failed to find value of goods alleged to have been stolen. **Com. v. Ruch**, 648.
16. PRESUMPTION THAT PUBLIC OFFICIAL PERFORMED HIS DUTY—Election law—Indictment of judge and inspectors of election—Binding instructions. **Com. v. Brangan**, 760.
17. REGISTRATION OF FOREIGN CORPORATIONS—Act of April 22, 1874, P. L. 108—Service of summons. **American Steel and Wire Co. v. Coal and Coke Co.**, 285.
18. ROAD LAW—Presumption that viewers did their duty. **Road in Mt. Joy Twp.**, 490.
19. ROAD LAW—Report of viewers—Presumption in favor of regularity. **Vacation of Eastburn Road**, 585.

PRINCIPAL AND INCOME.

1. AGREEMENT TO APPROPRIATE INCOME to repay loan made to principal. **Hart's Estate**, 421.
2. AGREEMENT TO PAY A SUM CERTAIN TO WIDOW in lieu of dower. A widow who makes an agreement with the other parties in interest, which is confirmed by the court and by which a sum certain is to be paid to her each year in lieu of her dower and every interest in the estate, is not a volunteer but a purchaser; and if the income arising from the property set aside for the purpose under the agreement is insufficient to pay the amount agreed upon, the deficit is to be paid out of the principal. **Campbell's Est.**, 497.
3. DAMAGES TO FREEHOLD are to be treated as principal. **Witzel's Estate**, 462.
4. STOCK DIVIDENDS—Rule of apportionment. **Merrell's Estate**, 319.
5. STOCK AND SECURITIES—Options—Proceeds of sale at auction—Increase in value—Express power to sell and reinvest given by will. **Kemble's Estate**, 320.

PRINCIPAL AND SURETY.

1. BONDS TO MUNICIPALITIES FOR USE OF SUB-CONTRACTORS and materialmen—Judgment in favor of city in action by principal contractor for contract price *res inter alios acta* in action by sub-contractor or materialman against surety on bond—Release of surety by subsequent alteration of contract. **Philadelphia v. Stewart and Trust Co.**, 395.
2. LIQUOR LAW—Act of May 4, 1898, § 5, clause 9, P. L. 30—Rules of court. Manufacturers may be sureties. **Retail Liquor License Sureties**, 209.
3. REFUNDING BOND—Releasing counter-indemnity—Practice, O. C. **Hoffman's Estate**, 758.
4. RESCISSION OF MINOR'S CONTRACT on attaining age no defence to surety. **Fritz v. Moyer and Hallman**, 763.
5. SURETY COMPANY—Assignability of bond. **Citizens' Trust and Surety Co. v. Howell**, 65.
6. SURETYSHIP—What amounts to—Affidavit of defence. **Main Belting Co. v. Fowkes**, 6.

PROBATE. SEE WILLS.

PROMISSORY NOTES.

1. BANKS AND BANKING—Liability of endorser—Demand note—Reasonable time—Release of. **Harrisburg Nat. Bank v. Moffitt**, 22.
2. BILLS AND NOTES—Certificates of deposit—Negotiability of—Federal courts not bound by decisions of state courts on matters of the general commercial law. **Bank of Saginaw v. Title and Trust Co.**, 74.
3. PRACTICE, C. P.—Affidavit of defence—Delay in filing same—Opening judgment. **Garman v. Charlier**, 38.

PROVINCE OF COURT AND JURY.

- ELECTION LAW—Indictment of judge and inspectors of general election—Directing verdict for defendant. **Comm. v. Brangan**, 760.

PUBLIC OFFICERS.

1. ASSESSORS—Duties of—Election law—Act of May 16, 1895, P. L. 75. **Assessor's List of Voters**, 624.
2. BOARD OF EDUCATION—Power to suspend teachers—Vaccination. **Lyndall v. Board of Education**, 665.
3. BOROUGH AUDITORS—Powers of—Finality of report. **Seanlan's Appeal**, 448.
4. COUNTY COMMISSIONERS OF PHILADELPHIA—Power to make contracts with assessors for payment of services—Bills on which warrants were procured as evidence of contracts. **Seymour v. Philadelphia**, 439.
5. COUNTY TREASURER—Commission on liquor license money cannot be retained for use of county. **Schuylkill Haven Borough v. Schuylkill County**, 494.
6. DIRECTOR OF PUBLIC WORKS—Compliance with requirements of advertisement—Refusal of official to schedule bids. **Shields v. Philadelphia; Prettyman v. Philadelphia**, 247.
7. DIRECTOR OF PUBLIC WORKS—Secret explanatory letters from bidder to municipal officer—Duty of municipal officer—Act of May 23, 1874, P. L. 233. **Ryan v. Ashbridge**, 153.
8. INSURANCE COMMISSIONER—Deputy—Service of process—Sheriff's return—Acts of April 4, 1873, § 2, P. L. 21, and June 20, 1883, P. L. 134. **McCann v. Insurance Co.**, 560.
9. JUSTICES OF THE PEACE—Township or borough officers—Act of July 9, 1897, § 5, P. L. 223. **Reed and Amour's Nominations**, 210.

PUBLIC OFFICERS (*Continued*).

10. PRACTICE, C. P.—Sheriff's return—Amending same. **Whitman v. Higby**, 39.
11. PUBLIC SCHOOLS—Examination and appointment of teachers—School directors—County superintendent—Act of May 8, 1884, § 23, P. L. 622, and § 41, P. L. 628. **Stroup's Petition**, 301.
12. REGISTER OF WILLS—Appeals from—Addition of parties—Practice, O. C. **Atcheson's Estate**, 297.
13. REGISTER OF WILLS—Conclusiveness of his decree. **Freas's Estate**, 333.
14. REGISTER OF WILLS—Revocation of ancillary letters—Demand for production of original will. The petition for revocation of ancillary letters or demand for production of the original will should be made before the register in the first instance, and not the Orphans' Court. **McKeown's Estate**, 332.
15. SHERIFF'S RETURN—Conclusiveness. **Daly v. Iselin**, 193.
16. TOWN CLERK—Refusal to serve. Under the Act of April 15, 1884, P. L. 552, if a person elected as town clerk refuses to serve before the beginning of his term, the court has authority to appoint a person to fill the vacancy. **Appointment of Town Clerk for Nether Providence Twp.**, 631.

PURE FOOD LAW.

MILK ADULTERATION—Prosecution must be at place where sale was completed. **Com. v. Weaver**, 533.

QUO WARRANTO.

1. CORPORATE ELECTIONS—Legality of election of officers. **O'Shea v. Flannery**, 356.
2. DISTINGUISHED FROM MANDAMUS—Proceedings against claimant of defunct office. **Plymouth Twp. Commissioners v. Sweeney**, 617.

RAILROADS.

1. CORPORATIONS—Freight agent—Serving summons on—Setting same aside—Practice, C. P. **Zablocki v. Railroad Co.**, 54.
2. ELECTRIC RAILWAYS—Equity—Constitutional law—Just compensation—Servitudes. **Lancaster and Susquehanna Turnpike Road Co. v. Columbia Telephone Co.**, 322.
3. ELECTRIC RAILWAYS—Injunction by land-owner against occupation of turnpike—Street railways—Laches—Variance in route. **Minnich v. Railway Co.**, 126.
4. EMINENT DOMAIN—Title acquired thereby in roadbed by railroad—Construction of overhead crossing by property-owner whose land abuts on both sides of railroad—Act of April 18, 1838, P. L. 464—Injunction. **Speese v. Railroad Co.**, 515.
5. GRADE CROSSINGS—Permitting same—Injunction. **Abington Twp. v. Railway Co.**, 719.
6. GRADE CROSSINGS—Streets—Boroughs. **Norristown Boro. v. Railway Co.**, 539.
7. INCREASE OF INDEBTEDNESS—Bond issue—Outstanding stock—Status of paid-up stock of corporation held in its own treasury—Acts of April 4, 1868, § 8, P. L. 62, May 7, 1867, § 3, P. L. 94, and Feb. 9, 1901, P. L. 3. **Com. v. Railroad Co.**, 363.
8. MUNICIPAL AUTHORITIES—Streets—Right of railroads to cross streets without municipal consent—Act of April 4, 1868, P. L. 62, and Constitution, art. III, § 7. **Pittsburgh v. Railroad Co.**, 541.
9. STREET RAILWAYS—Application for charter—Extensions filed by another company before action—Acts of May 14, 1889, P. L. 211, and June 7, 1901, P. L. 514. **Rock Glen Street Ry. Co.**, 592.

RAPE.

STATUTORY RAPE—Chastity of girl—Evidence—Reasonable doubt of defendant's guilt. **Com. v. Leonard**, 573.

REAL ESTATE.

1. DECEDENT'S ESTATE—Life-tenant—Collection of income—Interference by executor—Costs. **Boyle's Estate**, 206.
2. DISCRETION TO SELL REAL ESTATE GIVEN TO EXECUTORS—Wills—Petition for order to sell for payment of debts—Protecting unsecured creditors. **Lukens's Est.**, 118.
3. EMINENT DOMAIN—Rights of lien creditors—Mortgage—Ejectment. **Mack v. Railroad Co.**, 102.
4. LIEN OF DECEDENT'S DEBTS—Extending same. **Hall's Estate**, 215.
5. LIENS FOR MUNICIPAL TAXES—Allegheny and Philadelphia—When lien attaches—Acts of Feb. 3, 1824, P. L. 18, and Feb. 27, 1880, P. L. 85. **Woods v. Von Bunnhorst**, 640.

REAL ESTATE (Continued).

6. LIENS—Legacies charged on land—See Legacies.
7. LIQUOR LICENSE—Enhancement in value. The proceeds of a sale of real estate by the executor under a power in a will are to be regarded as realty, although greatly enhanced by the fact that the property had a retail liquor license. *Maguire's Est.*, 238.
8. MACHINERY OF TENANT—Taxation—Newspaper plant. *Wilkes-Barre Times v. Wilkes-Barre*, 691.
9. MECHANIC'S CLAIM—Motion to strike off—Title cannot be so determined. *Cutter & Bro. v. Magaw*, 146.
10. NOTICE TO PROPERTY-OWNERS—Road law. *Road in Winslow and Washington Twp.*, 750.
11. PAVING—Assessment—Including cost of repairs—Municipal liens—Estoppel. *Williamsport v. Hughes*, 607.
12. PRACTICE, O. C.—As to mortgage of decedent's real estate. *Corbett's Estate*, 59.
13. RENT SERVICE—Rent charge—Decedent's estate—Holding real estate for rise in value—When real estate should be sold—Covenant to pay proportionate part of principal at death of each life-tenant. *Phillips's Estate*, 99.
14. ROAD LAW. See Road Law.
15. SURFACE WATER—City lots—Duty of owner to remove surface water—Rights of adjoining lot-owners—Injunction. *Rieker v. Brewing Co.*, 406.
16. TAXATION—Liability of Commonwealth for city and county taxes on escheated real estate. *Philadelphia v. Linton*, 329.
17. TAXES—False return by collector—Sale of land to enforce collection of tax—Enjoining same. *Harris v. Davis*, 7.
18. TAXES—Lien—Cities of third class—Act of May 23, 1889, art. xv, § 11, P. L. 277. *Chester v. Sinex*, 620.

RECEIPTS.

BAILMENT DISTINGUISHED FROM DUE BILL—Receipt construed. *Lukens's Estate*, 294.

RECEIVERS.

1. FOREIGN RECEIVER—Stockholder's liability—Equitable jurisdiction—Demurrer—Adequate remedy at law. *Hale v. Allinson*, 13.
2. TIME OF VESTING OF CREDITOR'S RIGHTS—Claims arising after appointment of receiver have no right to participate in distribution. *Com. v. State Ins. Co.*, 339.

RECORD.

1. JUSTICE'S RECORD—Amendment of—*Certiorari*. *Stambaugh v. Baker*, 79.
2. PRESUMPTION IN FAVOR OF REGULARITY—Magistrates' judgments—Defects of record—*Certiorari*. *Hershey & Bro. v. Mylin*, 551; *Wolf v. Sailer*, 601; *Hoyt v. Traction Co.*, 767.
3. QUASHING INDICTMENT—Defective complaint before justice of the peace. *Com. v. Roland*, 410.

RECORDING ACTS. SEE DEEDS.**REMAINDERS. SEE LEGACIES; VESTED AND CONTINGENT INTERESTS; WILLS.****REMOVAL OF CAUSES.**

TIME OF FILING PETITION—Time cannot be extended by agreement or order—Construction of United States statute, Aug. 13, 1888, ch. 366, 25 Stat. at Large, 433. Although a petition for removal of a cause from the state to the Federal court, under the Act of Aug. 13, 1888, ch. 366, 25 Stat. at Large, 433, avers that the time to appear and plead, before which time the statute requires the application to be made, has not arrived, still, if the record shows that the time has elapsed, the court will notice it and refuse the application; and when such an order has been made and bond filed, if, before the record is removed, the court's attention is called to the fact, the order will be rescinded. In an action of *assumpsit* the petition for removal must be filed before the time has elapsed within which the defendant is required to file his affidavit of defence. Under this Federal statute, neither an agreement of parties nor an order of the state court, extending the time to file an affidavit of defence in actions of *assumpsit*, or to plead in actions of trespass, beyond the time fixed by statute or rule of court, will operate to extend the time to file a petition for removal. *Muir v. Insurance Co.*, 577.

RENT SERVICE.

COVENANT TO PAY PROPORTIONATE AMOUNT OF PRINCIPAL. The rent reserved as part of the consideration of a sale is not changed from a rent service to a rent charge by the covenant of the purchaser to pay a proportionate part of the principal at the death of each of the *cestui que trusts* for life. **Phillips's Estate**, 89.

REPLEVIN.

1. **LANDLORD AND TENANT—Pleading.** **Lutz v. Brown**, 355.
2. **SERVICE OF WRIT.** Service of writ of replevin in the office of a police magistrate, where goods sought to be replevied are held as evidence in a cause, is invalid and will be set aside. **Jones v. Pavey**, 498.
3. **WHEN IT LIES.** Goods in the possession of a police officer, by whom they have been taken from a person charged with their larceny, cannot be replevied. **Jones v. Pavey**, 498.

RES ADJUDICATA.

1. **PRINCIPAL AND SURETY—**Municipal bonds for use of sub-contractors and materialmen. Judgment in favor of city in action by principal contractor for contract price is *res inter alios acta* in action by sub-contractor or materialman against surety on bond. **Philadelphia v. Stewart and Trust Co.**, 395.
2. **REGISTER OF WILLS—**Conclusiveness of his decree. **Fream's Estate**, 383.
3. **TRUST AND TRUSTEES—**Surcharge. A surviving trustee obtained a rule to open a judgment against the trust property, entered on a bond accompanying a mortgage executed by the trustees, alleging in his petition that the judgment had been paid. An issue was then framed to determine whether the obligors had obtained the money fraudulently, and whether the mortgagee was affected with notice of the fraud at the time of its loan upon the mortgage. This issue was found in favor of the mortgagee. Thereafter, the Orphans' Court was petitioned to enjoin the mortgagee from proceeding upon the judgment, and to decree that it was either null or had been paid. The auditor to whom the matter was referred reported that the trustees had made no misapplication of the proceeds, and that the sum of \$2000 which remained due upon the mortgage had been used for the benefit of the estate of the *cestui que trust*. This report was, on appeal, sustained by the Supreme Court. One of the trustees died, and the surviving trustee filed two accounts, one in the name of the joint trustees, and a final account in his own name as surviving trustee. Held, that, notwithstanding the determination of the above questions, they were reviewable on the audit of the accounts filed by the surviving trustee, and, it not appearing in the account what became of the \$2000, the trustees should be surcharged with the amount paid in settlement of the judgment upon the bond which accompanied the mortgage, and with the amount of the credits claimed in the account for sums expended in the litigation over it and the costs of the audit. **Appleton's Estate**, 441.

REVIEW.

1. **ONUS OF SHOWING ERROR** in adjudication is on petitioner. **Brooke's Est.**, 447.
2. **PAYMENT OF MORE THAN PROPER SHARE** to distributee. **Githens's Est.**, 375. Compare **Stough's Estate**, 547.
3. **PETITION FOR REVIEW—**Necessary precision. Petition for review, even when presented promptly, must point out with exact precision the errors requiring correction. **Van Syckel's Estate**, 744.
4. **PETITION FOR REVIEW—**Practice, O. C.—Inaccuracies alleged by accountant. Burden of proof in such case rests on accountant to move for reference, and in case of unreasonable delay, court will enter a rule on him, on motion of distributee, to do so by day certain, or dismiss petition. **Unruh's Estate**, 238.
5. **PETITION FOR ORDER UPON DISTRIBUTEES** to refund after distribution. **Stough's Estate**, 547.
6. **PRACTICE, O. C.—**Alleged error in a prior account must be corrected by a review of such account, and not in a subsequent account. **Sinkler's Estate**, 399.
7. **PRACTICE, O. C.—**Distribution—Fund under control of court—Act of Oct. 13, 1840, P. L. (1841) 1. **Collins's Estate**, 249.

RIPARIAN RIGHTS.

PITTSBURGH WHARVES—Control by city. Under the Acts of April 15, 1851, P. L. 708, and April 19, 1858, P. L. 386, the city of Pittsburgh has control and authority over the Monongahela wharf, located between high and low water-lines of the Monongahela river. **Pittsburgh v. Railroad Co.**, 541.

ROAD LAW.

1. ABANDONING ROAD or vacating or changing location—Report of viewers—Written notice—Acts of June 13, 1836, May 2, 1899, and April 3, 1899. **Public Road in Potter and Tioga Counties**, 456.
2. AMENDMENT TO APPEAL. The court will permit a defective appeal, taken in good faith and within the proper time, to be amended. **Brown v. Railway Co.**, 693.
3. APPEAL FROM REPORT OF VIEWERS entered on docket sufficient, although no formal paper filed—Act of April 9, 1856, § 3, P. L. 288. **Brown v. Railway Co.**, 693.
4. BOROUGH—Act of May 16, 1891, P. L. 75—Costs of appeal. Though the Act of May 16, 1891, P. L. 75, relating to street improvements in boroughs, does not specifically or separately provide for the costs of appeal thereunder, a fair consideration of its terms makes the borough properly chargeable with such costs. **Ebe's Appeal**, 370.
5. CHANGE OF GRADE—When injury accrues—Act of May 24, 1878, P. L. 129—Power of boroughs to grade sidewalks. **McCurdy v. Linesville Borough**, 546.
6. CONSTITUTIONAL LAW—Liability of townships for opening roads. The opening of a public road in a township does not constitute a taking of private property for public use within the meaning of art. XVI, § 8, of the Pennsylvania Constitution; hence, property-owner has such remedy only as is provided by statute. **Richards v. Conneaut Twp.**, 274.
7. ERIE COUNTY—Appeal from road commissioners—Acts of March 26, 1846, P. L. 175, May 14, 1874, P. L. 164, May 8, 1876, P. L. 145, June 13, 1874, P. L. 283, and June 18, 1896, P. L. 199. **Richards v. Conneaut Twp.**, 274.
8. GRAND JURY—Return of—Setting aside—Surplusage. **Bridge in Centerville Borough**, 636.
9. LUZERNE COUNTY—"Due process of law"—Acts of June 13, 1836, P. L. 551, and Feb. 24, 1845, P. L. 52—Viewers—Appointment—Record—Evidence of—Substituted viewer. **Road in Ashley Borough and Hanover Twp.**, 288.
10. NOTICE TO LAND-OWNER—Defects cured by confirmation—Setting report aside—Recommitment. **Road in Winslow and Washington Twp.**, 750.
11. NOTICE TO PROPERTY-OWNERS AND SUPERVISORS—Posting of notice insufficient compliance with Acts of March 26, 1873, P. L. 402, May 14, 1874, P. L. 164, and May 2, 1899, P. L. 176—Place of meeting of viewers must appear in the notice—Omission from report that personal notice was given owners and occupants and that viewers endeavored to procure releases, held fatal. **Road in Rush Twp.**, 650.
12. OPENING STREETS, ETC.—Publication of ordinance—When necessary—Acts of May 22, 1895, P. L. 106, and May 16, 1891, § 9, P. L. 75. **Ursinus College v. Collegeville Borough**, 642.
13. PHILADELPHIA—Act of April 21, 1858, P. L. 336, not repealed. **Vacation of Toronto and other Streets**, 349.
14. PRIVATE ROAD—Act of June 13, 1836, § 11, P. L. 556—Jurisdictional averments in petition—Location of termini—Personal notice to land-owner must appear of record. **Road in Lower Towamensing Twp.**, 581.
15. REPORT OF VIEWERS—Setting aside report for failure to note improvement therein. **Road in Mt. Joy Twp.**, 490.
16. VACATION OF ROADS—Power of borough authorities to vacate—Effect of adopting plan omitting road. **Lansdowne Borough v. Hoffman**, 600.
17. VACATION OF ROADS—Report of viewers—Exceptions—Presumption of regularity—Jurisdiction, Q. S., Montgomery county. **Vacation of Eastburn Road**, 595.
18. VACATION OF STREETS—Assessment of benefits—Construction of ordinance providing that, in consideration of a property-owner making no claim for damages, the city released all claims for benefits—Practice—Findings of fact by viewers in such case. **Vacation of Delaware Avenue, Ball Street and other Streets**, 753.
19. VACATION OF STREETS—Boroughs—Act of May 16, 1891, P. L. 75—Appeals under. **Ebe's Appeal**, 367.
20. VACATION OF STREETS—Philadelphia. The Act of April 21, 1858, P. L. 336, is not repealed by the Act of May 16, 1891, P. L. 75. **Vacation of Toronto and other Streets**, 349.
21. VACATION OF STREETS—Striking from plan in pursuance of ordinance—**Wetherill v. Pennsylvania R. R.**, 195 Pa. 156, construed. **Bornot v. Bonschur**, 415.
22. VIEWERS—Appointment—Record—Evidence of—Substituted viewer. **Road in Ashley Borough and Hanover Twp.**, 288.
23. WIDENING OF CHESTNUT STREET—Construction of ordinances *in pari materia*—Ordinances of March 31, 1884 (Ordinances, 54), and March 21, 1881 (Ordinances, 51). **Bornot v. Bonschur**, 415.

RULE IN SHELLEY'S CASE.

ISSUE—Executed and executory trusts. Where a testator, by apt words, creates a trust, requiring active duties, for the life of his son, an implied limitation to his issue (*i. e.*, the heirs of his body) does not have the effect, under the rule in *Shelley's Case* and the Act of 1855, of enlarging the life-estate into a fee, when there intervenes between the life-estate and the ultimate remainder a contingent limitation to the son's children and their issue, the preservation of which requires the continuation of the trust. *Osborne's Estate*, 191.

RULES OF COURT.

1. **COSTS**—Verifications of bill in Philadelphia. *McGerrin v. Wanamaker*, 725.
2. **EQUITY RULES**—Partition—Appointment of master. *Lyons v. Lyons*, 594.
3. **EQUITY RULES**—Special replication—Practice, O. C. *Stoker's Estate*, 375.
4. **FILING APPRAISEMENT**—Montgomery county rule, requiring sheriff to file appraisement before the return-day of writ, inapplicable where a valid claim is made on or after the return-day. *Barrett v. Smith*, 581.
5. **JUDGMENT FOR WANT OF APPEARANCE**—*Scire facias*. *Lessing Building Ass'n v. Lentz*, 257.
6. **LIQUOR LICENSE**—Sureties—Act of May 4, 1893, § 5, clause 2, P. L. 30—Rule of court inconsistent therewith is void. *Retail Liquor License Sureties*, 209.
7. **PRACTICE, C. P.**—General issue—Illegal entry of same by prothonotary—Plea in abatement—Abandonment of same. *Daly v. Iselin*, 193.
8. **REASONS FOR NEW TRIAL**—New matter—Practice. *Com. v. Reber*; 683.
9. **ROAD LAW**—Construction of rule No. 170, Quarter Sessions of Centre county, in regard to notice of meeting of viewers. *Road in Rush Twp.*, 650.
10. **SECURITY FOR COSTS**—Non-resident plaintiffs. *Breat v. Knight*, 140; *McPherson v. Blair*, 492; *Muir v. Lewis*, 639.
11. **VERIFICATION OF BILL IN PHILADELPHIA**. *McGerrin v. Wanamaker*, 725.

SALES.

SALE OF CHATTELS complete on delivery—Milk adulteration—Prosecution. *Com. v. Weaver*, 583.

SANITARY AGENT.

APPOINTMENT OF—Act of April 11, 1899, P. L. 38. *West Wheatfield Township's Sanitary Agent*, 76.

SCHOOL LAW.

1. **APPOINTMENT OF SANITARY AGENT**—Act of April 11, 1899, P. L. 38. *West Wheatfield Township's Sanitary Agent*, 76.
2. **COMPULSORY ATTENDANCE LAW** of July 11, 1901, P. L. 658. *Compulsory Attendance Law*, 576.
3. **DIRECTORS**—Removal—Proper accommodations for scholars—Sanitary conditions and playgrounds—Acts of June 6, 1893, P. L. 330, and June 6, 1893, P. L. 339. *Petition of Certain Taxables of York Twp. School District*, 687.
4. **INCREASE OF INDEBTEDNESS OF SCHOOL DISTRICT**—Constitutional limitation—Injunction. *Dolan v. Lackawanna Twp. School District*, 694.
5. **POWER OF BOARD OF EDUCATION TO SUSPEND TEACHERS**—Vaccination. *Lyn-dall v. Board of Public Education*, 665.
6. **PUBLIC SCHOOLS**—Appointment of teachers—Duty of county superintendent to examine—Validity of superintendent's rules—Power of school directors to select teachers—Act of May 8, 1854, § 23, par. 5, P. L. 622, and section 41, P. L. 626. *Stroup's Petition*, 301.
7. **SCHOOL ORDERS**—Negotiability of—Drawn in violation of law—Payment restrained. *Stephens v. School District*, 135.
8. **TERM OF OFFICE OF SCHOOL DIRECTORS**. Under the Act of April 22, 1863, P. L. 523, the term of office of school directors commences on the first Monday of June in each and every year. The members of the outgoing board do not hold over until their successors qualify. *Stanciliff & Co. v. School District*, 697.

SCIRE FACIAS.

ENTERING JUDGMENT FOR WANT OF APPEARANCE. *Lessing Building Ass'n v. Lentz*, 257.

SEARCH WARRANT.

SECRET SERVICE—Agents of—When they may make a search or arrest without warrant. *United States v. Fuellhart*, 194.

SECRET SERVICE.

AGENTS OF—When they may make a search or arrest without warrant. *United States v. Fuelhart*, 194.

SEPARATE USE.

WILL—Separate use-trust held to be created by language of will, notwithstanding the fact that construction would vest in daughters an equitable estate, under their father's will, in certain real estate in which they already held a legal estate under their mother's will, and that testator knew of their interest therein under the latter will. *Samson's Estate*, 690.

SERVICE OF PROCESS.

1. **ATTACHMENT**—Acts of July 12, 1842, P. L. 339, and March 17, 1869, P. L. 8—Construction—Practice—Question of fraud—Appeal. *Hotchkiss & Bro. v. Pinney*, 219.
2. **CORPORATIONS**—Railroad—Freight agent—Serving summons on—Setting same aside—Practice, C. P. *Zablocki v. Railroad Co.*, 54.
3. **CORPORATIONS REGISTERED UNDER ACT OF 1874**, P. L. 108—Presumptions—Practice, C. P. *American Steel and Wire Co. v. Coal and Coke Co.*, 285.
4. **CORPORATIONS**—Service on director—Act of March 17, 1856, P. L. 388—Sufficiency of return—Transcript of justice. *Hoyt & Sharpless v. Traction Co.*, 767.
5. **CORPORATIONS**—Service on president at residence in Philadelphia—Headquarters in Philadelphia—Mills in Lebanon. *Samuel v. Iron and Steel Manuf. Co.*, 43.
6. **DIVORCE**—Personal service on respondent in state other than that from which process issued. *Comm. v. Stevens*, 652.
7. **EXECUTORS AND ADMINISTRATORS**—Service of process on resident sureties of non-resident executors—Act of March 27, 1854, P. L. 214. *McCahan v. Reeder*, 298.
8. **FOREIGN CORPORATIONS**—Corporation whose president lives in Pennsylvania, but which does no business in the state, not subject to jurisdiction. *Cleveland Builders' Supply Co. v. Cement Co.*, 491.
9. **FOREIGN INSURANCE COMPANY**—Acts of April 4, 1873, § 2, P. L. 20, and June 20, 1883, P. L. 184. *McCann v. Insurance Co.*, 560.
10. **JUSTICE OF THE PEACE**—*Certiorari*—Jurisdiction—Service of summons where borough is defendant. *Brennan & Ward v. Borough*, 64.
11. **MAGISTRATES' COURTS**—Service of summons—Return—Computation of time—When summons should be returnable. *Goldman v. Teitlebaum*, 53.
12. **PRIVILEGE OF WITNESS**—Premature service of process set aside. *Ferree & Co. v. Pierce*, 746.
13. **REFLEVIN**—Service of writ of replevin in the office of a police magistrate where goods sought to be replevied are held as evidence in a cause is invalid and will be set aside. *Jones v. Pavey*, 498.
14. **SHERIFF'S RETURN**—Practice, C. P.—Conclusiveness. *Daly v. Iselin*, 193.
15. **SUMMONS**—Contents—Practice, J. P. *Griffith v. Hendler*, 632.

SERVITUDES.

1. **ADDITIONAL SERVITUDE**. The construction of a telephone line along the side of a turnpike, the middle or side of which is occupied by a trolley railway, imposes an additional servitude upon the turnpike and trolley companies, and will be enjoined until just compensation to them is made or secured. *Lancaster and Susquehanna Turnpike Road Co. v. Columbia Telephone Co.*, 322.
2. **SURFACE WATER**—City lots—Duty of owner to remove surface water—Rights of adjoining lot-owners—Injunction. *Rieker v. Brewing Co.*, 406.

SET-OFF.

1. **DEBTS MUST BE IN SAME RIGHT**—Indebtedness of distributee to accountant. An administrator cannot set off against an award by an adjudication, duly confirmed, a debt due himself in his own right from the person to whom the award was made. *Gallen's Estate*, 262.
2. **LANDLORD AND TENANT**—Assignment of lease—After-accruing rent—Debt due from lessor to lessee. *Kiesfaber v. Armour & Co.*, 338.
3. **RECOGNIZANCE**. A recognizance in the Orphans' Court is in the nature of a judgment, and a claim cannot be set off against it which is not attached to it nor to the consideration on which it rests. *Deckard's Estate*, 377.

SEWERS. SEE MUNICIPAL LIENS.

ASSESSMENT FOR COST OF CONSTRUCTION—Private sewer—Adoption by the city—Municipal liens. *Griffith v. Hendler*, 632.

SHERIFF. SEE PUBLIC OFFICERS.

SHERIFF'S RETURN. SEE PRACTICE, C. P.

SHERIFF'S SALES.

1. ADVERTISEMENT—Acts of March 27, 1824, P. L. 119, and June 16, 1836, P. L. 755. **Haas v. Fisher**, 150.
2. RECEIPT OF LIEN CREDITOR on account of purchase-money—Sheriff's right to refuse to accept same—Act of April 20, 1846, P. L. 411. **Com. v. Knorr**, 585.

SIDEWALKS.

- BOROUGH AUTHORITIES—Power to grade—Act of May 24, 1878, P. L. 129. **McCurdy v. Linesville Borough**, 546.

SPECIFIC PERFORMANCE.

1. CONSTRUCTION OF WRITTEN AGREEMENTS—Inconsistent clauses—Circumstances under which specific performance will be refused. **Sanson v. Steel Co.**, 726.
2. CONTRACTS FOR PERSONAL SERVICES—Mutuality—**Lumley v. Wagner**. To bring a case within the principle of **Lumley v. Wagner**, 1 De G., M. & G. 604 (1852), as construed and restricted by recent decisions, the defendant's services must be unique, extraordinary and of such a character as to render it impossible to replace him, so that his breach of contract would result in irreparable loss to the plaintiff. **Philadelphia Base-Ball Club v. Lajoie**, 309.
3. LEASE—Agreement to transfer liquor license—Mutuality of remedy essential—Adequate remedy at law. **Effinger v. Hain**, 107.
4. PLEDGE OF STOCK BY ASSIGNOR—Rights of pledgee—Standing of assignee for benefit of creditors to contest. **Hetsel v. Sawyer**, 29.

SPENDTHRIFT TRUSTS.

- WILL—Construction—Estates for life. **Hoffman's Estate**, 77.

STATUTE OF LIMITATIONS.

1. COLLATERAL INHERITANCE TAX—Clear residue—Debts barred by statute, where neither creditors, legatees nor devisees desire to interpose such plea, to be deducted from the gross assets of the estate in calculating "clear residue." **McKee's Estate**, 538.
2. EQUITY—Trusts—Bailments—Deposits—Due bills—Receipts for money—Construction. **Lukens's Estate**, 294.
3. GUARDIAN AND WARD. Where a guardian is sought to be held liable on the ground of negligence alone, the statute of limitations applies by analogy. **Magoffin's Estate**, 473.
4. LACHES—Circumstances under which statute was held to run from time when party could have perfected his cause of action, and not from time he actually did perfect it—Principle applied to an action by county against poor district to recover payments made in support of inmate of state insane hospital. **Jefferson County v. Poor District**, 685.
5. OBLIGATION IMPOSED BY LAW. The statute of limitations does not apply to an action of debt brought to enforce an obligation imposed by law, as distinguished from one arising out of an agreement voluntarily assumed by the defendant. **Philadelphia v. Atlantic and Pacific Telegraph Co.**, 376.
6. TOLLING THE STATUTE—Declarations made by decedent in absence of claimant held insufficient when amount due not specified. **Haines's Estate**, 677.
7. TOLLING THE STATUTE—Statute is not tolled during period elapsing between the date of debtor's death and subsequent accretion of property to the estate. **Caldwell's Estate**, 679.
8. TOLLING THE STATUTE. Where decedent owed claimant an old account barred by the statute of limitations, and wrote him a letter, in which he said, "I will pay you the balance, \$553.07," held that the statute was tolled. **Peters's Estate**, 669.
9. WAIVER—Acknowledgment—Sufficiency of, to relieve claim from bar. **Brock's Estate**, 55.

STATUTES.

1. ACCOUNTS—Confirmation—Act of April 13, 1854, P. L. 383. **Pile's Estate**, 356.
2. ACT OF JULY, 12, 1897, P. L. 256—Class legacies—Republication of will by codicil. **Harrison's Estate**, 45.
3. ACT OF MAY 11, 1901, P. L. 166.—Commutation of sentence for good behavior. Construction of Act of May 11, 1901, 361.

STATUTES (*Continued*).

4. AFFIDAVIT OF DEFENCE—Apportioned mechanic's claim—Rule for judgment for part of claim under Acts of May 31, 1898, P. L. 185, and July 15, 1897, P. L. 276. **Swenk, Benson & Co. v. Irwin**, 732.

5. AFTER-ACQUIRED REALTY—Acts of April 8, 1883, P. L. 249, and June 4, 1879, P. L. 88. **Williams v. Brice**, 721.

6. ANNEXATIONS TO BOROUGH—Acts of April 3, 1851, P. L. 320, and April 23, 1899, P. L. 115—Words "freehold," "land"—Appeal—Practice—Acts of June 2, 1871, P. L. 283, and April 6, 1899, P. L. 38. **Bethlehem Borough Extension**, 680.

7. APPEAL FROM REPORT OF VIEWERS entered on docket sufficient, although no formal paper filed—Act of April 9, 1856, § 3, P. L. 288. **Brown v. Railway Co.**, 693.

8. APPLICATION FOR CHARTER—Extensions filed by another company before action—Acts of May 14, 1899, P. L. 211, and June 7, 1901, P. L. 514. **Rock Glen Street Ry. Co.**, 592.

9. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—Circumstances under which an assignment by an executor who has interest in an estate and reassignment thereof were held not to create an assignment for the benefit of creditors under the Act of April 17, 1843, P. L. 278. **Hart's Estate**, 421.

10. ATTEMPTS TO COMMIT CRIME—Indictment—Act of March 31, 1860, P. L. 442. **Com. v. Clark**, 541.

11. BLACKMAIL—Act of May 27, 1897, P. L. 111—Unconstitutional—Original and amendatory Acts—Correspondence of Act with title. **Com. v. Hudusko**, 230.

12. BONUS—Foreign Corporations—Limited partnerships—Joint stock associations. Under the Act of May 8, 1901, P. L. 150, the bonus is to be paid by such foreign organizations upon the actual capital invested in Pennsylvania and any subsequent increase thereof. **Corporation Bonus**, 646.

13. BOOKS, PRODUCTION OF—Act of Feb. 27, 1798, 3 Sm. Laws, 308—Practice on return of rule. **Langcliff Coal Co. v. Coal Co.**, 645.

14. BULLITT BILL—Act of June 1, 1885, P. L. 43—Municipal control of streets—Distinction between powers vested in councils and powers vested in the chief of the bureau of highways. **Denison v. Ryan**, 495.

15. CHARGING COSTS BY GRAND JURY on prosecutor where larceny is less than \$10—Act of May 25, 1897, P. L. 89. **Com. v. Ruch**, 648.

16. CHARITIES—Act of April 26, 1855, P. L. 328—Gifts for religious use within thirty days of death. **Conway's Estate**, 509.

17. CHILDREN AND GRANDCHILDREN OF DECEASED UNCLES AND AUNTS—Acts of April 27, 1855, P. L. 368, and June 30, 1885, P. L. 251. **Smith's Estate**, 92.

18. CITIES OF THIRD CLASS—Act of May 23, 1899, P. L. 277—Power to appropriate money to entertain guests. **Com. v. Gingrich**, 747.

19. CLASSIFICATION OF TOWNSHIPS. Under the Act of April 23, 1899, P. L. 104, inmates of insane asylums who are there for treatment for indefinite periods, whose homes are outside of township, are not to be included in estimating the population. **Crawford v. Allegheny County Commissioners**, 649.

20. CORPORATIONS—Acts of March 31, 1868, P. L. 50, and May 14, 1891, P. L. 61—Directors—Fiduciary relations. **Bergdoll v. Bergdoll Brewing Co.**, 173.

21. CORPORATIONS—Service of process on director of corporation—Act of March 17, 1856, P. L. 388. **Hoyt & Sharpless v. Traction Co.**, 767.

22. CORPORATIONS—Service of process on president of corporation in Philadelphia—Headquarters in Philadelphia—Mills in Lebanon—Acts of March 22, 1817, 6 Sm. Laws, 438, June 13, 1836, § 41, P. L. 563, and March 17, 1856, § 1, P. L. 388. **Samuel v. Iron and Steel Manuf. Co.**, 43.

23. CRIMINAL LAW—Act of March 31, 1860, P. L. 427—Accessory after fact—Receiving stolen property—Larceny—Indictment—Jurisdiction, Q. S. **Com. v. O'Neill**, 227.

24. DURATION OF LIEN OF TAXES IN CITIES OF THIRD CLASS—Act of May 23, 1899, art. xv, § 11, P. L. 277. **City of Chester v. Sinex**, 620.

25. DUTIES OF ASSESSORS in making list—Act of May 16, 1895, P. L. 75. **Assessor's List of Voters**, 624.

26. ELECTION LAW—Names of political parties—Acts of July 9, 1897, P. L. 223, and June 10, 1893, P. L. 419. Under the Act of July 9, 1897, § 1, P. L. 223, amending the Act of June 10, 1893, P. L. 419, the filing of the affidavit with the prothonotary of the proper county, and his certificate, showing compliance with the Act, in the office of the secretary of the Commonwealth, gives an exclusive right to the use of the political appellation therein adopted. **Barnes's and Heydrick's Nominations**, 681.

27. FOREIGN CORPORATIONS—Engaging in business within meaning of Acts of March 21, 1849, P. L. 216; April 8, 1851, P. L. 354, and April 21, 1858, P. L. 403. **Sheets v. Railway Co.**, 373.

STATUTES (*Continued*).

28. FOREIGN INSURANCE COMPANY—Service of process—Sheriff's return—Acts of April 4, 1873, P. L. 20, and June 20, 1883, P. L. 134. **McCann v. Insurance Co.**, 500.
29. FORESTRY—Act of June 1, 1887, P. L. 287—Construction and constitutionality. **Luck v. Com.**, 500.
30. FORESTRY RESERVATION COMMISSION—Act of Feb. 25, 1901, P. L. 11. **Forestry Reservation Commission**, 676.
31. GAMBLING—Act of March 11, 1834, P. L. 122—Recovery of penalty prescribed by Act—Indictment. **Com. v. Conrad**, 342.
32. GARNISHEE'S COUNSEL FEE—Acts of April 22, 1863, P. L. 527; June 11, 1885, P. L. 107, and April 20, 1891, P. L. 35. **Wanamaker v. Fitzpatrick**, 291.
33. GUARDIAN AND WARD—Society for the prevention of cruelty to children—Act of June 11, 1879, P. L. 142. **Scott's Estate**, 213.
34. INJUNCTION—Conspiracy—Refusal of members of union employed by persons other than the employer against whom strike is directed to handle material intended for latter—Attempts to persuade remaining workmen to cease work—Picketing—Act of June 16, 1896, § 13, clause 5, P. L. 790. **York Manuf. Co. v. Oberdick**, 463.
35. INSOLVENCY—Act of June 1, 1901, P. L. 404—Construction and constitutionality. **Hull's Estate**, 661.
36. INSOLVENCY—Act of June 4, 1901, P. L. 404, not retroactive. **Smith & Son v. Speakman**, 609.
37. INSURANCE COMPANIES—Insolvency—Act of April 4, 1873, P. L. 20. **Com. v. State Ins. Co.**, 339.
38. INTERPLEADER—Wife's affidavit—Act of May 26, 1897, P. L. 93—Claimant's bond. **Ruffner v. Brown**, 186.
39. JOINT ACTIONS—Act of April 6, 1830, P. L. 277—Practice, J. P. **Davis v. Sidle**, 435.
40. JURISDICTION, O. C.—Partition. Under the Act of April 13, 1840, § 4, P. L. 320, the Orphans' Court has jurisdiction to award an inquest in partition when the decedent dies leaving a will. **Lusch's Estate**, 224.
41. JUSTICE OF THE PEACE—Attachment cannot issue after judgment and appeal therefrom entered—Act of July 12, 1842, P. L. 346. **Keith v. Moore**, 212.
42. KILLING BIRDS—Act of June 3, 1873, P. L. 160—Jurisdiction, J. P.—Practice, Q. S.—Criminal law—Indictment—Insectivorous birds. **Com. v. Boettcher**, 101.
43. LABOR UNIONS—Unlawful conspiracy—Acts of June 14, 1872, P. L. 1175, April 20, 1876, P. L. 45, and June 16, 1891, P. L. 300, merely relieve workmen from criminal prosecution in the cases therein specified, and do not deprive persons injured by combination or conspiracy of union workmen of their civil remedies at law or in equity. **Erdmann v. Mitchell**, 701.
44. LIMITED PARTNERSHIPS—Act of June 2, 1874, P. L. 271—Contracts executed by two managers. **Philadelphia Base-Ball Club v. Lajoie**, 309.
45. LIQUOR LICENSE—Sureties—Act of May 4, 1893, § 5, clause 9, P. L. 30—Manufacturers may become sureties on bonds for retailers. **Retail Liquor License Sureties**, 209.
46. LUNATICS—Weak-minded persons—Acts of June 25, 1895, P. L. 300, and June 13, 1898, P. L. 589. **In re Mary Wood**, 374.
47. MAINTAINING ORGANIZATION—Right of members of military organization to resign when necessary to preserve its identity and prevent disruption—Act of April 23, 1899, P. L. 133. **Milibauer v. Infantry Battalion, State Fencibles**, 585.
48. MANDAMUS—Demurrer to petition—Act of June 8, 1893, § 11, P. L. 348. **Plymouth Twp. Commissioners v. Sweeney**, 617.
49. MANDAMUS—Peremptory writ—Act of June 8, 1898, P. L. 345. **Com. v. Knorr**, 585.
50. MECHANIC'S LIEN—Amendment—Surplusage—When lien attaches—Successive liens—Acts of April 9, 1862, P. L. 402, June 11, 1879, P. L. 122, and April 14, 1885, P. L. 238. **Harner v. Thomas**, 437.
51. MUNICIPAL LIENS—Time of filing—Act of July 26, 1897, P. L. 420—Constitutionality—Construction. **Philadelphia v. Athow**, 187; s. c. 352.
52. PARTITION—Act of May 17, 1868, P. L. 1096—Jurisdiction, O. C. **Deckard's Estate**, 877.
53. PARTITION—Appointment of master—Act of July 7, 1885, P. L. 257. **Lyons v. Lyons**, 594.
54. "PERSON"—Meaning of, within Corporation Act of 1874—Unincorporated association not such person. **Hall Ass'n of Washington Camp, No. 485, P. O. S. of A.**, 621.
55. POOR LAWS—Act of April 20, 1899, P. L. 78—Liability of poor district for support of inmates of state insane hospital. **Jefferson County v. Poor District**, 685.

STATUTES (*Continued*).

56. POOR LAWS—Act of May 12, 1897, P. L. 68—Order of removal signed by justice of the peace of removing district—Notice—Quashing order. **Lathrop Poor District v. Poor District**, 324.
57. PRACTICE, J. P.—Affidavit under Act of July 7, 1879, P. L. 194—Defects therein. **Lehman v. Winters**, 147.
58. PRACTICE, J. P.—Appeals *nunc pro tunc*—Act of July 14, 1897, P. L. 271. **Roush v. Meyer**, 892.
59. PRACTICE OF MEDICINE AND SURGERY—Osteopathy—Act of May 18, 1898, § 14, P. L. 94. **Com. v. Pierce**, 335; **Com. v. Thompson**, 634.
60. PRELIMINARY HEARING BEFORE MAGISTRATE—Right of accused to testify—Act of May 23, 1887, P. L. 158. **Brown v. McCroskey**, 588.
61. PUBLIC SCHOOLS—School directors—County superintendent—Appointment and examination of teachers—Act of May 8, 1854, § 23, P. L. 622, and section 41, P. L. 626. **Stroup's Petition**, 301.
62. RAILROADS—Overhead crossing—Permission of managers to construct—Act of April 16, 1838, P. L. 464. **Speese v. Railroad Co.**, 515.
63. RAILROADS—Right to cross streets without municipal consent—Act of April 4, 1868, P. L. 62, and Constitution, art. III, § 7. **Pittsburgh v. Railroad Co.**, 541.
64. REVIEW. A distribution which has not changed the actual custody of the fund, so that it remains intact and under the control of the court, is not within the Act of Oct. 13, 1840, P. L. (1841) 1, and does not prevent a review. **Collins's Estate**, 249.
65. ROAD LAW—Abandoning road—Vacating or changing location—Report of viewers—Written notice—Acts of June 13, 1836, P. L. 551, April 3, 1899, P. L. 26, and May 2, 1899, P. L. 176. **Public Road in Potter and Tioga Counties**, 456.
66. ROAD LAW—Boroughs—Act of May 16, 1891, P. L. 75—Costs of appeal. **Ebe's Appeal**, 370.
67. ROAD LAW—Change of grade—Time when injury accrues—Power of boroughs to grade sidewalks—Act of May 24, 1878, P. L. 129. **McCurdy v. Linesville Borough**, 546.
68. ROAD LAW—Erie County—Acts of March 26, 1846, P. L. 175, June 18, 1895, P. L. 199, and June 13, 1874, P. L. 283. **Richards v. Conneaut Twp.**, 274.
69. ROAD LAW—Jurisdiction, Q. S.—Special jurisdiction in Montgomery county—Act of May 9, 1871, P. L. 689. **Vacation of Eastburn Road**, 595.
70. ROAD LAW—Notice to property-owners and supervisors—Posting notice insufficient compliance with Acts of March 25, 1878, P. L. 402, May 14, 1874, P. L. 164, and May 2, 1899, P. L. 176—Place of meeting of viewers must appear in notice—Omission from report that personal notice was given owners and occupants, and that viewers endeavored to procure releases, held fatal. **Road in Rush Twp.**, 650.
71. ROAD LAW—Opening streets—Publication of ordinance—Acts of May 22, 1895, P. L. 106, and May 16, 1891, § 9, P. L. 75. **Ursinus College v. Collegeville Boro.**, 642.
72. ROAD LAW—Vacation of streets—Boroughs—Act of May 16, 1891, P. L. 75—Appeals under. **Ebe's Appeal**, 367.
73. ROAD LAW—Vacation of streets—Philadelphia—Acts of April 21, 1858, P. L. 386, and May 16, 1891, P. L. 75. **Vacation of Toronto and other Streets**, 349.
74. ROAD LAW—Words "lands" and "field" are not equivalent to "plantation" as used in the Act of June 13, 1836, § 11, P. L. 556. **Road in Lower Towamensing Twp.**, 581.
75. SCHOOL LAW—Compulsory attendance law of July 11, 1901, P. L. 658—Time when statutes go into effect. **Compulsory Attendance Law**, 576.
76. SCHOOL LAW—Removal of directors—Acts of June 6, 1898, P. L. 330, and June 6, 1898, P. L. 339. **Petition of Certain Taxables of York Twp. School District**, 687.
77. SHERIFF'S SALES—Receipt of lien creditor on account of purchase-money—Sheriff's right to refuse to accept same—Act of April 20, 1846, P. L. 411. **Com. v. Knorr**, 535.
78. SIDEPATH COMMISSIONERS—Act of April 11, 1899, P. L. 36—Bicycle tax—Constitutionality. **Keeler v. Westgate**, 240.
79. STATUTES IN PARI MATERIA are to be considered together, and all are to be maintained, if that result can be secured without doing violence to the language. There is a presumption against an implied repeal, and an interpretation that leads to such a result is not to be adopted, unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. **Bornet v. Bonschur**, 415.
80. SUNDAY LAWS—Sufficiency of complaint under Act of April 22, 1794, 3 Sm. Laws, 177—Jurisdictional averments. **Com. v. McFadden**, 718.
81. TAKING DEPOSITIONS OUTSIDE OF STATE—Act of June 25, 1895, P. L. 279. **Carter v. Blair**, 749.
82. TAXATION—Assessment—Act of April 19, 1889, P. L. 37—Construction—Constitutionality. **White v. Venango County**, 482.

STATUTES (*Continued*).

83. TAXATION—Machinery—Newspaper plant—Acts of April 15, 1834, § 4, P. L. 500, and April 29, 1844, § 32, P. L. 486. *Wilkes-Barre Times v. Wilkes-Barre*, 691.

84. TAX LIENS—Time when lien attaches to real estate—Allegheny City and Philadelphia—Acts of Feb. 3, 1824, § 1, P. L. 18, and Feb. 27, 1860, § 2, P. L. 85. *Woods v. Von Bonnhorst*, 640.

85. TELEPHONE COMPANIES. Under the Act of June 24, 1885, P. L. 164, telephone companies have the right of eminent domain, subject to control of borough authorities as to erection of poles or running of wires. Under the Act of April 17, 1876, P. L. 80, the company may assign franchises and rights acquired by ordinance. *Lewistown Borough v. Telephone Co.*, 562.

86. TERM OF OFFICE OF SCHOOL DIRECTORS. Under the Act of April 22, 1863, P. L. 523, the term of office of school directors commences on the first Monday of June in each and every year. The members of the outgoing board do not hold over until their successors qualify. *Stancliff & Co. v. School District*, 697.

87. TOWN CLERK—Refusal after election to serve. Under the Act of April 15, 1834, P. L. 552, if a person elected as town clerk refuses to serve before the beginning of his term, the court has authority to appoint a person to fill the vacancy. *Appointment of Town Clerk for Nether Providence Twp.*, 631.

88. TOWNSHIPS OF FIRST CLASS—Act of April 28, 1899, P. L. 104. *Plymouth Twp. Commissioners v. Sweeney*, 617.

89. TOWNSHIPS OF FIRST CLASS—Wilkes-Barre township—Implied repeal of special Act of April 14, 1859, P. L. 661, by general Act of April 28, 1899, P. L. 104. *Com. v. Rooney*, 745.

90. TRUSTEES—Insolvency—Entering security—Act of May 1, 1881, P. L. 680. *McDowell's Estate*, 223.

91. WEAK-MINDED PERSON—Act of June 25, 1895, P. L. 300—Jurisdiction, C. P. *Pringle v. Second Nat. Bank of Wilkes-Barre*, 674.

92. WEAK-MINDED PERSONS—Distinguished from persons suffering from mental disease—Acts of June 25, 1895, P. L. 300, and June 13, 1836, P. L. 560, construed. *In re Mary Wood*, 374.

STOCK.

1. CONDITIONAL SUBSCRIPTIONS—Validity of conditions. *Quaker City Apartment House Co. v. Kirk*, 292.

2. DIVIDENDS—Principal and income—Rule of apportionment. *Morrell's Estate*, 319.

3. PLEDGE OF STOCK BY ASSIGNOR—Rights of pledgee—Standing of assignee for creditors to contest. *Hetsel v. Sawyer*, 29.

STOCKHOLDER.

FOREIGN RECEIVER—Stockholder's liability—Equitable jurisdiction—Demurrer—Adequate remedy at law. *Hale v. Allinson*, 13.

STREETS.

PAVING—Assessment—Including cost of repairs—Municipal liens—Estoppel. *Williamsport v. Hughes*, 607.

SUNDAY LAWS.

SUFFICIENCY OF COMPLAINT of non-observance—Act of April 22, 1794, 3 Sm. Laws, 177—Jurisdictional averments. *Com. v. McFadden*, 713.

TAX SALES.

REAL ESTATE—False return by collector—Sale of land to enforce collection of tax—Enjoining same. *Harris v. Davis*, 7.

TAXATION.

1. ASSESSMENTS—Act of April 19, 1889, P. L. 37—Appeal—Method of valuation on appeal. *White v. Venango County*, 482.

2. BONUS—Foreign corporations—Limited partnerships—Joint stock association. Under the Act of May 8, 1901, P. L. 150, bonus is to be paid by such foreign organizations upon the actual capital invested in Pennsylvania and any subsequent increase thereof. *Corporation Bonus*, 646.

3. COLLATERAL INHERITANCE TAX—Clear residue—Debts barred by statute of limitations. *McKee's Estate*, 588.

4. COLLATERAL INHERITANCE TAX—Legacy given trustee or executor in consideration of services to be rendered not subject thereto. *Clark's Estate*, 378.

TAXATION (*Continued*).

5. COLLATERAL INHERITANCE TAX ON REALTY—Citation to devisees. *Lisle's Estate*, 718.

6. CORPORATIONS—Passenger railways—Property essential to the exercise of public franchises—Injunction. *People's Pass. Ry. Co. v. Taylor*, 343.

7. DURATION OF LIEN OF TAXES—Cities of third class. Under Act of May 23, 1889, art. xv, § 11, P. L. 277, in cities of the third class, municipal taxes assessed upon real estate remain a lien thereon until paid. Lien is not dependent upon the return or registry. *City of Chester v. Sinex*, 820.

8. ESCHATE—Liability of Commonwealth for taxes. Real estate which has escheated to the state is liable for city and county taxes, and may be sold for the same. *Philadelphia v. Linton*, 829.

9. LIENS FOR MUNICIPAL TAXES — Allegheny and Philadelphia — When lien attaches—Acts of Feb. 3, 1824, § 1, P. L. 18, and Feb. 27, 1860, § 2, P. L. 85. *Woods v. Vom Bonnhorst*, 640.

10. MACHINERY—Newspaper plant—Acts of April 15, 1884, § 4, P. L. 509, and April 29, 1844, § 82, P. L. 486. *Wilkes-Barre Times v. Wilkes-Barre*, 691.

11. REAL ESTATE—False return by collector—Sale of land to enforce collection of tax—Enjoining same. *Harris v. Davis*, 7.

12. WAR TAX—Treasury Decisions.

Act of March 2, 1901, 245.

Bank Checks, 124.

Bankers, 762.

Banks, 72, 165, 513.

Bay Rum, 513.

Beer Stamps, 404.

Beerine, 671.

Billiard and Pool Tables, 165.

Bills of Lading, 245, 307.

Bonds, 401, 513, 671.

Bonds and Guaranties, 307.

Bonds of Notaries, etc., 245.

Bonds of State Officers, 245.

Bottled Beer, 513.

Bottled Wine, 762.

Bowling Alley, 72.

Brewers, 513.

Brokers, 165.

Brokers, Class 2 Book, 245.

Brokers, Memoranda of, 245.

Brokers, Second Class, 245.

Bucket Shops, 165, 245.

Building and Loan Associations, 124.

Calls, 307.

Cancellation of Stamps, 307.

Changes in Records, 404.

Cigars, 307.

Circular No. 410, 124.

Circus, 513.

Collection Internal Revenue, Porto Rico, 513.

Collector's Record of Stills No. 115, 307, 404.

Conveyances, 124, 404.

Definition—Vested Interests, 762.

Deputy Collectors, 72.

Distilleries, Grain, 762.

Distillers, 165.

Documentary Stamps, 245, 404, 513.

Drafts, 404.

Dummy Packages, 245.

Entertainment, 165.

Essence of Jamaica Ginger, 671.

Excesses Arising from Fractions, 124.

Excise Tax on Sugar, 307.

Executor Selling Liquor, 671.

Exempting Provision, Section 4, Act of March 1, 1879, 28.

Exhibition, 307.

Exportation of Distilled Spirits, 671.

Express Receipts, 307.

Flour, 245, 404.

Form 45, Use of, 307.

Freight Receipts, 404.

Gaugers' Accounts, 28.

Gaugers' Unlawful Assignment, 245.

General Bonded Warehouses, 245.

Ginger, Essence of Jamaica, 671.

Indictment under Oleomargarine Laws, 307.

Instructions, Collection of Judgments, 307.

Instructions, Entry of Daily Receipts, etc., 165.

Instructions, Special Tax, etc., 165.

Internal Revenue Law, 124, 165, 245.

Internal Revenue Tax, 515.

Lease, 124, 514.

Legacy Tax, 72, 124, 165, 245, 307, 404, 513, 671, 762.

Liquor Dealers, 165, 245, 307, 513, 671.

Medicine Vender's Entertainment, 165.

Memoranda, 245, 307, 513.

Mexican Bank Notes, 28.

Microscopes for Oleomargarine, 28.

Money Orders, 245.

Mortgages, 404.

Occupations Subject to Tax, 307.

Oleomargarine, 28, 72, 124, 307, 762.

Opera House, 72.

Packages for Plug and Twist Tobacco, 404.

Packing Domestic Cigars, 307.

Packing Plug Tobacco, 404.

Penalties, 671.

Penalty Envelope, Use of, 72, 245.

Plasters, 72.

Playing Cards, 671.

Pool Tables, 28, 124, 165.

Porto Rico, 513, 671.

Porto Rico—Permit for Release of Goods, 671.

Powers of Attorneys or Proxies, 72.

Prune Juice, Rectification, 245.

Real Estate, 124.

Rebates, 245, 307, 404.

Receipts, 124, 163, 671.

TAXATION—WAR TAX—Treasury decisions (*Continued*).

- | | |
|--|---------------------------------------|
| Receivers and Assignees, 245. | Stamps, Beer, 404. |
| Record 89, Use of, 307. | Stamps, Cigarette, 762. |
| Rectification of Prune Juice, 245. | Stamps, Redemption of, 245, 404, 513. |
| Redemption of Documentary Stamps, 245, | Strawberry Cider, 245. |
| 307, 404, 513. | Sugar, Excise Tax on Refining, 307. |
| Refund of Taxes, 124, 671. | Tax on Brokers, Class 2, 307. |
| Sale of Seized Property, 124. | Taxes, 124, 165, 245, 307. |
| Sales of Real Estate, 124. | Theaters, 671. |
| Sales, Surplus Proceeds from Distraint, 513. | Tivoli Peg Pool Tables, 124. |
| Scenic Railway, 307. | Tobacco, 72, 245, 307, 404, 513. |
| Special Tax, 124, 245, 671. | Transfer of Lease, 513. |
| Spirits, 23, 124. | Vouchers, 72. |
| Stamp Tax, 72. | Vermuth, 671. |
| Stamp Tax on Bonds Used in Internal | Vested Interest Defined, 762. |
| Revenue Service, 513. | Wantage, Equalization of, 165. |
| Stamps, 307. | Warehouses, 165, 245. |

TELEGRAPH AND TELEPHONE COMPANIES.

TURNPIKES—Additional servitude—Art. 1, § 10, Pennsylvania Constitution. **Lancaster and Susquehanna Turnpike Road Co. v. Telephone Co.**, 323.

TELEPHONE COMPANIES.

EMINENT DOMAIN—Exercise of right subject to borough ordinance—Act of June 25, 1885, P. L. 164—Assignment of franchises—Act of April 17, 1876, P. L. 30. **Lewistown Borough v. Telephone Co.**, 562.

TESTAMENTARY CAPACITY.

1. INSANE DELUSIONS—Misconception of facts essential—Unsoundness of testator's point of view immaterial. **Bennett's Estate**, 145.
2. INSANE DELUSIONS—Will disinheriting daughter induced by alleged communications believed by testator to have been made by spirits of the dead—Issue *d. v. n.* **McIlroy's Estate**, 73.
3. PHYSICAL DEBILITY—Undue influence—Confidential relationship between physician and patient. **Adams's Estate**, 237.
4. PRESUMPTIONS—Burden of proof—Undue influence—Circumstances casting burden on proponent. **Brady v. McEnroe**, 115.
5. TEST OF MENTAL CAPACITY—Presumptions—Burden of proof. Sleepiness, flightiness or violent outbursts of passion and intemperance are insufficient to overcome presumption of capacity, unless proof shows testator's mind and memory were not sufficiently sound to enable him to understand the business in hand at date of execution of will; every presumption is in favor of the will, and the burden of proof is on contestant. **Wright's Estate**, 133.

TIME.

COMPUTATION OF—Magistrates' courts—Service of summons—When summons should be returnable. In computing the five days between the date of the summons and the return-day, the first day is to be excluded from the count. **Goldman v. Teitlebaum**, 53.

TOWNSHIP. SEE BOROUGH.

TOWNSHIP OFFICERS. SEE PUBLIC OFFICERS.

TRANSCRIPT.

1. AMENDMENT—A justice of the peace has no right to amend his record after it is removed to the Court of Common Pleas by *certiorari*. **Stambaugh v. Baker**, 79.
2. AMENDMENT—Transcript cannot be amended, after it has been filed in Common Pleas, by adding thereto affidavit not entered at large on docket, although lying loose therein. **Lehman v. Winters**, 147.
3. PRESUMPTIONS IN FAVOR OF REGULARITY—Judgments of magistrates and justices of the peace—Defects of record—*Certiorari*. **Hershey & Bro. v. Mylin**, 551; **Wolf v. Sailer**, 601; **Hoyt v. Traction Co.**, 767.
4. SUMMARY CONVICTION—Duty of justice or magistrate to set out substance of testimony. **Com. v. Manager House of Correction**, 371; **Luck v. Com.**, 500.

TRESPASS.

CONTINUING TRESPASS—Duty of owner of said lot to remove surface water—Right of adjoining lot-owners—Injunction—Damages. **Rieker v. Brewing Co.**, 406.

TRUSTS AND TRUSTEES.

1. ABSCONDING TRUSTEE—Compromise—Decree authorizing compromise refused. **Reiff's Estate**, 450.

2. ACCOUNTS. It is improper to include therein real estate and ground rents at appraised value. **Pile's Estate**, 356.

3. ACCOUNTS—Practice, O. C.—Blending administration and distribution, principal and income condemned. **Hart's Estate**, 421.

4. ACCOUNTS—Unexplained shrinkage of assets—Surcharge—*Res adjudicata*. **Appleton's Estate**, 441.

5. ACQUIREMENT OF ASSETS BY EXECUTOR—Unexpired lease containing clause against assignment is an asset—An executrix cannot take new lease for her own benefit. **Furlong's Estate**, 527.

6. COMMISSIONS—Circumstances under which $3\frac{1}{2}$ per cent. on principal and 5 per cent. on income allowed—Uncollected assets. **Sunderland's Estate**, 358.

7. COMMISSIONS—Circumstances under which claim to commissions was sustained, although accountant had failed to charge himself with securities belonging to the estate. **Conway's Estate**, 509.

8. COMMISSIONS—Lower on fund derived from real estate than from personal property. **Singerly's Estate**, 258.

9. COMMISSIONS—Right to same at settlement of final account. **Pile's Estate**, 356.

10. COMMISSIONS not allowed on uncollected securities—Circumstances under which commissions will be reduced for unbusinesslike management of the trust and improperly stating account. **Hart's Estate**, 421.

11. COMMISSIONS ON INCOME will be allowed where no intentional fraud or misappropriation is shown. **Sinkler's Estate**, 399.

12. COMPENSATION—Distinguished from commissions—Allowed for accountant's services, irrespective of actual receipts. **Edenborn's Estate**, 184.

13. COUNSEL FEES—Circumstances under which counsel fees are presumed to have been included in executor's compensation. **Hart's Estate**, 421.

14. COUNSEL FEES—When chargeable to income—Services rendered trustee in individual capacity not chargeable to estate. **Sinkler's Estate**, 399.

15. DECEDENT'S ESTATE—Holding real estate for rise in value—When real estate should be sold—Rent service—Rent charge—Covenant to pay proportionate part of principal at death of each life-tenant. **Phillips's Estate**, 99.

16. DUTIES AND LIABILITIES OF TRUSTEE under deed of trust. A trust company accepting a trust under a mortgage is not liable to the holders of the bonds secured thereby, by reason of failure of the security through an after-discovered defect in the mortgagor's title, if, before accepting the trust, it exercised due diligence in investigating the title and was guided by the opinion of counsel in the state where the lands lay. **Sprigg v. Trust Co.**, 267.

17. EXECUTED AND EXECUTORY TRUSTS—Rule in Shelley's Case—Issue. **Osborne's Estate**, 191.

18. IMPLIED TRUSTS—Sufficiency of evidence to establish. **Bilderback's Est.**, 759.

19. INSOLVENCY—Entering security—Act of May 1, 1861, P. L. 680. **McDowell's Estate**, 223.

20. INVESTMENT—Shrinkage in value—Liability—Surcharge—Act of April 13, 1854, P. L. 368. **Pile's Estate**, 356.

21. INVESTMENT BY TRUSTEE—Camden mortgages—Depreciation in value—Liability. **Gouldsey's Estate**, 216.

22. LOANS BY TRUSTEE to co-trustees—Loans to himself—Discrepancy between award to trustee and the sum he had on hand—Surcharge—Interest on surcharge. **Sinkler's Estate**, 399.

23. MARRIED WOMAN—Separate estate—Active trusts—Contingent interests—Perpetuities—Remoteness. **Boyd's Estate**, 87.

24. PRECATORY WORDS—Devise of realty construed by rule in force at date of execution. **Liste's Estate**, 713.

25. PURCHASE BY TRUSTEE AT HIS OWN SALE—Corporations—Officers—Fiduciary relationship. The equitable principle that a trustee cannot be permitted to buy the trust property at his own sale, or secure to himself any individual benefit from such purchase, applies to a purchase by an officer of a financial corporation, for his own benefit, of stock held by the corporation in a trust capacity, where he has acquired his knowledge of the trust property through his connection with the corporation, and is the agent through

TRUSTS AND TRUSTEES (*Continued*).

whom its directions with respect to the disposition of the property have been carried into effect. **Granger v. Pigott**, 327.

26. PURCHASE BY TRUSTEE OF TRUST PROPERTY. **Finley's Estate**, 272.

27. RESULTING TRUSTS—Parent and child. The rule in equity that when one man buys land in the name of another and pays the consideration money, the land will be held by the grantee in trust for the person who so paid the purchase-money, does not apply to a purchase by a parent in the name of a child, and such a purchase will be deemed *prima facie* an advancement. **Cooper v. Duval**, 475.

28. SPENDTHRIFT TRUST—Gift for life without anticipation—Neither principal nor income to be liable for debts—Active and passive trusts. **Hoffman's Estate**, 77.

29. STOCK AND SECURITIES—Options—Proceeds of sale at auction—Increase in value—Principal and income—Express power to sell and reinvest given by will. **Kemble's Estate**, 320.

30. STOCK DIVIDENDS—Principal and income—Rule of apportionment. **Morrell's Estate**, 319.

31. SURCHARGE—Interest on deposit. A trustee who deposits moneys of the estate in his individual account in a trust company will be charged with the rate of interest allowed him by the company. When that item is omitted from the account, it forms a proper subject of surcharge. **Hollinger's Estate**, 223.

32. TESTAMENTARY TRUSTEES—Removal—Act of April 9, 1868, P. L. 785. **Neafie's Estate**, 70.

TURNPIKES.

1. ELECTRIC RAILWAYS—Injunction by land-owner against occupation of turnpike. **Minnich v. Railway Co.**, 126.

2. SERVITUDES—Additional servitude—Trolley railways, telegraph and telephone companies—Property interest in roadbed protected by Constitution. **Lancaster and Susquehanna Turnpike Road Co. v. Telephone Co.**, 322.

UNDUE INFLUENCE.

1. BURDEN OF PROOF—Presumptions—Circumstances casting burden on proponent. **Brady v. McEnroe**, 115. Compare **Wright's Estate**, 133.

2. PHYSICAL DEBILITY—Confidential relation—Physician and patient. **Adams's Estate**, 237.

UNINCORPORATED ASSOCIATION.

CHARTER—Unincorporated association as applicant—Risk to funds—Hazardous business venture—Trust and trustees. **Hall Ass'n of Washington Camp**, No. 485, P. O. S. of A., 621.

UNITED STATES COMMISSIONER.

COMMITMENT BY—Sufficiency of evidence—*Habeas corpus*—Review. **United States v. Blair**, 106.

VACCINATION.

POWER OF BOARD OF EDUCATION to suspend teachers who refuse to produce certificates of successful vaccination within five years. **Lyndall v. Board of Public Education**, 665.

VENDOR AND VENDEE.

ASSUMPTION OF MORTGAGE DEBT—Bill in equity against vendee for deficiency. **Thompson v. Lodge**, 602.

VESTED AND CONTINGENT INTEREST. SEE WILLS; AND LEGACIES.

WAGES.

1. MINORS—Debts of parent—Set-off. **Beresford v. Susquehanna Coal Company**, 243.

2. SUIT FOR WAGES—Bill—Act of April 20, 1876, P. L. 43—Appeal. **Houck v. Whitaker**, 244.

WAIVER.

STATUTE OF LIMITATIONS—Acknowledgment—Sufficiency of, to relieve claim from bar. **Brock's Estate**, 55.

WARRANT OF ARREST.

SECRET SERVICE—Agents of—When they may make a search or arrest without warrant. **United States v. Fuellhart**, 194.

WARRANTY.

AFFIDAVIT OF DEFENCE. Where a warranty is relied on in an affidavit of defence, the averments must show facts sufficient to constitute a basis for an assessment of damages. **Howland Pulp Co. v. Jessup & Moore Paper Co.**, 623.

WASHERY.

MINES—Act of June 2, 1891. A washery is a coal mine or colliery within the meaning of the mine law of June 2, 1891. P. L. 176, and subject to its provisions **Com. v. Coal Co.**, 253.

WASTE.

LANDLORD AND TENANT—Unauthorized use of freehold by tenant—Injunction. **Rector Christ Church v. Bala Golf Club**, 666.

WATER AND WATER RIGHTS.

1. **FORESTRY RESERVATION COMMISSION**—Control of waters—Act of Feb. 25, 1901, P. L. 11. **Forestry Reservation Commission**, 676.
2. **SURFACE WATER**—City lots—Duty of owner to remove surface water—Rights of adjoining lot-owners—Injunction. **Rieker v. Brewing Co.**, 406.

WIDOW'S ELECTION.

1. **DECEDENT'S ESTATE**—Sequestration for benefit of disappointed devisees. **Collins's Estate**, 249.
2. **WILLS**—**Laches**—Absence of fraud—Ignorance of law—Petition for review. **Boileau's Estate**, 213.

WIDOW'S EXEMPTION.

NON-RESIDENT WIDOW not entitled thereto as against domestic creditors. **Larocco's Estate**, 568.

WILLS.

1. **ACT OF JULY 12, 1897, P. L. 256**—Republication of will by codicil. **Harrison's Estate**, 45.
2. **AFTER-ACQUIRED REALTY**—Residuary devise followed by specific description—Acts of April 8, 1893, § 10, P. L. 249, and June 4, 1879, § 1, P. L. 88. **Williams v. Brice**, 721.
3. **APPOINTMENT OF EXECUTORS AS GUARDIANS BY IMPLICATION.** **Scully's Estate**, 731.
4. **CHARITIES**—Validity of trust for charity sustained. **Schleicher's Estate**, 678.
5. **CONSTRUCTION**—Advancements—Will to be construed in its entirety. **Markle's Estate**, 756.
6. **CONSTRUCTION**—Annuity distinguished from payment of annual sum—Apportionment. **Powers's Estate**, 165.
7. **CONSTRUCTION**—Blending of real and personal estate. **Powell's Estate**, 46.
8. **CONSTRUCTION**—Devises of realty construed by rule in force at date of execution—Trusts—Precatory words. **Lisle's Estate**, 713.
9. **CONSTRUCTION**—Disinheriting the heir—After acquired realty—Residuary devise followed by specific description—Acts of April 8, 1893, § 10, P. L. 249, and June 4, 1879, § 1, P. L. 88. **Williams v. Brice**, 721.
10. **CONSTRUCTION**—Disinheriting whole class—"Or" read "and." **Hunter's Estate**, 120.
11. **CONSTRUCTION**—Equitable conversion—Blending realty and personalty. **Keim's Estate**, 252.
12. **CONSTRUCTION**—Estates for life—Spendthrift trusts. **Hoffman's Estate**, 77.
13. **CONSTRUCTION**—General intent. Where the words of a will are clear and free from ambiguity, and the external circumstances do not create any doubt or difficulty as to their proper application, the plain meaning of the words must govern. In all other cases the object is always to ascertain the intention of the testator from his entire will, in the light afforded by his estate and circumstances. Contemporaneous interpretation by parties in interest of weight. **Pearson's Estate**, 189.
14. **CONSTRUCTION**—Gifts for a particular purpose. **Armstrong's Estate**, 670.
15. **CONSTRUCTION**—Inconsistent clauses. **Benwill's Estate**, 98.
16. **CONSTRUCTION**—Issue—Perpetuities. **Horner's Estate**, 729.

WILLS (*Continued*).

17. CONSTRUCTION—Language held insufficient to charge the realty in exoneration of the personality. *Armstrong's Estate*, 670.
18. CONSTRUCTION—Lapse—Legacy given to parent for care of invalid son. *Elmslie's Estate*, 397.
19. CONSTRUCTION—Legacies—Conditions—Bequest of residuary estate. *Corr's Estate*, 740.
20. CONSTRUCTION—Legacy—Condition—Performance—Contract of devise. *Kuhn's Estate*, 742.
21. CONSTRUCTION—Life-estate—Remainder. *Hart's Estate*, 421.
22. CONSTRUCTION—Life-estate with limitations over—Words importing death. *Sunderland's Estate*, 358.
23. CONSTRUCTION—Life-tenant and remainderman—Vested and contingent interests. *Borda's Estate*, 117.
24. CONSTRUCTION—Mistake in number of class of legatees. *Good's Estate*, 598.
25. CONSTRUCTION—Separate use-trust—Language construed according to the strict, plain, common meaning of the words used. *Samson's Estate*, 680.
26. CONSTRUCTION—Time when annuity begins. *Hoffman's Estate*, 669.
27. CONSTRUCTION—Vested and contingent interests. *Grier's Estate*, 354.
28. CONSTRUCTION—Vested and contingent interests—Gifts to classes—Definite and indefinite failure of issue. *Reed's Estate*, 162.
29. CONSTRUCTION—Vested and contingent interests—Words importing death. *Campbell's Estate*, 287.
30. CONVERSION—Effect of election to take real estate as realty on provision for maintenance of homestead. *Sunderland's Estate*, 358.
31. DISCRETION TO SELL REAL ESTATE given to executors—Petition for order to sell for payment of debts by unsecured creditors. *Lukens's Estate*, 118.
32. ELECTION—Overthrowing will—Accepting benefit thereunder. Where a testator, who held real estate in trust for his son, by a species of fraud, possessed himself of the same and bequeathed thereout an annuity to his son, and the substituted trustees, by a decree of court, compelled the restitution of the premises to the beneficial owners, held (1), the substituted trustees had, to that extent, overthrown the will, and were not in a position to claim the legacies which the will on its face seemed to show were given by way of compensation for the injury done; (2) the testator's executors, however, could not recover back the annuities which they had paid for two years with full notice of the suit to compel restitution. *Nathans's Estate*, 205.
33. EVIDENCE—Contemporaneous interpretation of parties in interest. *Pearson's Estate*, 189.
34. FAMILY SETTLEMENT—Interest of executor. A family settlement supersedes a will, and an executor by virtue of prospective commissions has no standing to oppose it. *Lloyd's Estate*, 207.
35. ISSUE—Definite and indefinite failure of issue. *Reed's Estate*, 162.
36. ISSUE—Definite failure—"Without leaving lawful issue"—*Shelley's Case*—Executed and executory trusts. *Osborne's Estate*, 191.
37. ISSUE—Die without leaving issue or children surviving. *Horner's Estate*, 729.
38. ISSUE *d. v. n.*—Awarding issue—Issue cannot be had at place of ancillary administration—Act of March 15, 1882, §§ 12 and 13, P. L. 135—When demurrer to petition for issue will be sustained without prejudice. *McKeown's Estate*, 131.
39. ISSUE *d. v. n.*—Awarding issue—Principles governing award—Insane delusions. *Wright's Estate*, 133; *Mellroy's Estate*, 78; *Bennett's Estate*, 145.
40. ISSUE *d. v. n.*—Burden of proof. *Wright's Estate*, 133. Circumstances casting burden on proponent—Undue influence. *Brady v. McEnroe*, 115.
41. LEGACIES. See Legacies.
42. PARTITION—Setting aside on account of after-discovered will—Jurisdiction, O. C.—Act of April 13, 1840, P. L. 320. *Lusch's Estate*, 224.
43. PERPETUITIES—Remoteness—Married women—Separate estate—Active trusts—Contingent interests. *Boyd's Estate*, 87.
44. PERPETUITIES—Rule against—Gift over in case of death without leaving children or issue surviving—Contingent and vested interests. *Horner's Estate*, 729.
45. POWERS—Exercise of power by will disposing of donee's own estate—Exceeding authority—Presumption. *Van Syckel's Estate*, 744.
46. POWERS—Under what circumstances a will is to be regarded as in execution of a power. *Lisle's Estate*, 718.
47. PRINCIPAL AND INCOME—Stock and securities—Options—Proceeds of sale at auction—Increase in value—Express power to sell and reinvest given by will. *Kemble's Estate*, 320.

WILLS (*Continued*).

48. PROBATE—Domicile—Original will probated outside decedent's domicile—Duty of register in such case—Original and ancillary letters—Practice, O. C. **McKeown's Estate**, 832.
49. PROBATE—What instruments are not made wills by probate—Signing "at end thereof"—Presumption that register made inquiry suggested by Wineland's Appeal, 3 Crumr. 87. **Frees's Estate**, 833.
50. RULE IN SHELLEY'S CASE—Issue—Executed and executory trusts. **Osborne's Estate**, 191.
51. TESTAMENTARY CAPACITY—Insane delusions. **Mellroy's Estate**, 78; **Bennett's Estate**, 145.
52. TESTAMENTARY CAPACITY—Presumptions—Every presumption is in favor of the will, and the burden of proof is on contestant. **Wright's Estate**, 183. Compare **Brady v. McEnroe**, 115.
53. TESTAMENTARY CAPACITY—Test of mental capacity suggested. **Wright's Estate**, 183.
54. UNDUE INFLUENCE—Confidential relationship between testator and confessor—Circumstances casting burden of proof on proponent. **Brady v. McEnroe**, 115.
55. UNDUE INFLUENCE—Physical debility—Confidential relation between physician and patient. **Adams's Estate**, 237.
56. WIDOW CANNOT CONTEST WILL. **Kase's Estate**, 497.

WITNESSES.

1. COMPETENCY—Suit against administrator—Incompetency not cured by subsequent calling of enabling witness. **Magoffin's Estate**, 473.
2. COMPETENCY—Adverse interest—Act of May 23, 1887, P. L. 158. **Conway's Estate**, 509.
3. PRIVILEGE OF WITNESS from service of process while attending court—Setting aside premature service. **Ferree & Co. v. Pierce**, 746.

WORDS AND PHRASES.

1. "CARELESSNESS" as used in Forestry Act of June 1, 1887, P. L. 287, defined. **Luck v. Com.**, 500.
2. "FACTORY"—Taxation—Newspaper plant. **Wilkes-Barre Times v. Wilkes-Barre**, 691.
3. "LAND." The word "land," when used in a grant, denotes freehold estate. **Bethlehem Borough Extension**, 690.
4. LAND-OWNER EQUIVALENT TO FREEHOLD OWNER—Act of April 28, 1899, P. L. 115. **Bethlehem Borough Extension**, 690.
5. MEDICINE OR SURGERY—Osteopathy distinguished. **Com. v. Pierce**, 335.
6. "OR" READ "AND." **Hunter's Estate**, 120.
7. "PERSON"—Meaning of, within Corporation Act of 1874—Unincorporated association not such person. **Hall Ass'n of Washington Camp, No. 485, P. O. S. of A.**, 621.
8. "PLANTATION"—Act of June 13, 1886, § 11, P. L. 556—"Lands" and "fields" not equivalent to plantation. **Road in Lower Towamensing Twp.**, 581.
9. "POPULATION"—Held to exclude inmates of insane asylums who are there for treatment for indefinite periods, whose homes are outside of township, under the Act of April 28, 1899, P. L. 104. **Crawford v. Allegheny County Commissioners**, 649.

Ex. 111

3836 006

HARVARD LAW LIBRARY

